

# **Securing the Supply Chain: Does the Container Security Initiative Comply with WTO Law?**

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## Foreword

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I dedicate this work to my parents and brother, in recognition of their encouragement and support.

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## Executive Summary

Container Security has steadily increased in importance since 2001 and today is one of the most controversial trade-related issues. This is because maritime transportation is the most efficient and cost-effective method of transporting goods throughout the world (pp. 5 – 7). Today approximately 90 percent of the world's goods are moved by means of maritime containers. The challenge of securing the supply chain against terrorist attacks is to strike an effective balance trade facilitation and security (pp. 13, 63 – 64).

The aim of the investigation is to establish whether the Container Security Initiative achieves this balance by examining whether it complies with the legal requirements contained in the agreements of the World Trade Organization (pp. 9 – 11). The WTO is the most important trade organization in the world and safeguards the interests of its members to participate in international trade. All members are bound by the obligations arising under its agreements according to the international legal principle of *pacta sunt servanda* (pp. 112 – 114).

The first part of the investigation provides an overview of the various measures protecting the supply chain at national, international and supranational levels (pp. 23 – 57). It finds that the conflicting approaches to supply chain security run the risk of burdening traders with a proliferation of overlapping and incompatible security measures (pp. 57 – 60). The second section then defines and ascertains the nature of the Container Security Initiative (pp. 61 – 93) and describes its administration (93 – 104). It finds that the CSI is fundamentally unilateral in nature insofar as it does not recognize the maritime security standards of other nations and primarily aims to protect the borders of the United States rather than ensure international peace and security (pp. 104 – 111).

The third section deals with the question whether the CSI complies with the WTO agreements and to this end adopts a three-step approach (p. 115). First, the framework conditions are examined including the procedures for raising a complaint, the burden of proof, standard of review as well as relevant jurisprudence; second, the relevant agreements are examined and



infringements identified; finally, possible justifications for a breach of the relevant agreement(s) are examined.

The final section of the dissertation concerns Article XXI of the GATT, the so-called “national security exception” (p. 220). This provision constitutes a general exception to the obligations under the GATT and justifies measures which infringe the general obligations of the agreement. In other words, the CSI would comply with WTO if it is justifiable on the basis of this provision. However, the fact that there has never been a decision of the GATT or WTO concerning the interpretation of this provision, its subjective and objective wording as well as the great political sensitivity which surrounds the issue of national security means that this question cannot be easily answered – as shown by the very different views expressed in the literature on this provision (pp. 248 – 255).

The examination of Article XXI therefore adopts a modified version of the structure used by the Panels and Appellate Body in relation to Article XX (pp. 296 – 333):

- 1) Preliminary investigation: Does the measure fall within the scope of Article XXI(b) (i) – (iii)?
- 2) Necessity of the measure: a) is the measure “necessary” to protect “its essential security interests? b) is the measure effective? and c) is the measure the least trade restrictive measure available?
- 3) Has the United States exercised its right to invoke Article XXI reasonably?

The findings of the investigation are as follows. The question whether the CSI falls within the scope of Article XXI is a moot point. The terms contained in these provisions are to be interpreted in line with the “evolutionary interpretation” (pp. 297, 299) namely their contemporary meaning as defined in international agreement. As far as sub-paragraph (b) (i) is concerned, the CSI is primarily aimed at finding a “dirty bomb” rather than a nuclear weapon in a container. Technically, such a device does not fall within the scope of the term “fissionable materials”, because it is a by-product of the fission process (pp. 266 – 267, 297). Moreover, it is generally recognized that terrorists are highly unlikely to possess the technological know-how or

means to transport a nuclear device in a container. The CSI is also unlikely to fall within the scope of Article XXI (b) (iii) because the threat of international terrorism does not amount to a state of war or an emergency in international relations (pp. 301 – 304). The term “war” is interpreted according to Article 51 of the UN Charter and traditionally has been given a restrictive meaning in the sense that it is limited to state actors. Although commentators have called for the term to be re-evaluated following 9/11, the traditional notion of war still applies. It is not the role of the evolutionary interpretation to shape international law but to reflect its current usage (p. 300). Likewise, international terrorism does not amount to an “emergency in international relations.” Although port facilities are classified as critical infrastructure in the United States, the attacks carried out by terrorists within the maritime domain have hitherto been small-scale, sporadic and primitive, using traditional explosives (pp. 303 – 304). The limited technical capabilities of terrorists also casts doubt on whether there really is a terrorist threat in relation to maritime transportation (pp. 308 – 310)

The next section of the enquiry concerns the necessity of the CSI (pp. 310 ff.). This question is also difficult to answer with certainty mainly because the effectiveness of the CSI has been called into question by oversight bodies in the United States such as the General Accounting Office and the Permanent Subcommittee on Investigations. On the other hand, the SAFE Port Act 2006 has attempted to rectify some of these shortcomings (pp. 322 – 324).

The CSI does not appear to be the least trade restrictive measure available: considering that it affects a global resource, the United States should offer membership of the measure to all countries and closely base its requirements on the international standards of the Revised Kyoto Convention and the Framework of Standards (pp. 327 – 328). In addition, the recent 100 percent scanning amendment contained in Section 1701 of the IRCA 2007 sweeps away the risk assessment strategy upon which the CSI is based. This is likely to be considered disproportionate considering that the risk of maritime terrorism is uncertain at best (pp. 330).

The final stage of the test subjects the CSI to the *abus des droit* doctrine, similar to that found in Article XX (pp. 328 ff.). In fact, the investigation uses the chapeau of the latter provision as a basis for this investigation, concentrating on evidence of arbitrary discrimination and disguised

restrictions on trade. However, the concept of *abus des droit* does not need to be limited to these two instances and further evidence of potential abuses is also examined (pp. 331 - 333.).

In conclusion, the investigation finds that the CSI may infringe general obligations of the GATT and is unlikely to be justifiable under Article XXI (pp. 334 ff.). This rather unexpected result underlines the need for both the complainant and the United States to collect as much evidence as possible supporting their claims. In addition, the United States should not automatically invoke Article XXI as a response to a complaint because it can present strong arguments against an infringement of the general obligations (pp. 216 – 217, 218). On the other hand, Article XXI is far more restrictive in scope than past disputes involving this provision suggest (pp. 294 – 295). Like Article XX it is a conditional and limited exception to the GATT obligations and its interpretation is the preserve of the Dispute Settlement Body, not the member states themselves. Considering that this body is “quasi judicial” in nature and that the World Trade Organization is nowadays a “rules-based” institution (pp. 113 – 114), Article XXI is likely to be narrowly interpreted not because of policy reasons (à la the Panel in *US – Tuna I and II*) but because of the legal nature of its provisions.

“[F]or our frontline inspectors, border control remains the enforcement equivalent of trying to catch minnows at the base of Niagara Falls.”

Stephen Flynn, *America the Vulnerable*<sup>1</sup>

Consult before you legislate  
Negotiate before you litigate  
Compensate before you retaliate  
and comply – at any rate

Pascal Lamy, “Hymn to Compliance”

## Introduction

Maritime transportation is the most efficient, cost-effective and reliable means of transporting goods over long distances.<sup>2</sup> The four oceans – the Atlantic, Arctic, Indian and Pacific – together “represent the Earth’s greatest defining geographic feature.”<sup>3</sup> For thousands of years, the shipping industry has brought nations together in trading relationships and has developed its practices according to the needs of commerce.<sup>4</sup> Today, it is the preferred means of transporting goods long distances and represents an extremely important service sector. The popularity of maritime transportation is due to “containerization” which refers to the practice of ‘stuffing’ goods into a steel container which are then stacked on a ship for transportation.<sup>5</sup> It was introduced in the 1950s and led to a huge growth in maritime transportation services. The advantages of containerization over traditional methods of handling cargo were explained by the *U.S. Supreme Court in NLRB v. Longshoremen (1980)*:

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<sup>1</sup> STEPHEN FLYNN, *AMERICA THE VULNERABLE*, p. 2.

<sup>2</sup> See Hans Binnendijk, Leigh C. Caraher et al, *The Virtual Border: Countering Seaborne Container Terrorism*, Defense Horizons, August 2002, p.2.

<sup>3</sup> THE WHITE HOUSE, *THE NATIONAL STRATEGY FOR MARITIME SECURITY*, September 2005, p.1.

<sup>4</sup> William Tetley, *Maritime Transportation* in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*, Vol. XII, p. 3

<sup>5</sup> Further information and references on containerization can be found under < <http://www.worldshipping.org/ind.html> >.

*"The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo. Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo."*<sup>6</sup>

Soon after its introduction in the 1950s,<sup>7</sup> containerized intermodal transport quickly grew in popularity to become the major method of transporting goods from one country to another. The efficiency offered by this form of transportation has reduced transportation costs as a barrier to trade and led to a tremendous increase in freight traffic driven by the growth in electronic commerce.<sup>8</sup>

Nowadays, the American economy is heavily reliant on the maritime transportation system (MTS) as the following statement by the U.S. government makes clear:<sup>9</sup>

*"The MTS makes it possible for goods from other countries to be delivered to our front door step. It enables the U.S. to project military presence across the globe, creates jobs that support local economies, and provides a source of recreation for all Americans. Fundamentally, the Nation's economic and military security is closely linked to the health and functionality of the MTS."*<sup>10</sup>

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<sup>6</sup> U.S. Supreme Court, *NLRB v Longshoremen*, 447 U.S. 490 (1980), *per* Mr. Justice Marshall at section (A), second paragraph.

<sup>7</sup> *Malcolm McLean, Pioneer of Container Ships*, *The Economist* 2 June 2001, Issue 1. "I had to wait most of the day to deliver the bales, sitting there in my truck, watching stevedores load other cargo. [...] The thought occurred to me, as I waited around that day, that it would be easier to lift my trailer up and, *without any of its contents being touched*, put it on the ship." (emphasis added). Therefore, the concept of a container is that the contents do not have to be interfered with.

<sup>8</sup> MARITIME COMMERCE SECURITY PLAN, p. 2; INDIRA CARR, *INTERNATIONAL TRADE LAW*, 3<sup>RD</sup> EDITION, p. 103.

<sup>9</sup> See Section 101 (2) Maritime Transportation Security Act 2002, Pub. L. 107-295, 107<sup>th</sup> Congress, 25 November 2002 [S. 1214] [hereinafter MTSA 2002].

<sup>10</sup> DEPARTMENT OF HOMELAND SECURITY, *MARITIME TRANSPORTATION SYSTEM: SECURITY RECOMMENDATIONS FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY*, OCTOBER 2005 [hereinafter MARITIME SECURITY RECOMMENDATIONS], Foreword, p. i.

Maritime transportation therefore represents critical infrastructure for all trading nations.<sup>11</sup> Despite this, security at seaports has traditionally been low and the open nature of ports, weaknesses in container documentation<sup>12</sup> and low inspections of containers entering the US<sup>13</sup> have combined to make seaports a major locus of federal crime; containers have also been used to smuggle of narcotics and contraband into the United States.<sup>14</sup> In the years following containerization, U.S. Customs – the primary border enforcement agency of the United States – became overwhelmed by the increased volume of cargo entering U.S. ports<sup>15</sup> and after 9/11 policy-makers believed that the complete absence of security at harbours made a terrorist attack on a major U.S. seaport inevitable.<sup>16</sup> Historical events also show that global trade carries risks as well as benefits. For example, it has been claimed that 9/11 “imposed the most unwelcome transformation of international commerce since the Middle Ages, when westbound maritime trade brought the Black Plague from Asia to Europe.”<sup>17</sup> The comparison is apposite because experts believe that maritime transportation also offers an effective conduit for terrorism.

In the aftermath of 9/11, the Bureau of Customs and Border Protection (CBP) acted on expert advice that terrorists could place an explosive device in a container destined for an airport or harbour in the United States and detonated upon arrival.<sup>18</sup> The statistics of 9/11 had already revealed the destructive power and catastrophic effects of a terrorist attack on a critical economic

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<sup>11</sup> See Presidential Decision Directive/NSC-63 (22 May 1998); CRS REPORT FOR CONGRESS (98 – 675): JOHN D. MOTEFF, CRITICAL INFRASTRUCTURES: A PRIMER, 13 AUGUST 1998, (“The nation’s health, wealth, and security rely on the supply and distribution of certain goods and services. The array of physical assets, processes and organizations across which these goods and services move are called critical infrastructures.”), *page unavailable online*.

<sup>12</sup> See Hearing Before the Committee on Governmental Affairs United States Senate, *Cargo Containers: The Next Terrorist Target?*, 108<sup>th</sup> Congress, 1<sup>st</sup> Sess., 20 March 2003 [hereinafter S. Hrg. 108–55], p. 6.

<sup>13</sup> *Id.*, Section 101 (8).

<sup>14</sup> *Id.*, Section 101 (6). See REPORT OF THE INTERAGENCY COMMISSION ON CRIME AND SECURITY IN U.S. SEAPORTS, 2000, esp. Chapters 4 and 5. See also DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY, MARITIME TRANSPORT COMMITTEE, OECD, SECURITY IN MARITIME TRANSPORT: RISK FACTORS AND ECONOMIC IMPACT, JULY 2003 [hereinafter OECD Report 2003], p. 9 at paras. 24 – 26; S. Hrg. 108–55, pp. 4ff.

<sup>15</sup> See Hearing Before the Committee on Governmental Affairs United States Senate, *Weak Links: Assessing the Vulnerability of U.S. Ports and Whether the Government is Adequately Structured to Guard Them*, 107<sup>th</sup> Congress 1<sup>st</sup> Session 6 December 2001 [hereinafter S - Hrg. 107-309], p. 131 (testimony of Argent Acosta).

<sup>16</sup> S. Hrg. 108–55, (testimony of Stephan E. Flynn), p. 25. See also Section 101 (14) MTSA 2002.

<sup>17</sup> Leslie Woolf, *Global Terrorism Three Years Later*, Customs Today, September 2004

<sup>18</sup> See UNITED STATES SENATE PERMANENT SUB-COMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS: AN ASSESSMENT OF U.S. EFFORTS TO SECURE THE GLOBAL SUPPLY CHAIN, PREPARED BY THE MAJORITY AND MINORITY STAFF OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 2006, (hereinafter ASSESSMENT OF U.S. EFFORTS), pp. 3 – 5; concerning the variety of threats in the maritime domain see also THE NATIONAL MARITIME SECURITY STRATEGY, pp. 4 – 6.

structure. Such an event at a major U.S. seaport would effectively shut down container shipping and paralyze the world economy.<sup>19</sup> Faced with this threat, the U.S. government took pre-emptive, unilateral action to secure maritime container transportation.<sup>20</sup>

CBP announced the introduction of the Container Security Initiative on 20 January 2002<sup>21</sup> as a means of securing the container transportation of goods. The primary aim of the measure is to “protect the global trading system and the trade lanes between CSI ports and the U.S.”<sup>22</sup> To achieve this, CBP stations teams of U.S. Customs officials at key foreign ports of its major overseas trading partners on the basis of bilateral agreements in order to screen high-risk containers *before* they depart for the United States. Thereby, the CSI practically pushes U.S. borders outwards<sup>23</sup> and implements U.S. security standards overseas.<sup>24</sup> In the United States, the Container Security Initiative forms an integral part of Homeland Security and represents a crucial issue in domestic politics. This was shown by the 2004 presidential campaign, when Senator Kerry and President Bush both agreed on the threat that nuclear terrorism posed to the United States.<sup>25</sup> The need to secure maritime transportation against terrorists is also recognized by major international organizations including the G8, World Customs Organization and the World Shipping Council.<sup>26</sup>

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<sup>19</sup> ASSESSMENT OF U.S. EFFORTS, *id.*

<sup>20</sup> Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHI. J. INT’L L. 597 at 597 (describing the CSI as an “an excellent illustration of contemporary evolving preventative legal strategies in the international arena”).

<sup>21</sup> See Robert C. Bonner, *Speech before the Centre for Strategic and International Studies (CSIS) Washington, D.C.*, 17 January 2002 [hereinafter U.S. Customs Commissioner, Speech of 17 January 2002].

<sup>22</sup> Bureau of Customs and Border Protection, CSI FACT SHEET, p.1.

<sup>23</sup> Concerning the concept of “pushing the borders outwards” see *Seventh public hearing of the National Commission on Terrorist Attacks Upon the United States* 26 January 2004 (testimony of Robert C. Bonner, U.S. Commissioner for Customs) [hereinafter U.S. Customs Commissioner, Testimony of 26 January 2004].

<sup>24</sup> See DEPARTMENT OF HOMELAND SECURITY, SECURE SEAS, OPEN BORDERS: KEEPING OUR WATERS SAFE, SECURE AND OPEN FOR BUSINESS, 21 June, 2004 [hereinafter “SECURE SEAS, OPEN BORDERS”].

<sup>25</sup> Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate, *The Container Security Initiative and the Customs Trade Partnership Against Terrorism: Securing the Global Supply Chain or Trojan Horse?* 109<sup>th</sup> Congress, 1<sup>st</sup> Sess., 26 May 2005. [hereinafter S. Hrg. 109-186], p. 2. Cf. FINAL REPORT OF THE 9-11 COMMISSION, p. 341 (“Bin Laden, al Qaeda, or even terrorism was not an important topic in the 2000 presidential campaign. Congress and the media called little attention to it”).

<sup>26</sup> See G8, *The Co-operative G8 Action on Transport Security*, 26 June 2002; WCO, *Resolution of the Customs and Co-operation Council on Security and Facilitation of The International Supply Chain*, June 2002; WCO, *Resolution of the Customs and Co-operation Council on Global Security and Facilitation of The International Supply Chain*, June 2004; European Commission, Directorate-General for Energy and Transport, Directorate G, *Maritime Transport and Intermodality, Consultation Paper, Freight Transport Security*, 23 December 2003.

## Thesis and Method of Investigation

The aim of this study is to examine the substance and administration of the Container Security Initiative in order to identify aspects of the measure which could conflict with the provisions of the WTO agreements. The investigation also considers whether, in the event that a violation complaint is upheld, it would be possible to justify the Container Security Initiative on the basis of the national security exception.

The United States has introduced the Container Security Initiative for reasons of national security in order to ensure the security of its supply chain with its major trading partners.<sup>27</sup> The fact that the CSI seeks to regulate the supply chain together with the growing importance of supply chain security in general, means that WTO member states must be able to anticipate any potential conflicts between their security measures and WTO law at the planning stage and formulate their provision accordingly. It must be emphasized at the outset that member states are under a *legal* obligation to comply with the provisions of the WTO agreements. There is still a need for research into the legal implications of security measures such as the Container Security Initiative,<sup>28</sup> which are highly complex and affect many areas of international law. This investigation aims to use the available evidence to highlight the legal effects of the Container Security Initiative on World Trade Law.

With the creation and further tightening of trade security regimes at national and international level, there is an increasing danger that international trade could be adversely affected in the “war against terrorism.” In fact, the WTO Secretariat has already stated that security measures should not represent a disguised form of protectionism.<sup>29</sup> This particular danger resulting from increased security measures should also be considered against the general fact that, despite the progressive

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<sup>27</sup> THE WHITE HOUSE, THE NATIONAL STRATEGY FOR HOMELAND SECURITY 2002, p.8, which identifies cargo containers as a major initiative in relation to border and transportation security.

<sup>28</sup> See Marjorie Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National Security Measures*, 72 BROOK. L. REV. 385 at fn.1, describing this area of research as a “once obscure subject.”

<sup>29</sup> See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW: UNITED STATES, 2004, (WT/TPR/S/126) [hereinafter WTO TRADE POLICY REVIEW 2004], p. 8 at para. 9 (“In the aftermath of the September 2001 attacks, security considerations have become an essential component of trade and investment policy. Significant changes to U.S. trade practices have been implemented to ensure the nation’s security. [...] It is important that the new U.S. security-related policies and practices do not become unnecessary trade or investment barriers”).



liberalization of global trade achieved by the GATT and WTO since 1947, there is still a temptation for member states to circumvent their obligations under the WTO agreements by means of non-tariff barriers to trade in order to protect their economies against foreign competition. This dissertation argues that Article XXI of the GATT represents a conditional and limited exception to the general obligations and, as such, provides an effective means of preventing states from using national security measures as disguised forms of protectionism.

The dissertation is divided into five sections starting with the background to the Container Security Initiative and ending with an assessment of whether the measure complies with the national security exception(s) of the relevant agreement(s). **Section A** provides an overview of the various security measures which have been introduced since 9/11 in order to combat maritime terrorism. The Container Security Initiative is described within the context of these measures in order to make the reader aware of the fact that the measure under discussion forms only one of a number of security initiatives at national, supranational and international level. **Section B** examines the substance, implementation and administration of the 24 Hour Rule and the Container Security Initiative. Although the two measures are technically separate, the 24 Hour Rule is examined as part of the CSI because it forms the precondition for the measure's implementation at foreign seaports.<sup>30</sup> Other subjects of investigation include the bilateral agreements and benefits of CSI participation.

**Section C** tackles the question of whether the Container Security Initiative contravenes the various WTO Agreements. It starts by outlining in general terms the potential trade effects of the Container Security Initiative and then examines the measure against the GATS, GATT and TBT Agreement using a uniform structure. Considering the fact that the effects of the Container Security on trade have still not been precisely quantified, the examination aims to highlight *potential* conflicts between the Container Security Initiative and the WTO Agreement. **Section D** examines the hypothetical situation that the Panel upholds a violation complaint against the Container Security Initiative. The purpose of this section is to examine whether the Container

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<sup>30</sup> Concerning the relationship between the 24 Hour Rule and the CSI see UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, CONTAINER SECURITY: EXPANSION OF KEY CUSTOMS PROGRAMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS, GAO-03-770, July 2003 [hereinafter GAO-03-770], pp. 21 - 22 and Annex II p. 49, point 8.

Security Initiative can be justified under the national security exceptions found in the covered agreements. As with Section C, the major part of the examination concerns the GATT (particularly Article XXI) and it concludes with an assessment of whether the CSI complies with WTO law.

## A. Maritime Security Measures Following 9/11

The destruction of the World Trade Centre on 11 September 2001 by Al Qaeda terrorists exposed “the soft underbelly of globalization.”<sup>31</sup> Although the headquarters of Al Qaeda were in Afghanistan,<sup>32</sup> the terrorist cell responsible was easily able to exploit global transportation and communications networks to carry out their atrocity in the United States. If globalization had created the image of a world without borders, 9/11 highlighted the need to increase border security in order to protect the freedoms offered by globalization.

In the aftermath of 9/11, cross-border transportation security became a priority mission for the U.S. Government as it took steps to protect the American homeland against further terrorist attacks by strengthening border controls. Although some anti-terrorist measures introduced by the Bush administration have met with fierce criticism in the United States, those relating to maritime security have received a large measure of bipartisan support.<sup>33</sup> Other states too, recognizing the vulnerability of container shipping, introduced their own measures to protect the global supply chain. The need to secure maritime shipping environment was also recognized by international and regional organizations including the International Maritime Organization, the World Customs Organization and European Union.<sup>34</sup> These national, regional and multilateral security regimes sometimes differ in significant respects thereby running the risk of creating a patchwork-quilt of security standards which ship-owners, operators and masters of vessels must comply with. The following section examines this development by providing an overview of the security measures which have been adopted by the U.S. government, international organizations and the European Union in order to combat the terrorist threat.<sup>35</sup>

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<sup>31</sup> FLYNN, p. 7.

<sup>32</sup> For an overview of the origins of Al Qaida see National Commission on Terrorist Attacks Upon the United States, *Third public hearing of the National Commission on Terrorist Attacks Upon the United States* (Statement of Marc Sageman), 9 July 2003.

<sup>33</sup> See e.g. Hearing before the Committee on Homeland Security and Governmental Affairs, United States Senate, *The Future of Port Security: The Greenlane Maritime Cargo Security Act*, 109<sup>th</sup> Congress, 2<sup>nd</sup> Session, 5 April 2006 (hereinafter S. Hrg 109 – 877), pp.1 and 12; see also ASSESSMENT OF U.S. EFFORTS, p.1. See also votes on passage of the Security and Accountability For Every Port Act 2006 Pub. L. 109 – 347, 109<sup>th</sup> Congress (2<sup>nd</sup> Session) 30 September 2006 [H.R. 4954] [hereinafter SAFE Port Act 2006], available under < <http://www.govtrack.us/congress/bill.xpd?bill=h109-4954> >.

<sup>34</sup> *Supra n.* 26.

<sup>35</sup> An overview is also provided by Owen Bishop, *A Secure Package? Maritime Cargo Container Security After 9/11*, 29 TRANSP. L. J. 313; Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for*

## 1. Implementation Strategies

Considering that the level of security in the maritime domain has traditionally been low, governments should aim to implement security measures with as little disruption to the supply chain as possible. Customs authorities must respect the needs of globalized trade and the rights of stakeholders involved in the supply chain. Considering that inefficient customs procedures constitute a significant barrier to trade, security measures should also reflect principles of the modernized customs environment including transparency and predictability, risk management and customs simplification.<sup>36</sup>

The Container Security Initiative combines concepts of unilateralism, bilateralism and multilateralism. It is a unilateral measure designed to protect the United States against terrorist attacks by increasing security standards of seaports in foreign territories. The CBP has implemented the CSI using bilateral agreements entered into with national customs administrations in respect of selected seaports. At the same time, the U.S. Customs Commissioner expressed his intention to ‘internationalize’ the security standards contained in the CSI by means of the Framework of Standards, a multilateral agreement administered by the WCO.<sup>37</sup> The following examines these three approaches to supply-chain security.

### 1.1. Unilateral Security Measures

There is no official definition of unilateral measures<sup>38</sup> but the term generally refers to measures which a state takes independently of the international community with the aim of protecting its own interests. The ability of states to take unilateral measures largely depends on whether they have the economic or military leverage to enforce them. They are generally disapproved of by the international community which, since 1945, has been characterized by multilateral agreement

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*Marine Cargo Recoveries*, 77 TUL. L. REV. 1183; Constantine G. Papavizas, and Lawrence I. Kiern, *2001 – 2002 U.S. Maritime Legislative Developments*, 34 J. MAR. L. & COM. 451; Thomas J. Schoenbaum and Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11<sup>th</sup>*, 77 TUL. L. REV. 1333.

<sup>36</sup> See Kunio Mikuriya, *Legal Framework for Customs Operations and Enforcement Issues*, in CUSTOMS MODERNIZATION HANDBOOK, pp. 51 – 66 (Luc De Wulf and Jose Sokol, eds., 2005).

<sup>37</sup> See Robert C. Bonner, *Remarks to the Customs World London Summit 2004 London, England*, 21 September 2004 [hereinafter, U.S. Customs Commissioner, Remarks of 21 September 2004].

<sup>38</sup> ENCYCLOPEDIA OF INTERNATIONAL LAW, Vol. 4, 2000, p. 1018.

(i.e. states take action through the relevant international organizations).<sup>39</sup> Unilateral measures are controversial because they place the interests of one state above those of other (often weaker) states. In the 1980s, for example, the United States introduced unilateral measures to protect dolphins and sea turtles. Failure to comply with these measures led to the imposition of trade embargoes which were intended to force the offending state to change its environmental policies in line with U.S. demands. Although designed to protect the environment the measures also restricted developing countries' access to U.S. markets and thereby caused economic hardship to their citizens.<sup>40</sup>

Such a situation creates the suspicion that a state which has sufficient political and economic power to enforce unilateral measures could abuse its power to force trade or political concessions from other member states.<sup>41</sup> Failure to comply with the unilateral measures of an economically powerful state could lead to positive sanctions in the form of trade embargoes which can have devastating effects on the target country, as the following statement makes clear:

*“In addition to imposing immediate hardship on the people of the target nation, [security] ... sanctions tend to retard the nation’s future economic and social development. Future trade will be lost as traditional customers seek out more stable sources of supply. Advances in such areas as housing, health care, and education will be interrupted as money-flows and political stability wane and the infrastructure necessary to attract foreign investment deteriorates. As is often the case, such effects will not be limited to the target of the sanction but will be felt collaterally throughout the region.”<sup>42</sup>*

On the other hand, international law does recognize the right of states to take unilateral measures under certain circumstances, notwithstanding their obligations under international agreements. In fact, international treaties often contain escape clauses allowing states to take action to protect

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<sup>39</sup> See e.g. preamble to the Charter of the United Nations, which refers *inter alia* to employing international machinery for the promotion of the economic and social advancement of all peoples.

<sup>40</sup> See *infra n.* 64 and (on the effects of such measures) pp. 152 ff., 169 ff.

<sup>41</sup> See James R. Arnold, *The Oilseeds Dispute and the Validity of Unilateralism in a Multilateral Context*, 30 STAN. J. INT’L L., 187, p. 214.

<sup>42</sup> See Wesley A. Cann Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT’L LAW 413, p. 427.

vital interests.<sup>43</sup> For example, the WTO agreements recognize environmental and security interests as general exceptions to the contractual obligations of its members. National security, in particular, represents powerful exception for unilateral measures. Under the GATT and GATS, this exception is formulated in partially subjective terms that grant member states a wide (albeit not unlimited) discretion to adopt measures they consider necessary to protect their national security interests.<sup>44</sup> Especially nowadays, in the shadow of 9/11, the public expects their government to take precautionary measures to protect them against terrorism.<sup>45</sup> The political importance of national security measures means that rulings from the Panel or Appellate Body which limit this right could result in accusations of judicial activism<sup>46</sup> and would be difficult to reconcile with the principle *in dubio mitius*.<sup>47</sup> Moreover, Resolution 1373 issued by the UN Security Council shortly after 9/11 recognizes the legitimacy of unilateral measures which seek to protect national security.<sup>48</sup>

Therefore, although unilateral measures represent the exception rather than the rule in the international community, the right to such measures *in extremis* is nevertheless expressly recognized by international law. Particularly with regard to national security, it can be very difficult to challenge the legitimacy of such an important national interest, particularly counter-terrorist measures in the aftermath of 9/11. On the other hand, the practical difficulties of implementing unilateral measures at global level and the controversy which they give rise to challenge their long-term sustainability.

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<sup>43</sup> See Dapo Akande and Sope Williams, *Security Issues: What Role for the WTO?* VIRGINIA J. INT'L L. p. 366-367.

<sup>44</sup> See Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L REV. 1, p. 16, who refers to Article XXI as an "all-embracing exception to GATT obligations."

<sup>45</sup> See Robert E. Baldwin, *The Political Economy of Trade Policy: Interpreting the Perspectives of Economists and Political Scientists*, in THE POLITICAL ECONOMY OF TRADE POLICY, pp. 157 – 63 (Robert C. Feneestra et al. eds.).

<sup>46</sup> See *infra* pp. 246 ff.

<sup>47</sup> See *infra* p. 240.

<sup>48</sup> United Nations Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001 [hereinafter "S/RES/1373"].

## 1.2. Bilateral Agreements

Bilateral agreements are concluded between two states and cover a wide range of subjects, especially those not yet regulated by multilateral agreement.<sup>49</sup> They can take a number of different forms although states sometimes prefer informal and non-binding agreements in order to reach a quick agreement. Trade is often the motivating factor in concluding bilateral trade agreements<sup>50</sup> although law enforcement can also be important. Bilateral agreements often offer trade benefits in return for co-operation (e.g. the Declaration of Principles).<sup>51</sup>

As a general rule, a state's jurisdiction is limited to its sovereign territory and criminals attempt to evade prosecution by moving from one state to another.<sup>52</sup> Therefore, law enforcement agencies often enter into agreements with their foreign counterparts in order to combat transnational crime. For example, the United States' Coast Guard has entered into so-called 'Bilateral Maritime Counter-Drug and Immigration Interdiction Agreements' with Latin American<sup>53</sup> and Caribbean states, with the aim of combating drug smuggling and illegal immigration.<sup>54</sup> Their main purpose is to prevent vessels from exploiting the freedom of the high seas to escape law enforcement. Informal bilateral agreements, such as the Declaration of Principles used by CBP to implement the CSI, also provide for flexibility and efficiency by by-passing the normal cumbersome procedures relating to inter-state co-operation.<sup>55</sup> Another form of bilateral agreement used by the United States to combat transnational crime is a Mutual Legal Assistance Treaty (MLAT) which aims "to improve the effectiveness of judicial assistance and to regularize and facilitate its

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<sup>49</sup> See World Trade Organization, Committee on Regional Trade Agreements, Synopsis of 'Systemic' Issues Related to Regional Trade Agreements: Note by the Secretariat, WT/REG/W/37 (2 March 2000).

<sup>50</sup> Well-known examples of regional trade agreements include the North Atlantic Free Trade Association (NAFTA); Mercusur and ASEAN.

<sup>51</sup> For an overview of the bilateral approach adopted by CBP see Ashley Roach, *Container and Port Security: A Bilateral Perspective*, INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW, pp. 343 ff.

<sup>52</sup> See generally, Charles Clifton Leacock, *The Internationalization of Crime*, 34 N.Y.U. J. INT'L L. & POL. 263.

<sup>53</sup> According to the U.S. Department of State, the United States has concluded bilateral maritime co-operation agreements with all of the Central American governments except El Salvador. See Hearing And Briefing Before The Subcommittee On The Western Hemisphere Of The Committee On International Relations House Of Representatives, 109<sup>th</sup> Congress, 1<sup>st</sup> Session (testimony of Jonathan Farrar), 9 November 2005, p. 11.

<sup>54</sup> See Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?* 31 U. MIAMI INTER-AM. L. REV. 121, pp. 133 ff.

<sup>55</sup> See Romero, p. 601.

procedures.”<sup>56</sup> The United States has entered into more than sixty such bilateral agreements with other states and the European Union.<sup>57</sup>

There are at least three objections to bilateral agreements. First, they can contravene the non-discrimination principle of WTO law by granting contractual parties preferential trade conditions. Second, the proliferation of bilateral agreements whose contents reflect the conditions in the contracting parties can lead to a patchwork quilt of standards. Third, bilateral agreements such as the Declarations of Principles do not ensure global coverage because they limited to the major trading partners of the United States. On the other hand, there are counter-arguments. For example, any discriminatory effect of bilateral trading agreements can be compensated by their liberalizing effect on trade; the diversity of bilateral agreements can be mitigated by adopting model bilateral agreements such as that provided by the WCO in relation to customs co-operation. Finally, the proliferation of bilateral agreements on the same subject can contribute to the attainment of multilateral agreement<sup>58</sup>

### **1.3. Multilateral Framework**

Multilateralism is the dominant method of global governance and means that states take decisions in agreement with other states through international organizations which regulate different aspects of inter-state relations. Multilateralism aims to prevent political conflicts arising between states owing to protectionism and unilateral measures. This aim most clearly motivates the United Nations, which was created in an effort “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>59</sup> Since 1945, multilateral governance has expanded to other areas, most notably customs and world trade. The creation of the Customs Co-operation Council in 1954 created a forum for the multilateral regulation of customs matters.<sup>60</sup> The signing in 1947 of the General Agreement on Tariffs and

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<sup>56</sup> According to the U.S. Department of State Website, Mutual Legal Assistance (MLAT) and Other Agreements <[http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html)>; see also Leacock, pp. 273 – 274.

<sup>57</sup> Agreement on Mutual Legal Assistance between the European Union and the United States of America, 19 July 2003, O.J., L 181/34.

<sup>58</sup> Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 Cornell Int’l L.J. 1, pp. 21 – 22.

<sup>59</sup> Preamble to the Charter of the United Nations.

<sup>60</sup> The Customs Co-operation Council is the official name of the World Customs Organization



Trade heralded the creation of a multilateral trading environment.<sup>61</sup> Nowadays, one speaks of an international community of states which decides issues of common importance within international fora. Multilateralism depends on the willingness of states to respect their obligations under international agreements and the development of international law.<sup>62</sup>

Although international organizations such as the United Nations and World Trade Organization permit states to take unilateral measures under exceptional circumstances, its members must nevertheless attempt to take measures on the basis of multilateral negotiations where the measures in question affect a global resource.<sup>63</sup>

There is a fear that unilateral measures could lead to the fragmentation of the legal regimes established by international organizations and cause trade disputes.<sup>64</sup> At the same time, multilateral agreement is not always possible or effective owing to the practical difficulties in negotiations involving numerous states at different stages of economic development. It is therefore crucially important that multilateral organizations have effective decision-making procedures. For example, they must be able to take decisions reasonably quickly in order to respond to changing circumstances. In addition, the voting procedures and rights of participation must be seen as fair in order to ensure the continued support of all states. The World Trade Organization experiences difficulties in these respects owing to the size of its membership,<sup>65</sup> the

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<sup>61</sup> More recently, in 2002, the International Criminal Court was created with jurisdiction over war crimes, crimes against humanity, and related matters.

<sup>62</sup> E.g., the United Nations aims to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” In 1947, the General Assembly of the United Nations established the International Law Commission in order to promote the progressive development of international law and its codification. See Arts. 1 (1), 13 and 15 of the Statute of the International Law Commission.

<sup>63</sup> According to the Appellate Body, the use of unilateral trade measures aimed at protecting the environment is only acceptable if accompanied by multilateral efforts directed towards the same goal. See Report of the Appellate Body, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 [hereinafter Appellate Body, *US – Shrimp*], paras. 166 – 167. The importance of multilateralism to the WTO is also suggested in the preamble to the WTO Agreement, which states that members are resolved “to develop an integrated, more viable and durable multilateral trading system.” Moreover, it states that members are “Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system.” Members are also under an obligation to reach multilateral agreement.

<sup>64</sup> See Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R - 39S/155, circulated on 3 September 1991 (not adopted) [hereinafter *US – Tuna I*], para. 5.27; see also Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998 (adopted 6 November 1998), [hereinafter Panel, *US – Shrimp*], paras. 7.44 – 7.45.

<sup>65</sup> The World Trade Organization currently has 151 members.

different blocs of members, which each have differing and sometimes conflicting interests<sup>66</sup> and the length of time required to reach an agreement.<sup>67</sup> Such difficulties may compromise the ability of international organizations to respond quickly and effectively to pressing issues such as security measures in international trade.

In addition to these procedural difficulties there are some subject areas which do not lend themselves to multilateral agreement.<sup>68</sup> As stated above, national security is one area which can be exempt from the obligations imposed by international treaties. Article XXI of the GATT, for example, allows a member state to take unilateral measures “it considers necessary to protect its essential security interests.” Measures relating to national security are inherently unsuited to multilateral negotiations: only the government has the power to introduce such measures and it does so acting on top secret information provided by its security services.

Despite problems in achieving consensus, multilateral agreement is desirable if it can be achieved. Measures agreed by the members of an international organization can be implemented according to uniform standards and implemented under the auspices of the organization. Thereby, the needs of developing countries and LDCs in the implementation process can also be taken into account. Last but not least, the organization can make the adoption of such measures a precondition for the accession of new member states.

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<sup>66</sup> Developing countries outnumber developed countries. The World Trade Organization does not define the term “developing countries” but approximately one third of the WTO membership falls under the category of “least developed” countries. The United Nations does not define “developing country” either. In international trade statistics the Southern African Customs Union is considered a developed area: see United Nations. Standard country or Area Codes for Statistical Use. Series M, No. 49, Rev. 4 (United Nations publication, Sales No. M.98.XVII.9).

<sup>67</sup> Examples include the continuing lack of agreement on subjecting maritime transportation services to GATS disciplines. Negotiations have been held since 1994 without success. The United Nations has not been able to reach agreement on a universal definition of terrorism although it has defined terrorist actions. See e.g. Resolution adopted by the General Assembly, 49<sup>th</sup> Session, 49/62 on 9 December 1994 Measures to Eliminate International Terrorism [hereinafter A/RES/49/60, 17 February 1995], Annex I, paras.1 – 3. See also the recent Resolution adopted by the General Assembly 60th Session on 8 September 2006 60/288, The United Nations Global Counter-Terrorism Strategy [hereinafter A/RES/60/288, 20 September 2006], preamble, p.2.

<sup>68</sup> Increasing trade liberalization has given rise to a number of non-trade-related issues (e.g. the environment, labour laws and human rights) which has caused disputes between developing and industrialized countries, as illustrated by the Seattle and Cancun Ministerial Conferences. See *infra*, p. 245.

#### 1.4. Advantages and Disadvantages of Unilateral and Multilateral Approaches

The main advantage of the unilateral approach lies in the fact that the state has total control over the security standards it considers necessary to protect *its* national security and can formulate its strategy accordingly.<sup>69</sup> This reflects the close connection between national security and sovereignty: states have an inherent right to protect their continued existence.<sup>70</sup> With regard to maritime security, the U.S. government has stated:

*“The United States recognizes the inherent right of every nation, including our own, to defend itself, to protect its legitimate national interests, and to prevent unlawful exploitation of the maritime domain.”*<sup>71</sup>

National security measures are invariably mandatory in nature, enshrined by primary legislation and enforced by (sometimes draconian) trade measures. Recent examples of security measures in the United States include the SAFE Port Act 2006 and H.R. 1 Implementing the Recommendations of the 9/11 Commission.<sup>72</sup> When adopting security measures the government can also expect cross-party and popular support: after all, international terrorism strikes at the stability of government and the citizens of the state.<sup>73</sup> However, it is important that such legislation also be transparent, reflect international standards and allow sufficient flexibility.<sup>74</sup>

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<sup>69</sup> The Container Security Initiative is a direct response to a thesis of a leading U.S. security expert which demonstrates how terrorists may smuggle fissionable materials into the United States to create a WMD. Concerning this thesis see FLYNN, pp. 18 ff.. However, the actual threat level presented by this thesis is disputed. See e.g. ECMT/OECD REPORT 2005, pp., 36 – 44.

<sup>70</sup> Hannes L. Schloemann and Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, A. J. Int’l L. Vol. 93, 424, p. 426; Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 Mich. J. Int’l. L. 558, pp. 562 – 563; THE NATIONAL STRATEGY FOR MARITIME SECURITY, pp. 20

<sup>71</sup> THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 4.

<sup>72</sup> In particular, the Cuban Liberty and Democratic Solidarity (Libertad) Act 1996, Pub. L. 104 – 114, 104<sup>th</sup> Congress, [H.R. 927] is referred to within the context of Article XXI GATT. Reference is also made to the general embargo on trade applied against Nicaragua by the United States by virtue of Executive Order on 1 May 1985 as well as the trade sanctions applied against Argentina for non-economic reasons by the EEC owing to the Falklands conflict. See GATT ANALYTICAL INDEX, p. 600.

<sup>73</sup> With regard to maritime or port security see, e.g. S. Hrg 109 – 877, pp.1 and 12 referring to the bicameral and bipartisan efforts in relation to port security. See also p. 16 regarding the effect of the Dubai Ports World controversy on public awareness of port security. ASSESSMENT OF U.S. EFFORTS 2005, p. 1 (“This effort has been thoroughly bipartisan and bicameral”). FLYNN, p. 13 (“In the face of catastrophic threat, the general public will insist on protective measures”).

<sup>74</sup> See Mikuriya, pp. 61 – 62.

Being home to “the world’s premier marketplace”<sup>75</sup> and the world’s only superpower, the United States is in a position to enforce its unilateral customs controls through effective sanctions. Through the CSI, CBP seeks co-operation from strategically important states and uses its trading power over those states in a “carrot and stick approach” in order to conclude security agreements.<sup>76</sup> In fact, Section 1701 of the Act Implementing the Recommendations of the 9/11 Commission 2007 (amending Section 232 of the SAFE Port Act 2006) goes even further and effectively makes the very existence of trade relations with the United States dependent on the implementation of U.S. security standards (from 2012).<sup>77</sup> On the other hand, there are also disadvantages with unilateral measures. Such leverage over its trading partners makes unilateral security measures a viable option for the United States but they are hardly a realistic option for economically weaker states. Where unilateral measures protect vital interests such as national security, there is little likelihood of compromise, particularly where the implementing state has superior trade power.<sup>78</sup> This creates the conditions for trade wars with other states as well as disputes with supranational and international organizations.<sup>79</sup> This leads to another problem, namely that unilateral measures could conflict with the principle of *pacta sunt servanda*, according to which partner states must comply with their obligations under regional and international trade agreements.<sup>80</sup> This could deprive weaker states of their rights under trade agreements and the resultant damage to their economy could actually fuel the conditions for terrorism.<sup>81</sup> The non-reciprocity of security measures could also cause other states to introduce their own security requirements in retaliation<sup>82</sup> and the proliferation of incompatible unilateral

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<sup>75</sup> FLYNN, p. 6.

<sup>76</sup> FLYNN, p. 103, referring to delay as a stick and facilitation as a carrot.

<sup>77</sup> See Section 1701 (a), of the IRCA 2007 amending Section 232 (b) of the SAFE PORT ACT to make the importation of cargo containers into the United States conditional on non-intrusive scanning.

<sup>78</sup> See e.g. the Statement of Stuart Eizenstat with regard to the Cuban Liberty and Democratic Solidarity (Libertad) Act 1996, quoted in Kerry Anne Finegan, *National Security and the Multilateral Trade Regime, An Examination of GATT’s Article XXI National Security Defense in the Context of the Helms-Burton Dispute*, International Law Quarterly, Vol. XV, No.3, p. 15.

<sup>79</sup> The dispute between the European Communities and United States provides a good example. See generally John, A. Spanogle Jr., *Helms-Burton Be Challenged Under WTO?* 27 STETSON L. REV. 1313.

<sup>80</sup> This is also true of the CSI: see Florestal pp. 400 – 408. In 2003, the European Commission also threatened several European states with infringement proceedings for entering into bilateral security agreements with the United States. The Commission claimed that the agreements infringed its competence to formulate a uniform customs policy for the European Union. Concerning this dispute see Sung Y. Lee, *The Container Security Initiative: Balancing US Security Interests with the European Union’s Legal and Economic Concerns*, 13 MINN. J. OF GLOBAL TRADE 123.

<sup>81</sup> See *infra* pp. 154 – 155.

<sup>82</sup> See WSC, Statement of 30 July 2007, p. 3 at point 6.

measures could represent considerable barriers to trade.<sup>83</sup> In this context it is important to note that UN Resolution 1456 obliges states to respect their international obligations when implementing security measures.<sup>84</sup> Another significant disadvantage of the unilateral approach is that the implementing state has no way of knowing for certain if its measures are effective in preventing the perceived threat of terrorism. In dealing with the threat the member state in question will rely wholly on the intelligence provided by its security services. However, this assessment is usually classified and not open to scrutiny by the legislature or international organizations.<sup>85</sup> The risk of the ineffectiveness of unilateral measures is particularly acute in the case of the CSI considering that it is the first measure which attempts to secure maritime transportation against a shadowy, non-state actor (Al Qaeda).<sup>86</sup>

Multilateral measures are developed by international organizations which view security as a global public good and aim to improve the security of all their members.<sup>87</sup> Their main aim is to create uniform, albeit voluntary standards which can be adopted by all members taking account of their economic development. In particular, a body such as the World Customs Organization can ensure that LDCs and DCs are not excluded from security standards by coupling their implementation with necessary capacity building.<sup>88</sup> International organizations also formulate measures *within* the framework of the treaty obligations binding their members as well as international legal principles.<sup>89</sup> As a result, multilateral security measures can (in theory at least),

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<sup>83</sup> Inefficient customs procedures constitute significant non-tariff trade barriers: see Mikuriya, pp. 52 – 53.

<sup>84</sup> S/RES/1456, para. 6.

<sup>85</sup> See The British Prime Minister, *Foreward* to IRAQ'S WEAPONS OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOVERNMENT [hereinafter, ASSESSMENT OF THE BRITISH GOVERNMENT], p. 3. The Prime Minister acknowledges that the assessment "is based, in large part, on the work of the Joint Intelligence Committee (JIC). [...] Its work, like the material it analyses, is largely secret. [...]". He also refers to expressly to the fact that the assessment is the responsibility of the government, "Gathering intelligence inside Iraq is not easy. Saddam's is one of the most secretive and dictatorial regimes in the world. So I believe people will understand why the Agencies cannot be specific about the sources, which have formed the judgements in this document, and why we cannot publish everything we know. We cannot, of course, publish the detailed raw intelligence. I and other Ministers have been briefed in detail on the intelligence and are satisfied as to its authority".

<sup>86</sup> Concerning the effectiveness of the CSI see *infra pp.* 317 ff.

<sup>87</sup> See the THE UNITED NATIONS, A MORE SECURE WORLD, OUR SHARED RESPONSIBILITY, REPORT OF THE HIGH LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, 2004 [hereinafter U.N. REPORT 2004], p. 14 ("Global economic integration means that a major terrorist attack anywhere in the developed world would have devastating consequences for the well-being of millions of people in the developing world").

<sup>88</sup> See e.g. Framework of Standards, p. 8, paras. 1.6 – 1.7 emphasizing the importance for capacity building for implementing the Framework.

<sup>89</sup> E.g. the Framework of Standards complements the RKC issued by the same organization. According to the WCO, implementation of the latter is a condition for the implementation of the Framework.

lead to a more consistent security regime than the patchwork quilt of bilateral agreements with selected trading partners used to implement unilateral security measures (such as the CSI). On the other hand, the multilateral approach also entails considerable disadvantages. Perhaps most the most significant of these is the fact that the adoption of security measures at international organizations depends on consensus. Accordingly, it may take a long time before the organization achieves the necessary consensus and, in the battle for acceptance, the security measure may end up as representing the lowest common denominator and amount to no more than a weak supplement to the more stringent national measures. In addition, the security measures of international organizations (e.g. the WCO's Framework of Standards) are often voluntary and it is difficult to monitor compliance.<sup>90</sup>

## **2. Security Measures at National Level**

In the United States, economic security has long been linked to national security and seaports and container terminals are regarded as critical infrastructure owing to their economic significance.<sup>91</sup> Following 9/11, the United States government, acting through the Departments of State and Homeland Security introduced a raft of measures in response to the threat of maritime terrorism.<sup>92</sup> Such measures have given rise to controversy because they potentially restrict access to US markets and respond to a threat which is impossible to identify or predict precisely.

### **2.1. The Maritime Transportation Security Policy of the United States**

The security policy of the United States with regard to the maritime domain was established by Presidential Directive NSPD41/HSPD 13, which was issued on 24 December 2004. The aim of

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<sup>90</sup> See Commissioner Robert C. Bonner, *Remarks to the World Customs Organization, Brussels, Belgium, 23 June 2005* [hereinafter U.S. Customs Commissioner, Remarks of 23 June 2005], (“[T]he Framework will not amount to much or achieve its potential, unless it is actually implemented by a significant number of developed and developing countries”). See also *Angry lines condemn GE's container security initiative*, January 8, 2006, LLOYD'S LIST INT'L (page unavailable online) (2006 WLNR 13206886), concerning individual companies choosing to adopt different standards than the International Standards Organization with regard to safe container technology.

<sup>91</sup> See DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SYSTEMS, CRITICAL INFRASTRUCTURE AND KEY RESOURCES, SECTOR SPECIFIC PLAN AS INPUT TO THE NATIONAL INFRASTRUCTURE PROTECTION PLAN, MAY 2007, p.1; DEPARTMENT OF HOMELAND SECURITY, NATIONAL STRATEGY FOR MARITIME SECURITY, pp. 1 – 2.

<sup>92</sup> For a brief overview see U.S. DEPARTMENT OF HOMELAND SECURITY, *SECURE SEAS, OPEN BORDERS: KEEPING OUR WATERS SAFE, SECURE AND OPEN FOR BUSINESS*, 21 JUNE 2004 (hereinafter “SECURE SEAS, OPEN PORTS”), pp. 4 et seq.

the Directive is to establish “U.S. policy, guidelines, and implementation actions to enhance U.S. national security and homeland security by protecting U.S. maritime interests.”<sup>93</sup> The strategy primarily aims to protect the United States but it also recognizes the fact that securing the maritime domain is a global issue. It states that maritime security policies “are most effective when the strategic importance of international trade [is] ... considered appropriately.”<sup>94</sup> The fact that the international supply chain spans several jurisdictions means that, in practice, the United States will only be able to protect its national interests by co-operating with other states. The coordination of international efforts and international outreach therefore forms an important part of U.S. maritime security policy.<sup>95</sup>

As a result of Presidential Directive NSPD41/HSPD13, the Department of Defence and Homeland Security developed the National Strategy for Maritime Security which was published in December 2005, almost three years after the Container Security Initiative was introduced.<sup>96</sup> The Directive also mandated eight interrelated supporting plans which deal with different aspects of maritime security and are guided by the security principles in the National Strategy.<sup>97</sup> The “vision for maritime transportation system security” is stated thus:

*“A systems-oriented security regime built upon layers of protection and defense-in-depth that effectively mitigates critical system security risks, whilst preserving the functionality and efficiency of the MTS. Understanding the most effective security risk management strategies involves co-operation and participation of both domestic and international stakeholders acting at*

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<sup>93</sup> National Security Presidential Directive 41/Homeland Security Presidential Directive 13, 21 December 2004 [hereinafter NSPD41/HSPD13], p. 1.

<sup>94</sup> *Id.*, p. 2.

<sup>95</sup> *Id.*, p. 6.

<sup>96</sup> For details of its introduction and progress see Senate Committee on Homeland Security and Presidential Affairs, Press Release: *Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Port Security Legislation*, 5 April 2006.

<sup>97</sup> *Id.*, pp. 5-9; NATIONAL STRATEGY FOR MARITIME SECURITY, p. ii; see also <[http://www.dhs.gov/xprevprot/programs/editorial\\_0608.shtm](http://www.dhs.gov/xprevprot/programs/editorial_0608.shtm)> for an overview of the supporting plans. Of particular importance to the following investigation are MARITIME COMMERCE SECURITY PLAN, October 2005 and INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, November 2005. The division between the Department of State and the Department of Homeland Security raises questions concerning the uniformity of the strategy. For example, the CSI is based on international co-operation but is administered by the Department of Homeland Security. However, the Department of State is responsible for overseeing the INTERNATIONAL OUTREACH AND COORDINATION STRATEGY.

*strategic points in the system, the U.S. seeks to improve security through a co-operative and cohesive effort involving all stakeholders.*”<sup>98</sup>

The National Strategy for Maritime Security maps out the threat, interests at risk and means of protection. It claims that threat exists in the possibility that terrorists could exploit telecommunications and international commercial logistics to cause damage to global, political and economic security. The strategy identifies three groups of potential perpetrators (nation-states, terrorists and transnational criminals and pirates)<sup>99</sup> and has three overarching aims: to preserve the freedom of the seas;<sup>100</sup> to facilitate and defend commerce<sup>101</sup> and to facilitate the movement of desirable goods and people across U.S. borders, while screening out dangerous people and material. In order to achieve the last aim, goods and people should be screened before arriving at the physical borders of the United States.<sup>102</sup> The attainment of these overarching aims dictates the following objectives:

- Prevent Terrorist Attacks and Criminal or Hostile Acts<sup>103</sup>
- Protect Maritime-Related Population Centres and Critical Infrastructures<sup>104</sup>
- Minimize Damage and Expedite Recovery<sup>105</sup>
- Safeguard the Ocean and Its Resources<sup>106</sup>

The fact that the international supply chain is a global resource means that the maritime security strategy displays extraterritorial characteristics. For example, in order to safeguard the ocean and its resources, the United States declares that “[t]he vulnerability is not just within U.S. territorial seas and internal waters.”<sup>107</sup> Therefore, it intends to patrol its exclusive economic zone and high

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<sup>98</sup> MARITIME SECURITY RECOMMENDATIONS, p. 3.

<sup>99</sup> NATIONAL STRATEGY FOR MARITIME SECURITY, pp. 3 – 5

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, p.8

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* p.9

<sup>105</sup> *Id.* p. 11

<sup>106</sup> *Id.* p. 12

<sup>107</sup> *Id.* p. 12



seas areas of national interest. This is potentially controversial because under international law no nation can claim jurisdiction over the high seas.<sup>108</sup>

The United States has acknowledged that the international supply chain is a resource shared by all states by declaring its intention to pursue its security initiatives diplomatically through international organizations such as the International Maritime Organization, the World Customs Organization, and International Standards Organization.<sup>109</sup> Where appropriate, these initiatives are to build upon existing efforts, including the Container Security Initiative.<sup>110</sup> For example, the Department of State is to implement standardized international security and World Customs Organization frameworks for customs practices and standards to ensure that goods and people entering a country do not pose a threat.<sup>111</sup> In particular, the United States will offer maritime and port security assistance, training, and consultation in order to enhance the maritime security capabilities of other key nations.<sup>112</sup>

In addition to partnerships with other states, the strategy also requires the government and private sector to co-operate in improving maritime security and presents the Container Security Initiative and 24 Hour Rule as primary examples of such a partnership.<sup>113</sup> Operating in conjunction, these security initiatives aim to screen and inspect goods before they reach U.S. ports. However, in order to ensure the security of the entire supply chain, cargo must be loaded in containers at secure facilities and the integrity of the container maintained to its final destination.<sup>114</sup> To achieve this, individual companies must embed security measures into their commercial practices as well.

In the event of a terrorist attack, the United States “should not default to an automatic shutdown of the marine transportation system”<sup>115</sup> but instead aim to “disengage selectively only designated portions” and adopt “a prudent and measured response” on the basis of “an assessment of the

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<sup>108</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6TH ED. OXFORD 2003, p. 224.

<sup>109</sup> NATIONAL STRATEGY FOR MARITIME SECURITY, p. 14

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* p. 15

<sup>113</sup> *Id.* p. 18

<sup>114</sup> *Id.* p. 19

<sup>115</sup> *Id.* p. 23

specific incident, including available intelligence.”<sup>116</sup> In this connection, reference is made to “closures of selected commercial nodes within the marine transportation system, as well as effective efforts to redirect the affected modes of commerce.”<sup>117</sup>

The Maritime Security Strategy also reflects fundamental security concepts stated in other security strategies issued by the U.S. Government following 9/11,<sup>118</sup> namely pre-emptive defence, international co-operation and unilateralism. The concept of pre-emptive defence is also found in the National Security Strategy of the United States (September 2002) and the National Strategy for Combating Terrorism (February 2003). This form of defence aims to identify and destroy the threat before it reaches U.S. borders.<sup>119</sup> The National Security Strategy for the United States and the National Security Strategy for Homeland Security (July 2002) also stress the need for international co-operation. In particular, the former strategy declares that all nations have a responsibility to prevent acts of terrorism.<sup>120</sup> The National Strategy to Combat Weapons of Mass Destruction (December 2002), states that the United States will actively employ diplomatic approaches in bilateral and multilateral settings in pursuit of non-proliferation goals.”<sup>121</sup> Despite the need for international co-operation, the United States is also prepared to pursue unilateral defence measures. The National Security Strategy of the United States is based “on a distinctly American internationalism that reflects the union of our values and our national interests.”<sup>122</sup> In order to defend the nation, the United States is prepared to act unilaterally.<sup>123</sup> Similarly, in the National Strategy for Combating Terrorism states that the United States “will not hesitate to act alone to exercise our right to self-defense.”<sup>124</sup>

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<sup>116</sup> *Id.* p. 23

<sup>117</sup> *Id.*, p. 24

<sup>118</sup> A table with the description of all the strategies is provided in UNITED STATES GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING THREATS, AND INTERNATIONAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, COMBATING TERRORISM, OBSERVATIONS ON NATIONAL STRATEGIES RELATED TO TERRORISM, STATEMENT OF RAYMOND J. DECKER, GAO-03-519T, 3 March 2003 [hereinafter GAO-03-519T], pp. 5 – 6.

<sup>119</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, p.6

<sup>120</sup> *Id.*, Introduction by the President by the United States (“For freedom to thrive, accountability must be expected and required.”)

<sup>121</sup> NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION, p. 3

<sup>122</sup> NATIONAL STRATEGY OF THE UNITED STATES OF AMERICA, p. 1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Overall, the National Strategy for Maritime Security “represents a multi-layered approach and includes increased maritime domain awareness as well as enhanced prevention, protection and recovery capabilities.”<sup>125</sup> It also forms one component of an overall national strategy to combat terrorism. According to the GAO, the various national strategies “show cohesion in that they are organized in a hierarchy, share common themes and cross-reference each other.”<sup>126</sup> On the other hand, they tend to describe the terrorist threat only briefly or in general terms.<sup>127</sup> In addition, the GAO found that “most strategies lack detailed performance goals and measures to monitor and evaluate the success of combating terrorism programs.”<sup>128</sup>

### 2.1.1 The Container Security Initiative

The Container Security Initiative (CSI) was publicly announced on January 20, 2002 by U.S. Customs<sup>129</sup> and was based on the “In-transit Container Security Initiative” which existed between Canada and the United States prior to 9/11.<sup>130</sup> The CSI was a response to the lack of security in container transportation: following 9/11, security experts believed that terrorists could place a nuclear or radiological bomb in a container destined for an airport or harbour in the United States and detonated upon arrival.<sup>131</sup> Such an event would effectively shut down container shipping and paralyze the world economy.<sup>132</sup> The CSI enables teams of U.S. Customs officials to be stationed at key ports overseas in order to screen high-risk containers before they depart for the United States.<sup>133</sup> It aims to enlarge America’s zone of security by pushing U.S. borders outwards,<sup>134</sup> thereby ensuring that foreign harbours satisfy U.S. security standards.<sup>135</sup> The measure originally

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<sup>125</sup> THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 5.

<sup>126</sup> *Id.*, p. 2.

<sup>127</sup> *Id.*, p. 8.

<sup>128</sup> *Id.*, p. 17.

<sup>129</sup> See U.S. Customs Commissioner, Speech of 17 January 2002.

<sup>130</sup> See Robert C. Bonner, *Remarks to the Canadian/American Border Trade Alliance Washington, D.C.*, 12 September 2005 [hereinafter U.S. Customs Commissioner, Remarks of 12 September 2005]. According to the Commissioner, this programme targeted and carried out security inspections of high-risk cargo containers that were off-loaded at Canadian seaports, in transit, to the U.S. at the Canadian seaport and *vice versa*.

<sup>131</sup> See FLYNN, pp. 16 – 29.

<sup>132</sup> *Id.*

<sup>133</sup> For a detailed overview of the CSI see U.S. CUSTOMS AND BORDER PROTECTION, CONTAINER SECURITY INITIATIVE, STRATEGIC PLAN 2006 – 2011 [hereinafter CSI STRATEGIC PLAN].

<sup>134</sup> *Supra n.* 23.

<sup>135</sup> See SECURE SEAS, OPEN PORTS, p. 4; see also UNITED STATES GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS, AND INTERNATIONAL RELATIONS, HOUSE COMMITTEE ON GOVERNMENT REFORM CONTAINER SECURITY, CURRENT EFFORTS TO DETECT NUCLEAR

consisted of non-regulatory (bilateral agreements) and regulatory components (24 Hour Rule). However, since the passage of the SAFE Port Act 2006, major concepts of the CSI are now largely regulated by statute. The CSI takes its place alongside the numerous security measures introduced by governments since 2001.<sup>136</sup>

### **2.1.2. The Customs-Trade Partnership Against Terrorism**

This initiative was proposed on 27 November 2001 by U.S. Customs and was formally announced on 16 April 2002 by the U.S. Commissioner for Customs.<sup>137</sup> According to the Customs and Border Protection Bureau, “C-TPAT builds on the best practices of CBP/industry partnerships to strengthen supply chain security, encourage co-operative relationships and to better concentrate CBP resources on areas of greatest risk.”<sup>138</sup> It is a voluntary partnership between CBP and importers and participation is open to U.S. and selected foreign companies.<sup>139</sup> Applicants must demonstrate their commitment to C-TPAT by signing agreements in which they undertake to establish security practices in all phases of their operations which are approved by CBP.<sup>140</sup>

The C-TPAT offers the government and private sector reciprocal benefits. The government benefits from the fact that all participating businesses undertake to establish security practices in all phases of their operations which are approved by CBP.<sup>141</sup> This serves to remove from the inspection process legitimate commerce that presents no security risk. In return for satisfying the requirements, companies will be certified by CBP as C-TPAT members, thereby qualifying them for expedited processing at U.S. borders. This will create a system of clearance which processes

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MATERIALS, NEW INITIATIVES AND CHALLENGES, (STATEMENT OF JAYETTA Z. HECKER), GAO-03-297T, 18 NOVEMBER 2002 [hereinafter GAO-03-297T], pp. 11 – 12.

<sup>136</sup> Other national measures include Swedish Customs’ Stairsec programme; Canadian Customs’ Partnership in Protection; New Zealand Customs’ Secure Export programme and Australian Customs’ Frontline programme.

<sup>137</sup> See Robert C. Bonner, *C-TPAT Announcement, Detroit, Michigan*, 15 April 2002 [hereinafter U.S. Customs Commissioner, Announcement of 15 April 2002], available under:

<sup>138</sup> U.S. CUSTOMS AND BORDER PROTECTION, SECURING THE GLOBAL SUPPLY CHAIN, CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) STRATEGIC PLAN [hereinafter C-TPAT STRATEGIC PLAN], 2002, p.12.

<sup>139</sup> Participation to C-TPAT is not open to foreign manufacturers on a general basis but only to Mexican manufacturers and invited European and Asian manufacturers.

<sup>140</sup> See generally, C-TPAT STRATEGIC PLAN, p. 18; see also GAO-03-297T, pp. 12 -13.

<sup>141</sup> C-TPAT STRATEGIC PLAN, p. 8

goods faster, more efficiently and at less cost to business.<sup>142</sup> The C-TPAT applies to each sector of the supply chain and all modes of transportation. Its security requirements are tailored to suit the mode of transportation in question. It is not solely designed for large companies – the benefits may also be attractive for small or medium-sized companies.

The C-TPAT is an important security measure because it recognizes that responsibility for supply chain security primarily lies with the private sector.<sup>143</sup> Unlike the CSI, which only improves security at select foreign seaports of departure, a customs – business partnership has the potential to improve security at the point of origin (i.e. where the goods are packed for shipment).<sup>144</sup> It is not a new concept: a customs – business partnership to secure supply chain security was pioneered by the United States in the Sea Carrier Initiative in 1984 and the Business Anti-Smuggling Coalition (BASC) of 1996.<sup>145</sup> It also resembles pre-shipment inspection. However, the C-TPAT is more ambitious than previous partnerships because it seeks to assure the integrity of every cargo shipment bound for the U.S. – from the point of foreign manufacture to the U.S. border. It has proved a popular concept in many countries and is also reflected in the WCO’s Framework of Standards. According to CBP, the current membership includes over 86 of the top 100 United States importers by containerized cargo volume and represents over 40% of all the imports by dollar value into this country and over 96% of all the United States bound maritime container carrier traffic.<sup>146</sup>

### **2.1.3. The Secure Freight Initiative**

The Secure Freight Initiative (SFI) was launched on 7 December 2006 by the Department of Homeland Security and Department of Energy.<sup>147</sup> The initiative builds upon existing port security measures by enhancing the federal government’s ability to scan containers for nuclear and radiological materials overseas and to better assess the risk of inbound containers. The

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<sup>142</sup> *Id.*, Strategic Goal 2, p. 9

<sup>143</sup> See S. Hrg. 108–55, p.12.

<sup>144</sup> See THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 19.

<sup>145</sup> For an overview of BASC, see the CBP website under < [http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/partnerships/basc.xml](http://www.cbp.gov/xp/cgov/border_security/international_activities/partnerships/basc.xml) >. See also the website of the World BASC Organization < <http://www.wbasco.org/> > for further information on the strategy.

<sup>146</sup> See C-TPAT STRATEGIC PLAN, p. 13. ASSESSEMENT OF U.S. EFFORTS, p. 22.

<sup>147</sup> Office of the Press Secretary, *DHS and DOE Launch Secure Freight Initiative*, 7 December 2006

programme was mandated by Section 231 of the SAFE Port Act 2006<sup>148</sup> and is the result of a review of the Department's programmes, policies, operations and structure.<sup>149</sup> It is supported by the World Shipping Council.<sup>150</sup>

According to Section 231(b), equipment for the new security initiative will have to meet a certain technical standard and will be provided by either (1) the Department of Homeland Security and the Department of Energy or (2) in co-operation with the private sector or, when possible, host governments. The aims of the initiative are laid down in Section 231(c), which provides for *inter alia* the scanning of all containers destined for the United States loaded in partner ports;<sup>151</sup> the electronic transmission of images and information to appropriate United States Government personnel for evaluation and analysis and an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel.<sup>152</sup> Full scale implementation of the pilot system is due to commence one year after the enactment of the SAFE Port Act.<sup>153</sup> No less than 180 days thereafter the Secretary of the Department of Homeland Security is to submit a report to congress on the effectiveness of the initiative.<sup>154</sup> The implementation of the programme will begin in early 2007.

The programme displays similarities to the Container Security Initiative. However, there are two major differences. Unlike the Container Security Initiative, the SFI will not rely solely on cargo manifest information to target high-risk cargo, but use additional advance cargo shipment information from a number of sources.<sup>155</sup> This information will be compiled by privately-operated "fusion Centres." This initiative offers an important advantage over the CSI by providing a more complete and accurate picture of what cargo is being bought and sold, by

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<sup>148</sup> According to Section 231 (a), "Not later than 90 days after the date of the enactment of this Act, the Secretary shall designate 3 foreign seaports through which containers pass or are transshipped to the United States for the establishment of pilot integrated scanning systems that couple nonintrusive imaging equipment and radiation detection equipment."

<sup>149</sup> Christopher Koch, Remarks Before the Maritime Trades Department, AFL – CIO 2005 Convention, 22 July 2005 [hereinafter Koch, Remarks of 22 July 2005], pp. 9 – 10.

<sup>150</sup> See Christopher Koch, Statement of 7 December 2006 [hereinafter Koch, Statement of 7 December 2006].

<sup>151</sup> Six ports are involved in the initial phase of the Secure Freight Initiative: Port Qasim in Pakistan, Puerto Cortes in Honduras, Southampton in the United Kingdom, Port Salalah in Oman, the Port of Singapore, and Port Busan's Gamman Terminal in Korea.

<sup>152</sup> H.R. 4954, 32.

<sup>153</sup> Section 231 (c)

<sup>154</sup> Section 231 (a)

<sup>155</sup> *Supra n.* 149, pp. 9 – 10.

whom, and from where.<sup>156</sup> Second, the SFI requires United States-bound containers before departure to pass through a radiation detection machine and an X-ray device, a combination intended to find bomb-making materials that have intentionally been shielded. However, according to Section 1701 of the Act Implementing the Recommendations of the 9/11 Commission 2007, such scanning will apply to all containerized shipments destined for the United States by 2012 (so-called “100 per cent scanning”).

#### **2.1.4. The Megaport Initiative**

This initiative is administered by the Office of the Second Line of Defense (SLD) within the Department of Energy. The aim of the Megaports Initiative is to enhance security at major seaports by installing radiation detection equipment in order to prevent the smuggling of nuclear and radioactive material by containers.<sup>157</sup> Such material could be used to construct a weapon of mass destruction which could be used against the United States. Although the Megaports Initiative is separate from the CSI, it complements the fourth component of that measure. Like the CSI, it takes the form of a co-operation between the Department of Energy and the host country’s government. In effect, the two countries share the costs of the security equipment: the DOE provides the equipment which is to be used and the foreign port facilitates the installation and operational staff. Unlike the fourth component of the CSI, the Megaports Initiative involves commercially available, off-the-shelf equipment. The Megaports Initiative currently has three members: the port of Rotterdam in the Netherlands, the port of Antwerp in Belgium and the port of Piraeus in Greece.

#### **2.1.5. Operation Safe Commerce**

Operation Safe Commerce (OSC) was created in August 2001 and was originally intended to secure the supply chain against narcotics smuggling.<sup>158</sup> According to its mission, OSC aims to enhance border and international transportation security without impeding free trade and

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<sup>156</sup> *Id.*

<sup>157</sup> Further details on the Megaports Initiative are provided by GAO REPORT TO CONGRESSIONAL REQUESTERS PREVENTING NUCLEAR SMUGGLING, DOE HAS MADE LIMITED PROGRESS IN INSTALLING RADIATION DETECTION EQUIPMENT AT HIGHEST PRIORITY FOREIGN SEAPORTS, GAO-05-375, March 2005 [hereinafter GAO-05-375].

<sup>158</sup> See S. Hrg. 108–55 (Testimony of Peter W. Hall), pp.21-24; GAO-03-297T, pp. 13 – 14.

international commerce.<sup>159</sup> OSC is a coalition of private business, ports, local, state and federal representatives. It is headed by an Executive Steering Committee which is co-chaired by the Department of Transport and the Bureau of Customs and Border Protection. The measure identifies weaknesses in the supply chain and tests new cargo handling techniques and technology which can be used to secure the supply chain.<sup>160</sup> Operation Safe Commerce complements the CSI and C-TPAT but penetrates the supply chain further than either because container handling and technology solutions affect all private and public sector stakeholders in the supply chain.<sup>161</sup> It currently involves the three largest container ports in the United States which have been provided with grants by the Department of Homeland Security and the Transportation Security Agency to fund security projects.<sup>162</sup>

#### **2.1.6. The Proliferation Security Initiative**

This measure was introduced by President Bush on 31 May 2003 and is based on the National Strategy to Combat Weapons of Mass Destruction which was published in December 2002. The PSI is an interdiction strategy in relation to state or non-state actors of proliferation concern.<sup>163</sup> Such actors are those countries or entities which PSI participants believe should be subject to interdiction activities owing to their involvement in proliferation. It is a response to the growing market in weapons of mass destruction and related materials. Traffickers today are using increasingly aggressive and sophisticated methods to traffic WMD. This problem has been recognized by the United Nations<sup>164</sup> whose Security Resolution 1540 corresponds to the aims of the PSI.<sup>165</sup> The initiative consists of states which are concerned to ensure the non-proliferation of WMD and are willing and able to stop the flow of such materials as they are transported by sea,

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<sup>159</sup> *Id.*, p. 22. See also Comments of the World Shipping Council submitted to the Department of Transportation, Transportation Security Administration Regarding Operation Safe Commerce (Docket Number TSA-2002-13827), 5 December 2002 [hereinafter WSC, Comments of 5 December 2002], concerning the best way to structure the OSC initiative.

<sup>160</sup> See U.S. Department of Homeland Security, Office for Domestic Preparedness, Operation Safe Commerce Phase III, Program and Application Guidelines, pp. 1 – 2.

<sup>161</sup> See S. Hrg. 108–55, p. 24; WSC Comments of 5 December 2002.

<sup>162</sup> These are the ports of Los Angeles and Long Beach, ports of Seattle and Tacoma and the Port Authority of New York/New Jersey).

<sup>163</sup> For an overview see Press Release from the Office of the Press Secretary to the Whitehouse, 4 September 2003.

<sup>164</sup> See Resolution of the U.N. General Assembly, Human Rights and Terrorism, A/RES/50/186, 22 December 2005 < <http://www.un.org/documents/ga/res/50/a50r186.htm> >.

<sup>165</sup> See generally Resolution 1540 (2004), adopted by the Security Council at its 4956th meeting, on 28 April 2004 [hereinafter S/RES/1540]. However, this does not expressly refer to the PSI.



air or land. The programme is overseen by the Department of Homeland Security with the support of the U.S. Coast Guard and, like the CSI, is based on bilateral agreements with other states. There are currently agreements with Panama, Liberia, the Republic of the Marshall Islands and Croatia. Negotiations are being carried out with Greece, Belize and Cyprus. In 2003, participants of the initiative agreed to the PSI Statement of Interdiction Principles.<sup>166</sup>

### **2.1.7. The Smart Box Initiative**

This initiative was started in 2004 by the CBP and five C-TPAT participants. The currently used “fifty cent seal” is an indicative mechanical seal (i.e. is only designed to indicate interference). However, they can be easily replaced and are insufficient to ensure the integrity of the container.<sup>167</sup> The aim of this initiative is to develop a smart box which will prevent containers being opened by unauthorized persons en route to the port of destination. As a result, it aims to secure the container itself rather than the surrounding maritime environment. Research Centres around developing a container security device (CSD) which will record tampering and eventually replace the currently used ISO Standard mechanical security seal.<sup>168</sup> Arguably, this initiative is the only one which offers verifiable “cradle to the grave” security.

## **2.2. Legislative Instruments Relating to the CSI**

Immediately after 9/11 the United Nations Security Council passed Resolution 1373 under its Chapter VII powers. Article 2(b) obliged states to take the necessary steps to prevent the commission of terrorist acts. States were given a 90-day period in which to implement the provisions of the Resolution and a Committee of the Security Council was established, in order to monitor compliance. As a result of this Resolution, state legislatures acted quickly to improve their regulatory counter-terrorist regimes. In line with the obligation imposed by UN Resolution

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<sup>166</sup> Available under: < <http://www.fco.gov.uk/Files/kfile/PSIStatement.pdf> >.

<sup>167</sup> See EUROPEAN CONFERENCE OF MINISTERS OF TRANSPORT, CONTAINER TRANSPORT SECURITY ACROSS MODES, 2005 [hereinafter ECMT/OECD REPORT 2005], pp. 51 - 58.

<sup>168</sup> See Hearing Before The Committee On Commerce, Science, And Transportation United States Senate, *Port Security*, 109<sup>th</sup> Congress, 1<sup>st</sup> Session, 17 May 2005 [hereinafter S. Hrg. 109–282] (testimony of Mr. Robert Jacksta); Robert C. Bonner, *Remarks at the Maritime Security Lifetime Achievement Award, Third Annual U.S. Marine Security Conference and Expo, New York, New York*, 14 September 2004 (hereinafter “U.S. Customs Commissioner, Remarks of 14 September 2004”); see also SECURE SEAS, OPEN PORTS.

1373, Congress passed a number of statutes which aimed to secure U.S. borders against further terrorist atrocities. The legislative basis for the Container Security Initiative is provided by the Maritime Transportation Security Act 2002 (“MTSA”) which amended the Trade Act 2002. Generally speaking, the function of both Acts is to embed security practices and vulnerability reduction efforts into commercial practices.<sup>169</sup> The Trade Act 2002, Homeland Security Act 2002 and U.S. PATRIOT Act 2002, also served to facilitate the implementation of the CSI by creating the necessary conditions and infrastructure for effective counter-terrorist measures. The recent Security and Accountability for Every Port Act 2006 (“SAFE Port Act 2006”), codifies the Container Security Initiative. The following section provides an overview of applicable legal instruments as well as legislative developments relating to the CSI.

### **2.2.1. Homeland Security Act 2002**

One of the first steps that the U.S. government took in response to 9/11 was a fundamental reorganization of executive agencies in order to improve its anti-terrorist capabilities. This was achieved by the Homeland Security Act 2002,<sup>170</sup> described at the time as representing the “most extensive reorganization of the federal government since Harry Truman signed the National Security Act.”<sup>171</sup> Section 101 of the Act creates the Department of Homeland Security (DHS), an executive branch of the U.S. government. This department was established on 24 January 2003 and its primary mission is to prevent terrorist attacks in the United States, reduce America's vulnerability to terrorism, and minimize the damage of, and help in recovery from, terrorist attacks that do occur.<sup>172</sup> Section 402 identifies agencies and functions relevant to border and transportation security that are to be transferred to the Department of Homeland Security. Overall, the Department houses over twenty federal agencies including the United States Customs Service, the Immigration and Naturalization Service, the Animal and Plant Health Inspection Service, the Coast Guard, and the Transportation Security Administration. Subsuming

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<sup>169</sup> NATIONAL STRATEGY FOR MARITIME SECURITY, p. 13

<sup>170</sup> Homeland Security Act 2002, Pub. L. No. 107-296, 107<sup>th</sup> Congress, 2<sup>nd</sup> Session. 25 November 2002 [H.R. 5005]. (116 Stat. 2135). For an overview of the Act see: THE WHITE HOUSE, ANALYSIS FOR THE HOMELAND SECURITY ACT OF 2002.

<sup>171</sup> See President of the United States, Remarks at the Signing of H.R. 5005 the Homeland Security Act of 2002, Office of the Press Secretary 25 November 2002.

<sup>172</sup> For a listing of the mission of the Department see Section 101 (b) (1) (A) – (G) of the HSA 2002.

all the agencies with border security tasks under one department with overall responsibility for security aims to improve the flow of information and co-operation between them.<sup>173</sup>

### 2.2.2. US PATRIOT Act 2002

The US PATRIOT Act 2002<sup>174</sup> was passed as a direct response to Resolution 1373 and is described in its preamble as “[a]n Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”<sup>175</sup>

Section 801 outlaws terrorist attacks and other actions of violence against mass transportation systems. Accordingly, it is a crime to wreck, derail, burn or disable mass transit; place a biological agent or destructive device on mass transit recklessly or with the intent to endanger or to place the same in or near a mass transit facility knowing a conveyance is likely to be disabled.<sup>176</sup> Section 1016 (e) of the Act also defines the term “critical infrastructure”, which would appear to include physical networks such as the maritime transportation system.<sup>177</sup>

Terrorist attacks and other acts of violence against mass transportation systems are punishable by a fine or imprisonment.<sup>178</sup>

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<sup>173</sup> For this reason, there must be effective information-sharing systems in force. See UNITED STATES GENERAL ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: DEPARTMENT OF HOMELAND SECURITY, January 2003 [hereinafter GAO-03-102]; UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON HOMELAND SECURITY, HOUSE OF REPRESENTATIVES, DEPARTMENT OF HOMELAND SECURITY: OBSERVATIONS ON GAO ACCESS TO INFORMATION ON PROGRAMS AND ACTIVITIES, STATEMENT OF NORMAN RABKIN, 25 April 2007 [hereinafter GAO-07-700T].

<sup>174</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. 107-56, 107<sup>th</sup> Congress (1<sup>st</sup> session), 24 October 2001 [H.R. 3162] [hereinafter, PATRIOT Act 2002]. According to the Attorney-General it responds to the need “to expeditiously pass legislation to give the Department of Justice and out intelligence community needed prime fighting tools” upon which homeland security depends.

<sup>175</sup> See generally, CHARLES DOYLE, CRS REPORT FOR CONGRESS, THE USA PATRIOT ACT: A LEGAL ANALYSIS, RL 31 377, 15 APRIL 2002.

<sup>176</sup> Section 801 of the US PATRIOT Act is found in 18 USC § 1993 (a) (1) – (8).

<sup>177</sup> Section 1016 is known as the “Critical Infrastructures Protection Act of 2001” and is codified under 42 U.S.C. § 519 c (e). It defines “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” See also the NATIONAL STRATEGY FOR MARITIME SECURITY, p. 9.

<sup>178</sup> *Id.*

### 2.2.3. The Maritime Transportation Security Act 2002

The Maritime Transportation Security Act 2002<sup>179</sup> (MTSA) was the first piece of legislation dealing with maritime counter-terrorism and aims to protect ports and waterways in the United States from a terrorist attack without adversely affecting the flow of legitimate commerce. Section 102 of the Act implements the security requirements of SOLAS amendments and the ISPS Code issued by the International Maritime Organization.<sup>180</sup> Its provisions impose broad security requirements on the private sector and establish a comprehensive national antiterrorism system, integrating federal, state, local and private law enforcement agencies overseeing the security of the international borders at America's seaports.<sup>181</sup> Under this Act, the Coast Guard is primarily responsible for ensuring the security of ports and vessels in the United States.<sup>182</sup> However, there is also an extraterritorial dimension to this legislation. Section 108 (a) (1) (B) of the Act provides for the assessment of anti-terrorist provisions at foreign seaports from which foreign vessels depart on a voyage to the United States. In addition, sub-paragraph (C) authorizes the Secretary to assess the security arrangements of any other port he considers a risk to international maritime commerce. If the Secretary deems the anti-terrorist measures of the foreign port to be inadequate, he can deny vessels from that port entry to the United States.<sup>183</sup> Violations of the Act lead to severe monetary sanctions.<sup>184</sup> Another important function of the MTSA was to amend the Trade Act of 1930 to permit U.S. Customs to require the advance submission of electronic information.<sup>185</sup> Certain provisions of the MTSA were recently amended by the SAFE

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<sup>179</sup> For an overview of the Act see DEPARTMENT OF HOMELAND SECURITY, PROTECTING AMERICA'S PORTS: MARITIME TRANSPORTATION SECURITY ACT 2002.

<sup>180</sup> Section 101 (15) MTSA 2002; Henry H. Willis, David S. Ortiz, *Evaluating the Security of the Global Containerized Supply Chain*, RAND 2004, p. 5 (describing the MTSA as "the U.S. version of the IMO's International and Port Security Code"). The U.S. Coast Guard played an important role in the creation of the ISPS Code. See C.F.R. Vol. 68, No. 204, 22 October 2003, p. 60448 – 9.

<sup>181</sup> For an overview of the requirements see Clyne, pp. 1190 – 1197; Christopher E. Carey, *Maritime Transportation Security Act of 2002 (Potential Civil Liabilities and Defense)*, 28 TUL. MAR. L. J. 295.

<sup>182</sup> Clyne, p. 1190.

<sup>183</sup> Section 110 (a) (2).

<sup>184</sup> Section 117 provides that "Any person that violates this chapter or any regulation under this chapter shall be liable to the United States for a civil penalty of not more than \$25,000 for each violation."

<sup>185</sup> This is effected by Section 108 (b) (1) which amends Section 343 (a) of the Trade Act 2002 by authorizing the Secretary "to promulgate regulations providing for the transmission to the Customs Service, through an electronic data interchange system, of information pertaining to cargo to be brought into the United States or to be sent from the United States, prior to the arrival or departure of the cargo".

Port Act 2006. As a rule, the owner of a vessel or facility is now required to be a U.S. citizen.<sup>186</sup> The Act also reflects the need to co-operate with the private sector in securing the maritime facilities.<sup>187</sup>

#### 2.2.4. The Trade Act 2002

The effective prevention of terrorism requires the co-operation of the private sector. This is reflected in Chapter 4 of the **Trade Act 2002**<sup>188</sup> which contains a number of anti-terrorism provisions. Section 343 (a) directs the Secretary of the Treasury to promulgate regulations, within one year of enactment of the Act, providing for the transmission to the Customs Service, now the Bureau of Customs and Border Protection (CBP), of electronic cargo information prior to importation into or exportation from the United States. The regulations can require information which the Secretary believes is *reasonably necessary* to ensure aviation, maritime and surface transportation safety and security pursuant to those laws enforced and administered by the Customs Service.<sup>189</sup> Additionally, the statute sets parameters which the Secretary must adhere to when developing and promulgating the regulations; requires him to balance the needs of trade and security and to consider differences in the various modes of transportation.<sup>190</sup> The existence of competitive relationships among parties on whom requirements to provide particular information will be imposed are to be considered.<sup>191</sup> Customs also has to recognize the competitive importance for the confidentiality of information as well as the differences between modes of transportation.<sup>192</sup> Section 341 (a) of the Trade Act also increases the immunity of Customs officers from civil actions when conducting searches.<sup>193</sup>

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<sup>186</sup> Although this requirement can be waived if a background check reveals that they are not a security risk: see Section 102 (2) SAFE Port Act.

<sup>187</sup> Section 101 (D) and (E).

<sup>188</sup> The Trade Act 2002, Pub. L. 107-210, 107<sup>th</sup> Congress (2<sup>nd</sup> session), 6<sup>th</sup> August 2002 [H.R. 3009].

<sup>189</sup> Section 343 (a) (2).

<sup>190</sup> These parameters are listed in Section 343 (a) (3) (A) – (L).

<sup>191</sup> Section 343 (a) (3) (A) – (L).

<sup>192</sup> Section 343 (a) (3) (H) (“The regulations shall protect the privacy of business proprietary and any other confidential information provided to the Customs Service. However, this parameter does not repeal, amend, or otherwise modify other provisions of law relating to the public disclosure of information transmitted to the Customs Service”).

<sup>193</sup> *Infra pp.* 101 – 102.

### 2.2.5. The Security and Accountability for Every Port Act 2006

By 2006, political interest in the security measures introduced by the CBP had greatly increased and Senators introduced legislation to improve their effectiveness. Political support for codifying the CSI and C-TPAT was reinforced owing to the acquisition by DP World of rights to run terminal operations at six US ports in 2006.<sup>194</sup> Accordingly, a bill for the **Greenlane Maritime Cargo Security Act (S. 2008)**, was submitted to Congress following a high-profile hearing on maritime security measures in May 2005.<sup>195</sup> Its aim was to improve cargo security and regulate container security standards and procedures of the Container Security Initiative, the Customs-Trade Partnership Against Terrorism and “greenlane” clearance of maritime container cargo.<sup>196</sup> This bill was superseded by the Security and Accountability for Every Port Act 2006 which retained many of its provisions.

The so-called “SAFE Port Act” 2006 was passed on 14 March 2006 with strong bi-partisan support in the Congress. It specifically addresses maritime terrorism and aims to enhance security at U.S. ports, prevent threats from reaching the United States and track and protect containers en route to the United States.<sup>197</sup> The Act addresses weaknesses in maritime security identified by the Permanent Sub-Committee on Investigations (PSI)<sup>198</sup> namely the failure to examine high-risk containers and container systems.<sup>199</sup> It increases the transparency of the CSI by requiring the publication of a strategic plan<sup>200</sup> and minimum security standards<sup>201</sup> and also defines terms commonly used in relation to maritime security.<sup>202</sup> The Act also responds to the issue of costs

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<sup>194</sup> Owing to vociferous opposition by both political parties, the Executive was forced to withdraw its support for the transaction. DP Ports World eventually sold its rights to an American company. See generally Deborah M. Mostaghel, *Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?* 70 ALB. L. REV. 583; Jill Caiazzo and Cyndee Todgham et al, *International Legal Developments in Review: 2006, Business Regulation: Customs Law*, 41 INT’L LAW REVIEW 185, pp. 192 – 193.

<sup>195</sup> The bill was sponsored by Sen. Patty Murray and was also the subject of S. Hrg 109 – 877. At the same time, interest in maritime security was increased by the Dubai Ports World controversy. Although the bill never became law its provisions are largely reflected in the SAFE PORT ACT 2006.

<sup>196</sup> See generally, S. Hrg 109 – 877.

<sup>197</sup> FACT SHEET: H.R. 4984: THE SAFE PORT ACT.

<sup>198</sup> ASSESSMENT OF U.S. EFFORTS, pp. 8 – 20.

<sup>199</sup> See GOVERNMENT ACCOUNTABILITY OFFICE, STATEMENT OF STEPHEN L. CALDWELL, MARITIME SECURITY: OBSERVATIONS ON SELECTED ASPECTS OF THE SAFE PORT ACT, GAO-07-754T, 26 APRIL 2007.

<sup>200</sup> Section 201 (a).

<sup>201</sup> Section 204 (a).

<sup>202</sup> Section 2.

which was raised at a congressional hearing on the CSI and accompanying report.<sup>203</sup> The Act requires the stationing of personnel to be assessed with a view to conducting CSI targeting domestically.<sup>204</sup>

Title II of the Act deals with the security of the international supply chain, which is defined in Section 2 (10) as “the end-to-end process for shipping goods to or from the United States.”<sup>205</sup> Section 205 codifies the most important (and controversial aspects) of the Container Security Initiative. For example, Section 202 (a) requires the Secretary of the DHS to develop protocols for the resumption of trade which trade has been suspended owing to a transportation security incident. Preference will be given to vessels entering 1) from an approved foreign (CSI) port; 2) vessels operated by C-TPAT participants and 3) carrying Greenlane (3<sup>rd</sup> tier CTPAT) cargo.<sup>206</sup> Section 205 (j) expressly states that cargo from CSI ports will be deemed as representing a lesser risk than cargo from non-CSI ports and Section 202 (c) (1) authorizes the Customs Commissioner to give priority to cargo entering a port of entry directly from a foreign seaport designated under the Container Security Initiative.<sup>207</sup> Section 201 (a) requires the Secretary of the DHS to formulate a strategic plan for maritime transportation security and lists related requirements in Section 201 (b) (1) – (11). This complements existing plans relating to maritime transportation security<sup>208</sup> and must take into account the impact of supply chain security requirements on small and medium-sized companies. This is complemented by Section 201(c) which requires the Secretary to consult with major stakeholders involved in the security of containers moving through the international supply chain.<sup>209</sup>

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<sup>203</sup> S. Hrg. 109 – 186, p. 6. ASSESSMENT OF U.S. EFFORTS, pp. 9 – 10, 43.

<sup>204</sup> Section 205 (h) of the SAFE Port Act requires the Secretary to consider the remote location of personnel at CSI ports.

<sup>205</sup> Cf. definition of “maritime domain” in NSPD41/HSPD13.

<sup>206</sup> Section 202(c).

<sup>207</sup> Cf. THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 11.

<sup>208</sup> Section 201 (b) (12).

<sup>209</sup> This reflects the fact that container security is shared between each party in possession of a container: see Framework of Standards TO SECURE AND FACILITATE GLOBAL TRADE 2006 APPENDIX TO ANNEX 1, p. 32.

## 2.2.6. Implementing Recommendations of the 9/11 Commission Act 2007

The importance of the Implementing Recommendations of the 9/11 Commission Act 2007 (IRCA) lies in Section 1701 which amends Section 232 of the SAFE Port Act 2007 to provide for 100 per cent scanning of all container cargo entering the United States.<sup>210</sup> The proposal of 100 per cent is not new and was actually raised at a Senate hearing soon after the introduction of the CSI.<sup>211</sup> Following the enactment of the SAFE Port Act 2006 a number of amendments were tabled mandating 100 per cent inspections by senators who regarded the CSI as offering inadequate protection against high-risk containers. H.R. 4899 (the so-called “Sale Only if Scan” Act) required foreign ports participating in the Container Security Initiative to scan (as opposed to screen) all containers shipped to the United States for nuclear and radiological weapons before loading.<sup>212</sup> Failure to scan the cargo would have led to the suspension of trade in container cargo with that nation, which effectively made membership of the CSI a liability. The information collected from the scanning would be recorded and used to enhance the ATS system. However, the amendment was narrowly defeated.<sup>213</sup> On 12 September 2006 the so-called “Schumer Amendment” 4930 was offered which also provided for the 100 percent scanning of containers entering the United States<sup>214</sup> but it was killed by a table to motion. Another amendment was Senate Amendment 4999 offered on 13 September 2006: to improve the Security of Cargo

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<sup>210</sup> H.R. 1, Implementing the Recommendations of the National Commission on Terrorist Attacks Upon the United States, Public L. 110 – 53, 110<sup>th</sup> Congress [H.R.1], 3 August 2007. Section 1701 of the Act amends Section 232(b) of the SAFE Ports Act. See: < <http://www.govtrack.us/congress/bill.xpd?tab=main&bill=h110-1> >.

<sup>211</sup> See Hearing Before The Subcommittee On National Security, Veterans Affairs And International Relations Of The Committee On Government Reform House Of Representatives, *Homeland Security: Finding the Nuclear Needle in the Cargo Container Haystack*, One Hundred Seventh Congress, 2<sup>nd</sup> Session, 18 November 2002 [hereinafter S. Hrg. 107 – 224], p. 60 (“My question is it shouldn’t make sense to target based on risk based targeting until you get 100 percent coverage, but we don’t seem to be aiming for 100 percent coverage. Why should we not be aiming for a situation, aiming for a system under which every container is inspected and certified before it’s loaded on a ship bound for the United States”).

<sup>212</sup> A Bill to prohibit the entry of ocean shipping containers into the United States unless such containers have been scanned and sealed before loading on the vessel for shipment to the United States, either directly or via a foreign port. 109<sup>th</sup> Congress (2<sup>nd</sup> Session), introduced 8 March 2006 [H.R. 4899].

<sup>213</sup> See: < <http://www.govtrack.us/congress/vote.xpd?vote=s2006-248> >.

<sup>214</sup> Senate Amendment to H.R. 4954 to improve maritime container security by ensuring that foreign ports participating in the Container Security Initiative scan all containers shipped to the United States for nuclear and radiological weapons before loading. Proposed on 12 September 2006 [S.Amdt. 4930]. See: < <http://www.govtrack.us/congress/amendment.xpd?session=109&amdt=s4930> >.



Containers Destined for the United States.<sup>215</sup> This would have amended Section 126 of the SAFE Port Act to provide for the creation of a plan for 100 percent scanning of cargo containers. The plan would have provided for specific annual benchmarks of containers destined for the US which are scanned at foreign harbours as well as penalties for those harbours which did not correspond to the benchmarking, including the loss of access to United States ports and fines. However, this amendment was not approved in the Senate by a vote.

On 14 March 2006, S. 2410 (Foreign Investment Transparency and Security Act of 2006)<sup>216</sup> was introduced. Section 3 (a) (2) of the bill proposed amending the SAFE Port Act 2006 to the effect that it should be the goal of the United States to scan 100 percent of containers. The bill did not become law but in the 110<sup>th</sup> Congress, H.R. 1 Implementing the Recommendations of the National Commission on Terrorist Attacks upon the United States (IRCA 2007) was enacted.<sup>217</sup> Section 1701 of the IRCA 2007 effectively reinvoles the aim of H.R. 4899 amendment to permit container cargo to enter the United States only if it has been subject to scanning. This provision is planned to take effect by 1 July 2012 (Section 1701 (b) (2) (A)).

### **3. Security Measures at International Level**

The Container Security Initiative was the first measure designed to secure maritime cargo containers against terrorist attack. The measure is unilateral insofar as it aims to protect the borders of the United States but is implemented in co-operation with other states on the basis of bilateral agreements. After its introduction, a number of organizations also issued measures designed to secure maritime transportation.<sup>218</sup> As a result, the United Nations, World Customs Organization, the European Union, G8, the International Maritime Organization and the World

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<sup>215</sup> Senate Amendment to H.R. 4954 to improve the security of cargo containers destined for the United States. Proposed on 13 September 2006. [S. Amdt. 4999]. See < <http://www.govtrack.us/congress/amendment.xpd?session=109&amdt=s4999> >.

<sup>216</sup> Foreign Investment Transparency and Security Act of 2006, 109<sup>th</sup> Congress, 2<sup>nd</sup> Session [S. 2410]. The bill proposed amending Subtitle A of title IV the Homeland Security Act, by adding Section 404 (Report on Scanning of Maritime Containers). According to Section 404 (a), the Secretary was to submit a report to Congress, not later than 90 days after the date of enactment of the section, detailing the processes and policies for implementation of a scanning system for 100 percent of the inbound maritime containers. See: < <http://www.govtrack.us/congress/bill.xpd?bill=s109-2410> >.

<sup>217</sup> *Supra n.* 210.

<sup>218</sup> Most notably, the International Maritime Organization and the World Customs Organization.

Shipping Council have all taken steps to combat maritime terrorism. Some of these measures reflect the strategy employed by the CSI (most notably the WCO's Framework of Standards).<sup>219</sup> The proliferation of agreements and resolutions relating to anti-terrorism complement the rule of customary international law that states are obliged to co-operate in order to combat terrorism.<sup>220</sup>

Prior to 9/11, there was no international regime to prevent acts of terrorism involving maritime transportation. For example, existing security conventions such as the 1974 Safety of Life at Sea Convention (SOLAS) were directed towards the safety of those on board vessels and bilateral agreements with other states concerning co-operation in maritime matters dealt with drug smuggling and illegal immigration. The lack of a global maritime security regime reflected the absence of agreement on combating international terrorism generally. In some respects, this still applies: despite the universal condemnation of international terrorism, the Security Council has been unable to produce a definition of terrorism<sup>221</sup> owing to a lack of consensus within the international community on what constitutes terrorism."<sup>222</sup> The Security Council regards the lack of a universal definition as a major obstacle in combating terrorism<sup>223</sup> and has attempted to resolve this issue. For example, after 9/11 it attempted to strengthen anti-terrorist measures by issuing Resolution 1373 (2001) which obliged all states to take steps to combat terrorism.<sup>224</sup> In addition, it established the Policy Working Group on the United Nations and Terrorism in October 2001 to work on a Draft Comprehensive Convention which would define "international

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<sup>219</sup> It has been claimed that the WCO's Framework of Standards have "internationalized" the CSI. See *supra* n. 37.

<sup>220</sup> See Kuei-Jung Ni, *Redefinition and Elaboration of an Obligation to Pursue International Negotiations for Solving Global Environmental Problems in Light of the WTO Shrimp/Turtle Compliance Adjudication Between Malaysia and the United States*, 14 MINN. J. GLOBAL TRADE 111, p. 114 ("the duty to co-operate [...] is a customary element of international law that is reflected in a variety of instruments").

<sup>221</sup> A definition of terrorism has been discussed for over 50 years. However, it is believed to be too ambitious, see the remarks on the definition of terrorism on the website of the United Nations Office of Drugs and Crime: <[http://www.unodc.org/unodc/terrorism\\_definitions.html](http://www.unodc.org/unodc/terrorism_definitions.html)>. However, 9/11 has challenged existing definitions in international law. See United Nations Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth Session, Terrorism and Human Rights, 17 July 2002, UN Doc. E/CN.4/Sub.2/1999/27 paras 59 ff.

<sup>222</sup> In literature, there have been a number of attempts at an "academic" definition. See e.g. Henner Hess, *Terrorismus und Terrorismus Diskurs* in ANGRIFF AUF DAS HERZ DES STAATES. SOZIALE ENTWICKLUNG UND TERRORISMUS. ANALYSEN VON HENNER HESS, MARTIN MOERING, DIETER PAAS, SEBASTIAN SCHEERER UND HEINZ STEINERT, Vol. 1, Frankfurt: Suhrkamp 1988, pp. 55 – 74.

<sup>223</sup> Cf. Levitt, G., *Is terrorism worth defining?* OHIO NORTHERN UNIVERSITY LAW REVIEW, 13 (1986), 97 (98), arguing that a definition of terrorism at international level is not needed and would not be beneficial.

<sup>224</sup> S/RES/1373 (2001).

terrorism” in way which is acceptable to all nations. However, a general definition of terrorism has so far proved elusive.

This unsettled situation also applies to the weapons used by terrorists. International law does not provide a universal definition of “Weapons of Mass Destruction”<sup>225</sup> despite the fact that “weapons of mass destruction” (“WMD”) is a term routinely used in discussions on international terrorism.<sup>226</sup> It is commonly described as an umbrella term which refers to three different materials in the construction of weapons: nuclear, biological and chemical agents.<sup>227</sup> The possession and use of each weapon is regulated in international law by separate conventions.

The weapons capability of international terrorists (and thereby the risk they present to target nations) is also unclear. Although they have hitherto used conventional weapons in carrying out their acts of terror, there is a constant fear that terrorists could gain possession of Weapons of Mass Destruction in the near future.<sup>228</sup> Although the likelihood of terrorists using these particular weapons is believed to be remote owing to difficulties in constructing the weapons and detonation,<sup>229</sup> it is also acknowledged that it is not beyond the technical competence of terrorists to construct a radiological or “dirty” bomb, consisting of conventional explosives surrounded by

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<sup>225</sup> The term “weapon of mass destruction” (WMD) is defined in 18 U.S. Code §2332 a (c); cf. Alan Reynolds, *Hazy WMD Definition*, WASHINGTON TIMES, 2 February 2003.

<sup>226</sup> See also REPORT OF THE ENQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF DR. DAVID KELLY C.M.G. BY LORD HUTTON [hereinafter, HUTTON ENQUIRY REPORT] para. 223 (“I think ‘weapons of mass destruction’ has become a convenient catch-all which, in my opinion, can confuse discussion of the subject”).

<sup>227</sup> The term originated in the early part of the 20<sup>th</sup> century to describe conventional warfare. It was employed by the UN in 1996 against the background of the Iraq war and adopted by the US government in 1998.

<sup>228</sup> See William J. Clinton, *Letter to Congressional Leaders Reporting on Weapons of Mass Destruction*, November 9, 2000 Weekly Compilation of Presidential Documents (DOCID:pd20no00\_txt-16) p. 2842 – 2851 (“The proliferation of Weapons of Mass Destruction and their means of delivery continues to pose an unusual and extraordinary threat to the national security, foreign policy and economy of the United States”).

<sup>229</sup> See CRS REPORT TO CONGRESS, WEAPONS OF MASS DESTRUCTION, THE TERRORIST THREAT, 8 December 1999 [hereinafter CRS REPORT, 8 DECEMBER 1999], pp. 3 – 5. The improbability of a nuclear threat is also recognized in relation to the Container Security Initiative, see GAO-03-770, p. 8 (“[I]t is deemed less probable that terrorists have the resources and technical ability to build or obtain a workable nuclear weapon at this time ...”). See also CRS REPORT FOR CONGRESS, NUCLEAR, BIOLOGICAL AND CHEMICAL WEAPONS AND MISSILES: STATUS AND TRENDS, 14 January 2005 [hereinafter CRS REPORT, 14 JANUARY 2005], p. 2 (“The status of nuclear, chemical, and biological weapons and missiles worldwide has changed only slowly over time. In absolute numbers, stockpiles are actually decreasing”).

radioactive material.<sup>230</sup> A recent report by the National Defense University deemed an ocean container as ideally suited to delivering a WMD.<sup>231</sup>

### 3.1. International Organizations

There are many international organizations which deal with issues related to the maritime domain.<sup>232</sup> The most important organization for customs matters is the World Customs Organization whose membership accounts for 99 % of all customs administrations. According to its mission statement, the WCO aims “to enhance the efficiency and effectiveness of Member Customs administrations, thereby assisting them to contribute successfully to national development goals, particularly in the areas of trade facilitation, revenue collection, community protection and national security.”<sup>233</sup> This organization issued the Framework of Standards for supply chain security measures in 2005. On the other hand, customs procedures are also of importance to trade organizations because they can obstruct the efficient importation of goods. The UNCTAD and the OECD have both issued significant studies on the effects of the CSI on supply chain practices.<sup>234</sup> The most important trade organization is the World Trade Organization which has 151 members, although it has not as yet made any contribution to security issues in the maritime domain. Stakeholders in the maritime industry are represented by a considerable number of international organizations: in particular, the International Maritime Organization has played a leading role in maritime security through the issue of the ISPS Code in 2002. The World Shipping Council has also played an important role in evaluating the practical effect of these measures, notably with regard to the 24 Hour Rule and 100 Percent Scanning measures adopted

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<sup>230</sup> See CRS REPORT, 14 JANUARY, p. 8. See also NATIONAL DEFENSE UNIVERSITY, THE VIRTUAL BORDER: REDUCING THE RISK OF SEABORNE CONTAINER TERRORISM (Washington D.C., August 2002), [hereinafter “THE VIRTUAL BORDER”], at n.6.

<sup>231</sup> *Id.*, THE VIRTUAL BORDER.

<sup>232</sup> For a brief overview of the international organizations involved in maritime trade see INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, APPENDIX C, pp. 16 ff.

<sup>233</sup> WCO Strategic Plan 2007/2008 – 2009/2010, p. I/3.

<sup>234</sup> See ECMT/OECD REPORT 2005; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT CONTAINER SECURITY: MAJOR INITIATIVES AND RELATED INTERNATIONAL DEVELOPMENTS (UNCTAD/SDTE/TLB/2004/1), [hereinafter UNCTAD REPORT 2003].

by the CBP.<sup>235</sup> The following provides a brief overview of the most important measures adopted by international organizations in response to the threat of terrorism.

### 3.1.1 United Nations' Resolutions

The Resolutions of the United Nations issued by the Security Council under its Chapter VII powers oblige states to combat terrorism. The Resolutions lay down the aims to be achieved with respect to counter-terrorism whilst leaving the actual implementation to the Members themselves. However, Members must thereby respect their obligations under international law.

In its Resolution 1373 of 28 September 2001,<sup>236</sup> the Security Council of the United Nations requires all states to take the necessary steps to prevent the commission of terrorist by providing early warning to other states by exchange of information and other means.<sup>237</sup> States are to “afford one another the greatest measure of assistance in connection with criminal investigations” and “prevent the movement of terrorists or terrorist groups by effective border controls.”<sup>238</sup> In addition, the Security Council calls upon all states to “exchange information ... and co-operate on administrative and judicial matters to prevent the commission of terrorist acts.”<sup>239</sup> The Resolution also establishes the creation of the Counter-Terrorism Committee (CTC). This Resolution is significant because it imposes a binding obligation on states to take steps to prevent the commission of terrorist acts.

Resolution 1456 of the Security Council issued on 20 January 2003 reiterates the obligation on states to assist each other to the maximum possible extent wherever they occur.<sup>240</sup> It also

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<sup>235</sup> See Comments of the World Shipping Council Before the United States Customs Service In the Matter of Advance Cargo Manifest Filing Proposed Rulemaking For Vessels Loading Cargo at Foreign Ports for Transport to the United States Proposed Changes to 19 C.F.R. Parts 4 and 113, 9 September 2002 [hereinafter WSC, Comments of 9 September 2002]; World Shipping Council, Statement Regarding Legislation to Require 100% Container Scanning, 30 July 2007 [hereinafter WSC, Statement of 30 July 2007].

<sup>236</sup> S/RES/1373.

<sup>237</sup> Para. 2 (b). The effective implementation of the aims laid down by the U.N. Security Council is often reiterated in these counter-terrorist Resolutions. See also e.g. Resolution 1377 (2001), adopted by the Security Council at its 4413th meeting, on 12 November 2001 [hereinafter S/RES/1377]; Resolution 1526 (2004), adopted by the Security Council at its 4908th meeting on 30 January 2004 [hereinafter S/RES/1526], para. 20.

<sup>238</sup> Para. 2 (g)

<sup>239</sup> Para. 3 (b)

<sup>240</sup> Paras. 1, 2 (b)

recognizes that there is a serious risk that WMD could fall into the hands of terrorists and obliges states to take urgent action to prevent and suppress all active and passive support to terrorism, and, in particular, comply fully with all relevant resolutions of the Security Council.<sup>241</sup> In addition, the CTC should have regard to international best practices when monitoring the implementation of Resolution 1373.<sup>242</sup> According to paragraph 6, states must also ensure that any measure taken to combat terrorism comply with all their obligations under international law. International organizations should also collaborate to enhance the effectiveness of their actions against terrorism.<sup>243</sup>

The U.N. Security Council has also passed a number of resolutions which deal with various issues related to terrorism. For example, Resolution 1540 obliges states to prevent the proliferation of WMD<sup>244</sup> and Security Resolution 1624 of 14 September 2005 calls upon all States to co-operate, *inter alia*, to strengthen the security of their international borders.<sup>245</sup>

### **3.1.2. Co-operative G8 Action on Transport Security**

The Co-operative G8 Action on Transport Security represents an agreement of the members to promote greater transportation security in all modes.<sup>246</sup> The member states have agreed to develop an improved global container security regime, implement common standards for electronic customs reporting and to require advance electronic information pertaining to containers. The two aims of the Co-operative Action are greater security and trade facilitation. Concerning container security, the G8 aims to co-operate with international organizations “to develop and implement an improved global container regime.” The group aims to implement common standards for electronic customs reporting including in non-G8 countries within the

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<sup>241</sup> S/RES/1456, para. 1.

<sup>242</sup> Para. 4 (iii).

<sup>243</sup> Para. 7.

<sup>244</sup> See S/RES/1540, para. 2. “[A]ll States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

<sup>245</sup> United Nations, Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, on 14 September 2005 [hereinafter S/RES/1624], para. 2

<sup>246</sup> *Supra n. 26.*

WCO. It also requires advance electronic information pertaining to containers as easily as possible in the trade chain. G8 experts will promote policy conference and coordination in all relevant international organizations in partnership with industry.

### **3.1.3. International Ship and Port Facility Security Code**

The International Maritime Organization forms part of the United Nations and is responsible for the safety of life at sea and environmental protection. Following 9/11, it also adopted a resolution calling for the enhancement of measures and procedures to prevent acts of maritime terrorism in relation to ships and port facilities.<sup>247</sup> In December 2002, the IMO amended the International Convention for the Safety of Life at Sea with the express aim of safeguarding “the worldwide supply chain against any breach resulting from terrorist attacks against ships, ports, offshore terminals or other facilities.”<sup>248</sup> It was believed that this convention “offered the speediest means of ensuring the necessary security measures entered into force and given effect quickly.”<sup>249</sup> The amendments were effected by two resolutions and incorporated into Article XI of the Convention, which now deals with safety (XI-1) security (XI-2).<sup>250</sup> Resolution 2 of the diplomatic conference incorporates the International Ship and Port Facility Code (ISPS Code) into Chapter XI-2 (“Special Measures to Enhance Container Security”).<sup>251</sup>

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<sup>247</sup> International Maritime Organization, Assembly Resolution A.924(22), Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships, November 2001. This led to a Diplomatic Conference on Maritime Security held between 9<sup>th</sup> and 13<sup>th</sup> December 2002 which adopted the amendments to the SOLAS CONVENTION: see Chris Trelawny, *IMO Maritime Security Policy Background Paper*, 20 June 2007 (Paper delivered at the IMAREST World Maritime Technology Conference held in London on 6 - 10 March 2006).

<sup>248</sup> IMO Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, Agenda, Consideration and Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974 Conference Resolution 1 and related Amendments to the 1974 SOLAS Convention, (as adopted by the Conference), SOLAS/CONF.5/32, 12 December 2002.

<sup>249</sup> Preamble to the ISPS Code, para. 5. This is borne out by the fact that the SOLAS Convention entered into force within three years with 153 signatories. By contrast, the Convention on the Suppression of Unlawful Acts at Sea of 1988 took six years to enter into force with 121 signatories: see Chris Trelawny, *Containerised Cargo Security – A Case for “Joined-Up” Government*, 2 June 2006 (page unavailable online). The incorporation of security provisions in a convention which dealt with safety at sea also reflects the fact that security and safety are intertwined: see MARITIME SECURITY RECOMMENDATIONS, p. 11.

<sup>250</sup> IMO Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, Agenda Item 10, Adoption of the Final Act and any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference, Final Act of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, SOLAS/CONF.5/31; see also SOLAS/CONF.5/32.

<sup>251</sup> See Regulation 1 (12), Chapter XI of the SOLAS Convention 1974. The ISPS Code is attached to Conference Resolution 2 as Annex 1 of IMO Conference of Contracting Governments to the International Convention for the

The ISPS entered into force on 1 July 2004 and represents a direct response to 9/11.<sup>252</sup> Its preamble states that it is to “form the international framework through which ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector.”<sup>253</sup> The ISPS is the result of consultations with member states, inter-governmental organizations and non-governmental organizations held under the auspices of the IMO’s Maritime Safety Committee.<sup>254</sup> The provisions of the Code require security plans and enhanced security measures for ships engaged in international commerce and port facilities. Owing to the fact that the ISPS Code does not directly regulate land facilities, container security falls outside its scope. However, the security of land-based facilities has been regulated by the Framework of Standards 2005 issued by the WCO and the Code of Practice on Security in Ports 2003 issued by the ILO/IMO.<sup>255</sup>

#### **3.1.4. The WCO Framework of Standards**

The World Customs Organization (WCO) also responded to the terrorist attacks in New York by its “Resolution of the Customs and Co-operation Council on Security and Facilitation of The International Supply Chain.”<sup>256</sup> This Resolution reflects the need to pursue improvements in supply chain security at international level and adopts basic aspects of the Container Security Initiative such as the twin aims of trade facilitation and supply chain security; co-operation between the public and private sectors as well as customs administrations, the advance transmission of customs data and the importance of risk management and risk assessment techniques. The WCO resolves to develop guidelines by June 2003 to assist members in developing a legal basis to enable the advance electronic transmission of customs data. In addition, guidelines should also be developed for co-operative arrangements between members and private industry. The Resolution pays particular regard to the needs of developing countries

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Safety of Life at Sea, Agenda Items 7 and 8 Consideration and Adoption of the International Ship and Port Facility Security (ISPS) Code, Consideration and Adoption of the Resolutions and Recommendations and Related Matters, SOLAS/CONF.5/34, 17 December 2002.

<sup>252</sup> ISPS Code, preamble, para. 1.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*, para. 2.

<sup>255</sup> *Id.*, para. 5. Thereby, the IMO co-operated with the International Labour Organization and the World Customs Organization in relation to security of land-based facilities: see Trelawny (*supra n.* 249).

<sup>256</sup> *Supra n.* 26.



which will need assistance – both in financial and technical terms – in order to implement risk management and risk assessment techniques.

The WCO's "Framework of Standards to Secure and Facilitate Global Trade" provides a multilateral set of standards for container security.<sup>257</sup> The Framework consists of four components: harmonization of advance electronic cargo information requirements on shipments; adoption by members of a consistent risk management approach to address security threats; outbound inspection of high-risk containers and cargo, preferably using no-intrusive detection equipment upon request; definition of the benefits that Customs will provide to businesses that meet minimal supply chain security standards and best practices.<sup>258</sup> The Framework creates harmonized standards in relation to benefits, technology, communication and facilitation and encourages the recognition of other standards.<sup>259</sup> It is based on two pillars: customs – to – customs networks and customs – to – business partnerships which consist of consolidated standards. The C2C pillar provides for co-operation between customs authorities in order to inspect cargo before it arrives at the destination port. It achieves this by providing for the use of advance electronic information to identify high-risk containers or cargo. The C2B pillar aims to create an international system for identifying private businesses that offer a high degree of security.<sup>260</sup>

The Framework does not specifically concentrate on combating terrorism but aims to secure the international trade supply chain against terrorism *and* other forms of transnational crime. It recognizes that some customs administrations will need assistance in implementing the standards and makes capacity-building a precondition of implementing the security standards.<sup>261</sup> The Container Security Initiative will continue to exist alongside the multilateral framework of

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<sup>257</sup> The Framework of Standards was unanimously adopted by Directors General of 166 Customs Administrations meeting at the 105th/106th Sessions of the WCO Council, held in Brussels from 23 to 25 June 2005.

<sup>258</sup> Framework of Standards, p. 8. "Authorized Economic Operators (AEOs) will reap benefits, such as faster processing of goods by Customs, e.g. through reduced examination rates. This, in turn, translates into savings in time and costs. One of the main tenets of the Framework is to create one set of international standards and this establishes uniformity and predictability. It also reduces multiple and complex reporting requirements."

<sup>259</sup> The WCO has the membership and thus the participation of 166 Customs administrations, representing 99 percent of global trade.

<sup>260</sup> Framework of Standards, p. 11 (para. 3.1.) and pp. 13 – 14 (para. 3.3). Concerning the C2C pillar, it is significant that the Framework of Standards does not provide for the stationing of U.S. customs officers at foreign seaports.

<sup>261</sup> *Id.*, p. 8 at para. 1.7 ("It is unreasonable to expect that every administration will be able to implement the Framework immediately").

standards: the relationship between the two measures was described by the President of the World Shipping Council as follows:

*“This framework will be useful, but it is at a fairly high policy level and will be implemented on a voluntary basis by interested governments. Consequently, U.S. and foreign customs authorities must also create a network of bilateral co-operative relationships to share information and to enhance trade security.”*<sup>262</sup>

Therefore the Framework of Standards simply represents a voluntary code of standards and does not prevent states from pursuing their own security regimes. At the same time, it could be argued that it has a certain amount of persuasive force because it represents international best practices.

### **3.1.5. The SUA Convention 1988**

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was developed in response to piracy and terrorist hijacking of the *Achilles Lauro*.<sup>263</sup> The Convention resulted from proposals by some states that the IMO draw up an international convention providing for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation.<sup>264</sup> Such a convention would solve the problem of prosecuting unlawful acts against vessels.

The operative provisions of the Convention do not make any reference to terrorism possibly because inclusion of the term could have given rise to controversy about its definition.<sup>265</sup> However, the preamble refers to “the world-wide escalation of terrorism in all its forms.” It also refers to Resolution 40/61 of the General Assembly of the United Nations by which the UN invited the IMO to “study the problem terrorism aboard or against ships with a view to making

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<sup>262</sup> Koch, Remarks, 22 July 2005.

<sup>263</sup> 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, p. 382; Dennis L. Bryant, *Historical and Legal Aspects of Maritime Security*, 17 U.S.F. MAR. L.J. 1, pp. 5 – 6.

<sup>264</sup> International Maritime Organization, Assembly Resolution A.584(14) of 20 November 1985 on measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews.

<sup>265</sup> See Mellor, p. 384.

recommendations on appropriate measures.” The Convention deems certain acts committed on board or against ships to be unlawful and declares those who perpetrate them to be international outlaws, liable to arrest, extradition and trial.<sup>266</sup> Although the Convention does not provide a single definition of what constitutes an unlawful act, Article 3 provides a closed list of seven acts which may be considered unlawful for the purpose of the Convention, some of which clearly relate to terrorist activities.<sup>267</sup> In order for such acts to be considered “unlawful acts” pursuant to the Convention, two requirements in Section 3 (1) must be satisfied. Accordingly, the act must be unlawful *per se* and the necessary intention must be present. Clearly, if a ship is carrying hazardous materials without first having obtained the necessary documentation or permission, it could satisfy the requirement of unlawfulness but it would not satisfy the intention requirement.<sup>268</sup>

Following 9/11, the Legal Committee of the IMO has been considering amendments to the SUA Convention and its Protocol in order to take into account the increased threat of international terrorism. These revisions mainly concern extending the list of unlawful acts and allowing law enforcement officials to board ships on the high seas. For example, the list of offences in Article 3 is planned to be expanded to include “using against or on a ship or discharging from a ship any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage.” Another important, albeit controversial, revision grants law enforcement officials of one flag state to board the vessel of another if it suspects the vessel or a person on board that vessel of carrying terrorist materials.

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<sup>266</sup> Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation [hereinafter SUA Convention], contains a list of offences: in particular, Article 3 (1) (d) clearly refers to terrorist actions. Article 7 of the Convention obliges Contracting Governments to extradite or prosecute alleged offenders.

<sup>267</sup> For example, sub-paragraph (a) of the SUA Convention refers to seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; or (d) placing or causing to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship.

<sup>268</sup> Section 3(1) states “Any person commits an offence if that person unlawfully and intentionally [...]”

### 3.1.6. Other Instruments Relevant to Maritime Security

A number of instruments adopted by international organizations prior to 9/11 also contain provisions relating to security. In particular, they could provide a means of improving security standards with regard to the construction of containers and mutual assistance between customs administrations.

**The Customs Convention on Containers** signed in 1972<sup>269</sup> regulates the transparency of containers for inspection purposes as well as methods of sealing in order to prevent outside interference during transit. It also provides for the mutual recognition of containers. It is the major international agreement on containers today and its definition of a container is referred to in Section 2(5) of the SAFE Port Act 2006.

The 1972 Convention has two main objectives: (1) the temporary importation of containers and (2) the approval of containers for transport under customs seal. An annex to the Convention contains the regulations on technical conditions<sup>270</sup> which also relate to security standards. For example, Article 1 of Annex 4 lays down the basic principles governing the granting of approval for the international transport of goods under customs seal. Sub-paragraphs (a) – (d) ensure the transparency of containers for inspection purposes. Containers should be constructed and equipped in such a manner that no goods may be removed for or introduced into the sealed part of the container unnoticed. According to sub-paragraph (b), they must facilitate inspection by allowing customs seals to be affixed to them. Sub-paragraph (c) provides that they must not contain any concealed places where goods may be hidden. In addition, all spaces capable of holding goods must be readily available for customs inspections. Article 2 relates to the security of containers by requiring containers to be constructed in such a way as to prevent outside interference. According to Article 2 (1) (a), the parts of the container (e.g. sides, floor, roof etc.)

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<sup>269</sup> Adopted by 30 states at the UN/International Maritime Consultative Organization (IMCO) conference in Geneva and entered into force generally on 6 December 1975.

<sup>270</sup> The identification of containers is of the utmost importance at any stage of the distribution chain. The Bureau Internationale des Containers has grouped the available data on the identification of containers into one document (so-called “BIC Code”). Further information is available on the website of the Bureau Internationale des Containers <[www.bic-code.org](http://www.bic-code.org)> (e.g. Presentation of the BIC Codes, available under <<http://www.bic-code.org/telechargement/1-presentation-EN.PDF>>).

must be assembled in such a way that any alteration or removal of a part will leave visible traces. The Convention provides for a procedure to amend the Convention in accordance with new technical specifications. By means of such provisions, the 1972 Container Convention has the potential to offer a multilateral basis for modifying the design of containers to accommodate smart container technology.<sup>271</sup>

The **Convention on the Mutual Administrative Assistance in Customs Matters 2003 (Johannesburg Convention 2003)**<sup>272</sup> provides the legal framework for the exchange of information and provision of assistance in order to ensure the proper application of customs laws and to prevent, investigate and combat customs offences. The preamble to the Convention refers to the need to protect society and ensure the security of the international trade supply chain. It acknowledges the importance of risk management to balancing compliance and facilitation and emphasizes that it must be based on the international exchange of information. Article 2 (1) provides that mutual assistance in customs matters serves three purposes: 1) the proper application of customs law; 2) the prevention, investigation and combating of cargo offences and 3) ensuring the security of the international trade and supply chain.

According to Article 2 (2), mutual assistance shall be implemented by a Contracting Party according to its laws and regulations within the limits of its customs administration's legal powers and available resources. In particular, the Johannesburg Convention recognizes that crime nowadays transcends geographical borders and seeks to prevent offenders frustrating law enforcement by crossing borders. Articles 19 – 23 allow the officials of the Contracting Parties to continue pursuit, surveillance etc. in the territory of another Contracting Party. Article 5 deals with information for the application and enforcement of customs law. Accordingly, customs administrations are to exchange, either on request or on their own initiative, any information to assist in the proper application of customs law and to conduct risk assessments to prevent and detect customs offences.

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<sup>271</sup> See World Shipping Council, *In-Transit Container Security Enhancement*, 9 September 2002, pp. 9 – 10.

<sup>272</sup> Done at Brussels, 27 June 2003. For an overview of the Convention see International Convention on Mutual Administrative Assistance 27 June 2003, issued by the WCO which contains a commentary on the individual provisions (at p. 45 ff.), available for download under : < [http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Conventions/Johannesburg\\_Convention\\_eng.pdf](http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Conventions/Johannesburg_Convention_eng.pdf) >.

Chapter VII refers to the use, confidentiality and protection of information. Article 24 imposes conditions on the exchange of information. As a rule, information shall only be used for the purpose of administrative assistance and by the customs administration or for the purpose for which it was intended. This agreement provides a comprehensive framework for the conclusion of bilateral agreements between customs administrations concerning mutual assistance in customs matters. However, the Convention has yet to enter into force.<sup>273</sup>

Bilateral agreements are the preferred form of co-operation between customs administrations because their contents are to be tailored to the needs of each customs administration. The purpose of the WCO's **Model Bilateral Agreement 1996** is to enable states to achieve the maximum uniformity possible in their bilateral agreements and it also reflects the provisions of the Johannesburg Convention. Changes to the text should only be made where their specific circumstances require. Article 2(1) limits the administrative assistance to "the proper application of customs law" and Article 2(2) provides that all assistance under this Agreement by either contracting party shall be performed in accordance with its national legal and administrative provisions and within the limits of its Custom's Administrations' competence and available resources." Like the earlier agreement, Article 6 requires the state in need of assistance to "request" assistance from the other customs administration. Article 16 respects sovereignty concerns by providing that a customs administration can refuse requests for assistance on grounds of national security or sovereignty. Article 13 limits physical co-operation in another customs administration's territory to the inspection of documents at the offices of the customs administration of the requested administration.

The efficiency of customs administrations is very important for the flow of trade. **The International Convention on the Simplification and Harmonization of Customs Procedures (as amended) 2000 ("Revised Kyoto Convention ("RKC"))**,<sup>274</sup> responds to the demands of

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<sup>273</sup> Currently there are 2 contracting parties and 7 signatories without ratification. According to Article 51 the Convention shall enter into force three months after five of the entities referred to in paragraphs 1 and 3 of Article 46 thereof have signed the Convention without reservation of ratification or have deposited their instrument of ratification or accession.

<sup>274</sup> International Convention on the Simplification and Harmonization of Customs Procedures, done at Kyoto on 18 May 1973, amended on 26 June 1999 (hereinafter RKC).

modern international trade by simplifying and modernizing customs procedures and practices.<sup>275</sup> The Convention supersedes the original Kyoto Convention, which dates from 1974. The RKC consists of chapters, a General Annex and Specific Annexes.<sup>276</sup> The provisions in the General Annex are mandatory and all signatories must accept them without reservation. However states can choose which provisions they wish to apply in the Specific Annexes.<sup>277</sup> The General Annex and accompanying guidelines are particularly important for the following investigation because they contain core principles for all procedures and practices to be uniformly applied by customs administrations. Owing to the fact that the Convention was concluded just before 9/11, supply chain security is not treated as a separate chapter, although the stated aim of the Convention is to improve customs controls<sup>278</sup> and to this end it stipulates the use of automated systems, risk management techniques and pre-arrival information.<sup>279</sup> The provisions also improve trade facilitation by improving the transparency and predictability of customs procedures by requiring easy access to customs rules and regulations and providing a system of appeals in customs matters. These principles are also found in Articles V, VIII and X GATT. The Convention is updated by means of a Management Committee which meets annually and recommends updates to the Convention.<sup>280</sup> The Kyoto Convention entered into force on 3 February 2006 and there are currently 53 Contracting Parties. The United States signed the Convention on 6 December 2005. Reference is made to the Convention throughout this investigation in order to clarify customs terminology and practices.

### **3.2. The European Union**

The European Community has been developing measures to improve supply chain security since 9/11. These efforts were given additional urgency by the Madrid bombing of 2003. The European

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<sup>275</sup> See Preamble to the RKC. For an overview of this convention see Mikuriya, pp. 53 – 58.

<sup>276</sup> For an explanation of the structure, see RKC, Guidelines to the General Annex, Ch. 1, para. 2.

<sup>277</sup> Article 12 (1) – (2) and 13 (1) – (3) RKC.

<sup>278</sup> *Id.* (“The objective of this Convention is not only to meet the needs of the trading community to facilitate the movements of goods but also to improve the effectiveness and efficiency of compliance with Customs law and Customs control”).

<sup>279</sup> See e.g. RKC, General Annex, Ch. 6, para. 6 describing risk management (referring to standards 6.3, 6.4 and 6.5).

<sup>280</sup> The earlier Kyoto Convention 1973 was overtaken by developments in customs. The relationship between the RKC and Framework of Standards is important in this respect. The WCO has stated that a customs administration which has acceded to the RKC will be better placed to implement the Framework of Standards. Updates to the RKC are made by the Management Committee. See WCO, *Let's Talk: Your Questions Answered*, p. 9.

Commission seeks to balance security and trade facilitation by means of the “Authorized Economic Operator” (“AEO”) certificate<sup>281</sup> which status grants economic participants expedited customs clearance subject to certain conditions being satisfied. There are three types of AEO certification.<sup>282</sup> The “AEO Certificate – Customs” is designed for economic operators wishing to benefit from simplifications provided for under the customs rules (typically exporters trading with countries outside the EU). The “AEO – Security and Safety” is designed for economic operators wishing to benefit from reduced border controls when goods enter or leave the customs territory of the Community. Economic operators wishing to benefit from both customs simplifications and security facilitation may choose the combined Certificate “AEO – Customs / Security and Safety.” The procedure for issuing AEO Certificates is instituted by an application of the economic operator for granting AEO status. The applicant is required<sup>283</sup> to provide a central point for access to all information needed by the customs authorities, including access to main accounts, customs records and documentation, workflow–documentation and other records which provide evidence for compliance with the requirements for granting the status. In addition, applicants are also required, to the extent possible, to submit the necessary data by electronic means to the customs authorities. There are two important differences between the EU and US security measures: first, the EU measures provide for mutual recognition of security standards and, second, the US measures require more extensive data elements for risk assessment.<sup>284</sup>

#### **4. Conclusion**

The investigation has provided a brief overview of the various security initiatives taken at national, international and supranational level to secure the supply chain. Thereby, two major issues have emerged. On the one hand, trade can no longer be pursued in isolation but must be

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<sup>281</sup> Regulation (EC) 648/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code contains an amendment to the Customs Code. Article 5a of this regulation defines basic elements for the AEO. Furthermore it empowers the EU Commission to enact implementing provisions determining, *inter alia*, the rules for granting the status of AEO, type and extent of facilitation relating to security and safety and the conditions under which the status may be suspended or withdrawn.

<sup>282</sup> Article 5 a, Section 1, sub-Section 2 CC, Article 14 a CCIP

<sup>283</sup> Article 5 a Section 2, UA 2 CC, Article 14 b, c CCIP

<sup>284</sup> See Article 14 k (2) of Reg. 648/2005; a comparison of the data elements required by the WCO SAFE Framework, EU Regulation, US 24 Hour Rule and the 10+2 Data Elements reveals that the 10+2 Data Elements require the following elements not required by the other measures: Manufacturer name and address, seller name and address, buyer name and address, container stuffing location, consolidator name and address and country of origin.



balanced with national security interests. Second, the question arises as to what approach is best suited to secure the supply chain – an international asset which is of great economic importance to individual states. The following summarizes the findings of the investigation.

### **1. Governments must strike a balance between free trade and security. They must also pay due regard to capacity-building**

Prior to 9/11, the most important policy consideration in maritime transportation generally was trade facilitation. This was recognized by a number of international conventions, including the Revised Kyoto Convention and others dealing with specific modes of transportation.<sup>285</sup> As a result of 9/11 greater emphasis was placed on law enforcement which required customs to greatly increase the security of the international supply chain whilst facilitating trade. This objective reflects the fact that the supply chain is an asset of critical importance to the security interests of a nation as well as to the commercial relationships of the international community.<sup>286</sup> These two aims are by no means mutually exclusive<sup>287</sup> but can only be successfully balanced if security measures are effective and are implemented “with the minimum essential impact on commercial and trade-flow costs and operations.”<sup>288</sup> Effective security measures are also based on modern customs infrastructure which not all countries have in place. Therefore, capacity building must be a fundamental pre-condition of supply chain security.<sup>289</sup>

### **2. Unilateral and multilateral security measures offer advantages and disadvantages**

The examination has shown that measures combating maritime terrorism can be divided into two approaches: a unilateral approach which concentrates on protecting national borders using measure formulated by national security experts (e.g. the CSI) and a multilateral approach which regards security as a common good desired by all states and which incorporates international best

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<sup>285</sup> See e.g. Convention on the International Transport of Goods Under Cover of TIR Carnets, 1975 [hereinafter TIR Convention 1975]; Convention on Facilitation of International Maritime Traffic, 1965.

<sup>286</sup> For an examination of the approach of the US to combating the threat presented by Weapons of Mass Destruction as a response to the weaknesses of traditional approaches, see THE WEAPONS OF MASS DESTRUCTION COMMISSION, FINAL REPORT, WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, BIOLOGICAL AND CHEMICAL ARMS, STOCKHOLM, SWEDEN, 1 JUNE 2006, [hereinafter WMD COMMISSION FINAL REPORT] pp. 54 ff.

<sup>287</sup> Writers have argued that customs controls and trade facilitation are by no means mutually exclusive. In fact, effective customs controls can even enhance trade facilitation: see Luc de Wulf and Omer Matityahu, *The Role of Customs in Cargo Security*, in CUSTOMS MODERNIZATION HANDBOOK, (Luc de Wulf and José B. Sokol eds.), pp. 265 – 266.

<sup>288</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 20.

<sup>289</sup> See e.g. the Framework of Standards, *supra* pp. 49 - 51. This theme is examined further at *infra* pp. 149 - 155 ff.

practices (e.g. the Framework of Standards).<sup>290</sup> These two approaches display distinct advantages and disadvantages in securing the supply chain.

### **3. Unilateral and multilateral approaches to security are not mutually exclusive**

Both the maritime domain and supply chain security are public goods and, as such, all nations of the world have an obligation to contribute to their security and, by the same token, the right to benefit from them.<sup>291</sup> Effective security may therefore require a mixture of the three approaches: states seek to protect their own borders by devising measures that place particular emphasis on their vital interests but which are based on international standards and best practices. They can then seek to implement these agreements by entering into bilateral agreements with the relevant states.<sup>292</sup> Such an approach offers one way of striking a balance between the many issues at stake in implementing pre-emptive measures to protect maritime transportation security, namely national security, the global maritime domain, state sovereignty as well as a state's obligations under international agreements.

### **4. Cost is a major factor when implementing security measures**

A common problem of security measures, regardless of whether they are unilateral, bilateral or multilateral in nature is cost. There are few options available in securing seaports and cargo containers and, as a rule, the measures proposed to secure the supply chain require states to create the necessary infrastructure to facilitate information exchange and acquire expensive NII equipment to scan containers. This aspect was realized by the U.S. government and international organizations soon after the introduction of security measures.<sup>293</sup> This aspect is of particular concern to developing countries and demands effective capacity building.<sup>294</sup>

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<sup>290</sup> This resembles the approach taken by the United States to environmental measures. See e.g. Panel, *US – Tuna I*, paras. 527 – 528; Florestal, pp. 397 – 398.

<sup>291</sup> Cf. NATIONAL SECURITY FOR MARITIME SECURITY, p. 2.

<sup>292</sup> Both the ISPS CODE and the Framework of Standards recognize that implementation of their provisions depends on co-operation between states. See Preamble to the ISPS CODE, para. 8 and standards 7.5, 9, 11 of the Framework of Standards.

<sup>293</sup> See e.g. Preamble to the ISPS Code Resolution, para. 7, recognizing that the provisions “may place a significant additional burden on certain Contracting Governments.” See also S/RES/1377, recognizing that many States will require assistance in implementing all the requirements of S/RES/1373. See also S/RES/1624, para. 6 (b).

<sup>294</sup> See U.N. Resolution 1631 (2005), adopted by the Security Council at its 5282nd meeting, on 17 October 2005 [hereinafter S/RES/1631], para. 6; see also the Framework of Standards, p.8 at para. 1.6, p. 27 at para. 6.8.

## **5. The proliferation of anti-terrorist measures could result in competing standards of supply-chain security**

The foregoing has shown that states and international organizations approach the problem of security with different aims, priorities and decision-making structures. The scope and standards of security measures introduced by the United States and international organizations therefore may not correlate in terms of subjects, strategy and standards.<sup>295</sup> In practical terms, this means that proliferation of security measures can lead to overlaps, duplication of requirements and conflicts at national and global level.<sup>296</sup> Moreover, U.S. measures to improve supply chain security often depend on the co-operation of other states for their effectiveness. Trading partners of the United States could therefore find themselves involved in co-operative ventures with different U.S. border agencies which each pursue overlapping and competing security measures.<sup>297</sup> As one commentator points out, involving multiple government organizations in border security could result in “ineffective and inefficient border procedures and corruption.”<sup>298</sup>

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<sup>295</sup> See e.g. Section 204 (c) of the SAFE Port Act 2006. Although this provision encourages the establishment and promotion of international standards for container security, it does not explain the relationship that exists between the CSI and such international standards. A brief overview of all current U.S. security initiatives is provided in the INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, APPENDIX B, pp. 1 ff.

<sup>296</sup> For example, the Secure Freight Initiative shares many of the objectives of CSI and the question arises as to its relationship to this initiative. For example, the SFI has been launched in Southampton and Honduras but these seaports are already members of the CSI. In addition the U.S. Commissioner of Customs has stated that the SFI is the “next generation of CSP”: see Remarks by CBP Commissioner W. Ralph Basham on Container Security at the Centre for Strategic and International Studies, 11 July 2007 [hereinafter “CBP Commissioner, Remarks, 11 July 2007”]. This risk is recognized by Section 201 (b) (2) and Section 303 (b) (1) of the SAFE Port Act 2006, which provide for coordination between authorities in order to avoid a duplication of efforts. However, c.f. Section 1805, concerning the relationship of the Domestic Nuclear Detection Office with existing departments. The risk of overlap is recognized in Section 1841 (a) of IRCA 2007 which establishes Office of the United States Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism. According to Section 1841 (c), (2) (B) the coordinator must identify duplications in existing initiatives and programs when formulating the anti-terrorist strategy of the United States. See also Eric Lipton, *U.S. to Expand Cargo Scans to Detect Nuclear Material*, NEW YORK TIMES, 8 December 2006; see ECSA ANNUAL REPORT 2003 – 2004, p. 19.

<sup>297</sup> For example Operation Safe Commerce, the Secure Freight Initiative, the Megaports Initiative, Operation Port Shield all require co-operation with foreign governments. See e.g. GAO-03-297T, p. 14 (concerning Operation Safe Commerce).

<sup>298</sup> Mikuriya, p. 62.

## B. The Container Security Initiative

### 1. Substance of the Measure

In the immediate aftermath of 9/11, U.S. Customs became aware that terrorists could hide a radiological bomb in a container primed for detonation upon arrival at a U.S. seaport. Although it is generally impossible to precisely quantify the terrorist threat to the Maritime Domain, this particular scenario was directly supported by the following evidence:<sup>299</sup>

- The factually-based explanation of how terrorists could exploit security weaknesses of the Maritime Domain to smuggle WMD into the United State by a U.S. security expert;<sup>300</sup>
- An Italian newspaper report of an Egyptian national concealed in a container;<sup>301</sup>
- A “port security war game” carried out by independent consultants.<sup>302</sup>

The persuasive force of this evidence was increased by the economic devastation of 9/11<sup>303</sup> as well as the Madrid and London bombings<sup>304</sup> which provided further evidence of how terrorists target public transport in order to cause maximum carnage in built-up areas as a means of terrorizing civilians.<sup>305</sup> Seaports represent gateways to U.S. markets and incorporate transportation hubs which offer direct access to United States highway and rail networks.

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<sup>299</sup> For an overview of the evidence see ASSESSMENT OF U.S. EFFORTS. See also S. Hrg. 108–55, pp. 4 – 5.

<sup>300</sup> See FLYNN, pp. 17 - 29.

<sup>301</sup> See OECD REPORT 2003, p. 8, para. 23; S. Hrg. 108–55, p.7

<sup>302</sup> MARC GERENCSE ET AL, BOOZ ALLEN HAMILTON, PORT SECURITY WAR GAME: IMPLICATIONS FOR U.S. SUPPLY CHAINS, 2003 [hereinafter PORT SECURITY WARGAME].

<sup>303</sup> See Jason Bram et al *Measuring the Effects of the September 11 Attack on New York City*, FRBNY ECONOMIC POLICY REVIEW, November 2002; See also Tom Templeton and Tom Lumley, *9/11 in Numbers*, THE OBSERVER, Sunday, 18 August 2002.

<sup>304</sup> For many years transportation proved instrumental in the planning and carrying out of terrorist attacks and its vulnerability had already been identified in earlier reports commissioned by the US government: see, THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, October 1998, pp. 6,7, 15 ff.; See also Glen M. Segall, *Terrorism, London Public Transport*, 7 July 2005, STRATEGIC INSIGHTS VOLUME IV, ISSUE 8, August 2005; COUNCIL OF MINISTERS, SECURITY IN TRANSPORT, 3 MAY 2004 (CEMT/CM(2004)21, p. 2.

<sup>305</sup> For example, on 20 March 1995, the Japanese religious cult known as Aum Shinrikyo released the nerve agent sarin in the Tokyo subway, killing 12 people and injuring hundreds of others.

Therefore, if terrorists concealed a bomb in a container, they would be easily able to load it onto a truck or railway carriage and transport it to a major city centre for detonation.<sup>306</sup>

If seaports are a gateway to national markets then customs acts as a gatekeeper.<sup>307</sup> However, owing to the fact that, traditionally, security has not played a major role in the Maritime Domain, the question arises as to how U.S. Customs should introduce security measures into an environment characterized by efficient commercial practices. As already suggested, this is a source of great controversy but, according to the United States, any measures must take into account the following aspects:

*“To support the accelerating growth of global commerce and security concerns, security measures must: (1) be aligned and embedded with supply chain information flows and business processes; (2) keep pace with supply chain developments; (3) optimize the use of existing databases; and (4) be implemented with the minimum essential impact on commercial and trade-flow costs and operations. This will require new and enhanced partnerships, as well as cost- and burden-sharing between the private and public sectors.”*<sup>308</sup>

CBP’s answer to the challenge of supply chain security is the Container Security Initiative. It was introduced by U.S. Customs in 2002 and represents a unilateral security measure designed to protect the borders of the United States. The CSI was originally non-regulatory in form,<sup>309</sup> but recently has been codified into law by the SAFE Port Act. Although this Act regulates important

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<sup>306</sup> FLYNN, pp. 17 – 29; See INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, APPENDIX A, p. 2 (“WMD issues are of the greatest concern since the maritime domain is the likely venue by which WMD will be brought into the United States”).

<sup>307</sup> David Widdowson, *Border Protection and Trade Facilitation – Are the Two Compatible?* in, NEUE CHANCEN UND RISIKEN FÜR DIE EUROPÄISCHE WRTISCHAFT, TAGUNGSBAND DES 18. EUROPÄISCHEN ZOLLRECHTSTAGS DES EFA AM 1./2. JUNI 2006 IN ESSLINGEN, (Reginhard Henke, ed.), Band 28, pp. 19 et seq..

<sup>308</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 20.

<sup>309</sup> See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW BODY: TRADE POLICY REVIEW REPORT BY THE SECRETARIAT (REVISION) UNITED STATES, WT/TPR/S/160/REV.1, 20 JUNE 2006 [hereinafter TRADE POLICY REVIEW 2006], p. 28 at para. 25, “The U.S. authorities indicate that the CSI was authorized on the basis of Executive authority, rather than by statute, and that they did not envisage issuing regulations for the CSI.”

aspects of the CSI, it only provides a very general definition of the measure itself in Section 205 (a).<sup>310</sup>

*“[A] program [...] to identify and examine or search maritime containers that pose a security risk before loading such containers in a foreign port for shipment to the United States, either directly or through a foreign port.”*

The Act does not provide any information on the aims or objectives of the measure, the participating seaports, specific contents of the Declarations of Principles or cost-sharing arrangements. In order to find this information one must still refer to numerous official documents issued by government agencies and institutions. For example, DHS and CBP have issued the National Maritime Transportation Security Strategy and the CSI Strategic Plan respectively which provide information on the aims and objectives. Reports by the Congressional Research provide background information on security measures and responsible agencies and the Government Accountability Office has issued a number of reports which critically assess the CSI practical aspects of the CSI. Speeches by the U.S. Customs Commissioner also explain its function and operation and the views of policy-makers have been recorded at numerous congressional hearings on the CSI.<sup>311</sup> Reports by international organizations such as UNCTAD, OECD, the World Bank and the World Shipping Organization are also important sources of information on the practical effects of the measure on international trade.

The Container Security Initiative is an umbrella term which refers to four security measures. Taken together they create a layered security system. It is based on the premise that it is impractical to carry out 100 percent inspection of all container cargo entering the United States. Experience after 9/11 showed that intensifying inspections of cargo led to increased wait times at the border and that physically inspecting every container entering the United States would impose

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<sup>310</sup> Section 205 of the SAFE Port Act 2006 refers to the Container Security Initiative as “a program [...] to identify and examine or search maritime containers that pose a security risk before loading such containers in a foreign port for shipment to the United States, either directly or through a foreign port.”

<sup>311</sup> U.S. Customs has provided a definition of the Container Security Initiative on its official website < [http://www.customs.gov/xp/cgov/border\\_security/international\\_activities/csi/csi\\_in\\_brief.xml](http://www.customs.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml) >. This is supplemented by a CSI FACT SHEET which is periodically updated. The bilateral agreements are broadly worded and refer to general principles underlying the co-operation rather than specific guidelines concerning the CSI’s implementation. See *infra pp.* 80 ff.

an unacceptable burden on the American economy.<sup>312</sup> Therefore, CBP adopted risk management techniques in an attempt to strike the necessary balance between trade and security. This technique presumes that the majority of U.S. imports are legitimate and concentrates the (admittedly very limited) investigatory resources of CBP on the small proportion of containers which could be used by terrorists to carry out an attack. According to one commentator, “[t]he concept is not to develop the perfect system, but rather to raise the obstacles to carrying out a successful attack beyond the will or ability of terrorists to surmount them.”<sup>313</sup> Accordingly, the CSI identifies the small number of cargo containers that pose a high risk for terrorism and scans or physically examines them at the foreign port before they are shipped to the United States.<sup>314</sup> The following description of the four components is taken from the CSI Strategic Plan:<sup>315</sup>

- Identify high risk containers;
- Pre-screening and evaluate containers before they are shipped;
- Use technology to pre-screen high risk containers
- Use smarter, tamper-evident containers.<sup>316</sup>

In this respect, the CSI strategic plan follows the description of the CSI in speeches by the former U.S. Customs Commissioner, Robert C. Bonner.<sup>317</sup> The first three components are geared towards the single objective of preventing WMD being smuggled into the United States. The implementation of the CSI necessitates further measures, notably the 24 Hour Rule and the conclusion of so-called “Declarations of Principles.” The former provides CSI teams at partner

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<sup>312</sup> See U.S. Customs Commissioner, Speech of 17 January 2002. See also FLYNN, p. 87, calculating that 100 percent inspections would translate into 270,000 man-hours per day.

<sup>313</sup> Paul Bjorkholm and Lester D. Boeh, Jr. *The Economics of Cargo Screening*, PORT TECHNOLOGY INTERNATIONAL, ISSUE 31, SECTION 8, p.146.

<sup>314</sup> See CSI STRATEGIC PLAN, p. 6.

<sup>315</sup> See the introduction to the CSI STRATEGIC PLAN, p. ii. Cf. the description of the Container Security Initiative in, U.S. Customs Commissioner, Testimony of 26 January 2004.

<sup>316</sup> CSI FACT SHEET, 7 Jan., 2005, In addition to this definition, CBP has developed a strategic plan on the recommendation of the Government Accountability Office. This strategic plan contains a mission statement and describes the objectives of the Container Security Initiative. For further details see GOVERNMENT ACCOUNTABILITY REPORT TO CONGRESSIONAL REQUESTERS, CONTAINER SECURITY – A FLEXIBLE STAFFING MODEL AND MINIMUM EQUIPMENT REQUIREMENTS WOULD IMPROVE OVERSEAS TARGETING AND INSPECTION EFFORTS, April 2005 [hereinafter GAO-05-557], pp. 26 – 28.

<sup>317</sup> See e.g. Robert C. Bonner: *Statement before the Hearing on Security at U.S. Seaports U.S. Senate Committee on Commerce, Science, and Transportation, Charleston, South Carolina*, 19 February 2002 [hereinafter U.S. Customs Commissioner Statement of 19 February 2002].

seaports with the necessary information to carry out inspections.<sup>318</sup> Therefore, the effectiveness of the CSI largely depends on this component.<sup>319</sup> Similarly, the Declarations of Principles enables the CBP to examine high-risk containers in foreign as opposed to U.S. harbours and therefore form a precondition for preventing (as opposed to merely discovering) the importation of WMD into the United States.<sup>320</sup> The following examination regards the first three components of the CSI as interlocking components of the same strategy: removing one component would render the overall aim of the strategy inutile. On the other hand, the fourth component – smart and secure containers – is relatively undeveloped and therefore will only be dealt with briefly.<sup>321</sup>

The CSI is arguably the most ambitious maritime security measure of the U.S. government to date because it seeks to secure the three main components of the maritime transportation system, namely ports and port facilities, vessels and infrastructure.<sup>322</sup> In particular, it is concerned with securing cargo *before it enters the Maritime Domain*.<sup>323</sup> This means that the CSI is an extraterritorial security measure to the extent that CBP carries out border inspections in foreign territory (i.e. the last port of lading). By “pushing back the borders”, U.S. customs has the opportunity to assess the security of containers before they are loaded on vessels for transport to the United States.<sup>324</sup>

### **1.1. Use of Terminology in the Container Security Initiative**

At this preliminary stage of the investigation it is important to briefly consider terminology relevant to the CSI. Although the SAFE Port Act 2006 provides some definitions of relevant terms, these are not exhaustive<sup>325</sup> and reference must be had to other pieces of legislation (especially the MTSA 2002) as well as official documents (e.g. issued by the GAO, CRS and

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<sup>318</sup> See the 24 Hour Rule was created in response to the need for information of the CSI team in Le Havre in 2002, *see* GAO-03-770, p. 21.

<sup>319</sup> See FLYNN, p. 106 (“This twenty-four hour vessel-manifest rule is important, because without it, there is no credible way to run a risk-based targeting programme.”).

<sup>320</sup> See U.S. Customs Commissioner, Speech of 17 January 2002.

<sup>321</sup> CRS REPORT FOR CONGRESS, TRANSPORTATION SECURITY: ISSUES FOR THE 110<sup>TH</sup> CONGRESS (UPDATED 3 JANUARY 2007), p. 10

<sup>322</sup> See MARITIME SECURITY RECOMMENDATIONS, pp. 2 – 3.

<sup>323</sup> THE MARITIME COMMERCE SECURITY PLAN, p. 5; See also NATIONAL STRATEGY FOR MARITIME SECURITY, p. 8.

<sup>324</sup> OECD REPORT 2005, p. 48, fig. 4.2., para. B

<sup>325</sup> Cf. Section 2 of the SAFE Port Act.



CBP). First of all, there are three important terms which relate to the framework of maritime security measures. They include:

**“Maritime Domain”** this is the subject of security measures and is formulated broadly by the U.S. government. It means “all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterway, including all maritime-related activities, infrastructure, people, cargo, and vessels and other conveyances.” It is important to note that this definition includes the global commons (i.e. the “high seas”) and objects subject to national jurisdiction. Seeking to regulate such objects depends on the agreement of other states. Within the maritime domain, the CSI primarily deals with “component security” because each of its security measures aims to ensure the security of individual physical components of the Maritime Domain, (i.e. primarily containers but also vessels and seaports).<sup>326</sup>

**“International Supply Chain”** according to Section 2 of the SAFE Port Act 2006 this term refers to the “end-to-end process for shipping goods to or from the United States beginning at the point of origin (including manufacturer, supplier, or vendor) through a point of distribution to the destination. This is the subject of Title II of the SAFE Port Act, which includes the Container Security Initiative. The global nature of the international supply chain means that US security measures are extraterritorial in nature insofar as CBP regulates objects outside the territorial jurisdiction of the United States.”<sup>327</sup>

The level of threat plays a crucial role in justifying the introduction and severity of security measures regulating container cargo destined for the United States.<sup>328</sup> The **“Maritime Security (MARSEC) Level”** refers to “the level set to reflect the prevailing threat environment to the marine elements of the national transportation system, including

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<sup>326</sup> *Supra n.* 322, p. 2.

<sup>327</sup> See *infra pp.* 269 – 274.

<sup>328</sup> See Section 103 (a) (2) (F), MTSA 2002. This aspect is also important with regard to the security standards at foreign ports, *see* Section 108 (c) (1) (A).

ports, vessels, facilities, and critical assets and infrastructure located on or adjacent to waters subject to the jurisdiction of the U.S..”<sup>329</sup>

Finally, the event which the CSI attempts to prevent is a “**transportation security incident**” which is defined in the MTSA 2002. This term refers to a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.<sup>330</sup> This term should also be viewed in conjunction with an “Incident of National Significance”, which refers to the scale of the incident. This term refers to “high-impact events that require an extensive and well-coordinated multi-agency response to save lives, minimize damage, and provide the basis for long-term community and economic recovery”.<sup>331</sup> A TSI declared by the Secretary to be an INS is referred to as a “national TSI.”<sup>332</sup>

Another important aspect of terminology deals with the activities of CSI teams at foreign seaports. Specific terms which refer to individual assets such as “container”, “container security device”, and “radiation detection equipment” will be examined in the relevant section. However, at this point it is worth considering more general terms which refer to the type of controls applied to cargo containers. According to Section 2 of the SAFE Port Act 2006 the terms, “screening”, “scanning” and “inspections” are defined as follows.

- **Inspections:** the comprehensive process used by the United States Customs and Border Protection to assess goods entering the United States to appraise them for duty purposes, to detect the presence of restricted or prohibited items, and to ensure compliance with all applicable laws. The process may include screening, conducting an examination, or conducting a search.<sup>333</sup>

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<sup>329</sup> 33 CFR 101.105.

<sup>330</sup> Section 101 MTSA 2002; *id.*

<sup>331</sup> This definition is provided in the NATIONAL RESPONSE PLAN BROCHURE; see also p. 10, which refers to para. 4 of the Homeland Security Presidential Directive 5, (HSPD 5), February 28, 2003. This instrument lays down four criteria for incidents of national significance; see also the NATIONAL RESPONSE PLAN, DECEMBER 2004, p. 4.

<sup>332</sup> DEPARTMENT OF HOMELAND SECURITY, THE MARITIME INFRASTRUCTURE RECOVERY PLAN, April 2006, p.2.

<sup>333</sup> Section 2 (9).

- **Scan:** utilizing non-intrusive imaging equipment, radiation detection equipment, or both, to capture data, including images of a container.<sup>334</sup>
- **Screening:** A visual or automated review of information about goods, including manifest or entry documentation accompanying a shipment being imported into the United States, to determine the presence of mis-declared, restricted, or prohibited items and assess the level of threat posed by such cargo.<sup>335</sup>

The use of the terms “pre-screening”, “inspections” “screening” and “scanning” can give rise to confusion. When the CSI was introduced the U.S. Customs Commissioner referred to the general strategy of “pushing the borders outwards” by the term “**pre-screening.**”<sup>336</sup> This is also reflected in the CSI Strategic Plan. By contrast, the SAFE Port Act does not use the term “pre-screening” at all but instead uses the term “inspections” to refer to the general process of carrying out an assessment of US imports. However, the definition provided refers to the assessment of “goods *entering* the United States” (emphasis added) which would appear to exclude the extraterritorial control activities performed by CSI teams at foreign seaports. Also, the Section 2 of the SAFE Port Act defines the terms “screening” and “scanning” as two distinct procedures. This is supported by Section 232 which clearly differentiates between the “screening of cargo containers” and the “scanning of high-risk containers” as well as Section 1701 of the Act Implementing the Recommendations of the 9/11 Commission which amends Section 232 of the SAFE Port Act to provide for 100 per cent *scanning* as opposed to 100 per cent *screening*.<sup>337</sup> That said, Section 2 (12) of the latter Act refers to the utilization of NII equipment, radiation detection equipment “*or both*” and, under the “scanning of high risk containers”, Section 232 (a) (2) refers to a scan *or a search*. This clearly contradicts Section 1701 of the 9/11 Implementing Act, which defines scanning as a two-stage procedure, i.e. using “non-intrusive imaging equipment *and* radiation detection equipment.” The CSI Strategic Plan, by contrast, omits almost all reference to the term “scanning” and, in the single instance where it does use this term, it

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<sup>334</sup> Section 2 (12).

<sup>335</sup> Section 2 (13).

<sup>336</sup> See U.S. Customs Commissioner, Statement of 19 February 2002. According to this definition, “pre-screening” refers to act of examining cargo prior to departure to the United States and includes the stationing of CSI teams, as well as scanning and physical inspections.

<sup>337</sup> See OECD REPORT, p. 49

simply refers to the use of “radiation detection devices.”<sup>338</sup> A Report by the Permanent Subcommittee of Investigations which led to the passage of the SAFE Port Act adds to the confusion by referring to this two-stage procedure by the term “screening” and not “scanning.”<sup>339</sup>

Another important point to note is that only the term “pre-screening” is specific to the CSI insofar as it refers to screening taking place in a foreign seaport. The terms “screening” and “scanning” in the SAFE Port Act are location-neutral and therefore can also refer to screening and scanning carried out at U.S. seaports.<sup>340</sup>

Problems with terminology can also result from the use of commercial terms within a security context. A good example of this was CBP’s proposed use of the term “shipper” in 19 CFR 4.7., which it defined as meaning “the owner and exporter of the cargo.”<sup>341</sup> The definition of this term was clearly influenced by security considerations. By defining “shipper” in this way, CBP was attempting to get information about the source of the cargo (i.e., the foreign entity that last owned the cargo prior to export).<sup>342</sup> However, this definition did not reflect the normal meaning of the term “shipper” as used on commercial documentation and, according to the World Shipping Council, thereby ran the risk of disrupting the legal relationship between contractual parties.<sup>343</sup> CBP itself recognized the problems caused by this and suspended its interpretation of the term “shipper” in June 2004.

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<sup>338</sup> See CSI STRATEGIC PLAN, p.17 (this is also the only instance where the term “scan” is used).

<sup>339</sup> See ASSESSMENT OF U.S. EFFORTS, p. 34 ff. In this context, the authors use the term “screening” to refer to establishing the contents of a container by means of x-ray equipment. According to Section 2 of the SAFE Port Act, however, this falls under the term “scanning”. In addition, the report uses “inspection” and “examination” synonymously whereas “inspection” refers to the process of establishing the contents of a container by means of examinations and other methods.

<sup>340</sup> In this respect, it is significant that screening and scanning is not regulated within the context of the CSI but separately in Section 232. However, cf. CSI STRATEGIC PLAN, pp. 17, 19, which refers to screening primarily within the context of pre-screening (i.e. at foreign seaports).

<sup>341</sup> See Comments of the World Shipping Council Before the Bureau of Customs and Border Protection in the Matter of Required Advanced Electronic Presentation of Cargo Information, (Docket Number: RIN 1515-AD33), 22 August 2003, pp. 4 ff.

<sup>342</sup> *Id.* p. 8.

<sup>343</sup> *Id.* pp. 10 – 14.

## 1.2. Identification of High-Risk Containers

The sheer quantity of containers entering the United States every day means that customs administrations can only carry out a limited number of inspections, generally estimated to be 2 per cent of incoming containers per year.<sup>344</sup> In the aftermath of 9/11 U.S. Customs found that it was not possible to analyze more than 20 per cent of the cargo entering the United States.<sup>345</sup> Moreover, increased physical inspection of containers restricted trade and proved “economically intolerable.”<sup>346</sup> In view of this experience, U.S. Customs has attempted to balance trade facilitation and security controls by using risk management techniques in order to target containers which represent a high-risk of terrorist interference. Risk assessment is recognized in international conventions<sup>347</sup> and an increasing number of customs administrations throughout the world.<sup>348</sup> It also forms the basis of the pre-emptive defence strategy “pushing the borders outwards” by allowing customs administrations to assess the risk of cargo shipments before they reach the arrival port.<sup>349</sup>

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<sup>344</sup> See K. Lamar Walters, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TUL. MAR. L.J. 311, p. 329.

<sup>345</sup> In addition, such intensity of inspections would be impossible to sustain indefinitely, especially considering the range of tasks that Customs must perform. Concerning other enforcement activities of Customs post 9/11 see Robert C. Bonner, *Statement before the Hearing on U.S. Customs FY 2003 Budget Request House Appropriations Committee Subcommittee on Treasury, Postal Services, and General Government*, 27 February 2002 [hereinafter U.S. Customs Commissioner, Statement of 27 February 2002]. See also ASSESSMENT OF U.S. EFFORTS, at p. 17, which cites “mission fatigue” as the first reason for the low level of inspections.

<sup>346</sup> See James M. Loy and Robert G. Ross, *Global Trade: America’s Achilles’ Heel*, DEFENSE HORIZONS NO. 7, February p. 5; see also Robert C. Bonner, *Remarks to the Trade Support Network*, 9 October 2002 [hereinafter U.S. Customs Commissioner, Remarks of 9 October 2002] (“[I]nspecting every container would be wasteful and make no sense, because most containers pose no security risk.”).

<sup>347</sup> See e.g. Standards 6.3. and 6.4. of the RKC. See also RKC, General Annex, Guidelines on Customs Control, Chapter 6, p. 8, para. 4 defines “risk analysis” as “[t]he systematic use of available information to determine how often defined risks may occur and the magnitude of their likely consequences.” It also defines “risk assessment” as “[t]he systematic determination of risk management priorities by evaluating and comparing the level of risk against pre-determined standards, target risk levels or other criteria.” Other conventions include the Framework of Standards, Standard 4.2., which defines “risk-management” as “the systematic application of management procedures and practices which provide Customs with the necessary information to address movements or consignments which present a risk”; see also Columbus Ministerial Declaration on Trade Efficiency, App., Section B. para. 5. The necessity of advance information to prevent terrorist acts is also recognized in S/RES/1373, para. 2 (b).

<sup>348</sup> See WORLD BANK, *DOING BUSINESS IN 2007*, p. 45, table 9.2. (“Risk – based inspections: the most popular reform in 2005/06”).

<sup>349</sup> Cf. THE NATIONAL MARITIME SECURITY STRATEGY, pp. 8 – 9; THE NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS, October 2005, p.2 (“Awareness grants time and distance to detect, deter, interdict, and defeat adversaries”).

The first component of the Container Security Initiative aims to calculate the risk-rating of shipments entering the United States. It consists of two elements: the legal basis for advance notification of container cargo and its technical implementation. The first element refers to the so-called “24 Hour Rule”, which requires the advance collection and evaluation of information on containerized and break-bulk maritime cargo destined for or transiting through United States’ seaports. It is mandatory on all importers and enforced by severe financial penalties. As such, it has potentially wide-ranging effects on international trade.<sup>350</sup> The technical implementation of this component is accomplished by the Automated Commercial Environment, which is the data system utilized by the National Targeting Centre to sort through the information collected and identify high-risk containers. The following examines these two instruments in greater detail.

### **1.2.1. The 24 Hour Rule**

The 24 Hour Rule was introduced in February 2002 during trials at the port of Rotterdam in response to U.S. Customs officials’ request for more information on consignments destined for the United States.<sup>351</sup> As stated above, the introduction of the 24 Hour Rule was mandated by Section 343 (a) of the Trade Act 2002 which provides for the advance submission electronic cargo information. In order to implement the 24 Hour Rule, CBP amended Section 4.7 of CFR Title 19, Part 4 which deals with “vessels in foreign and domestic trades.”<sup>352</sup> U.S Customs informed the maritime industry of its security plans by publishing notices of its proposed rule-making in the Federal Register.<sup>353</sup> These notices detailed its intention to amend the Customs

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<sup>350</sup> See WSC, Comments of 9 September 2002, p. 5.

<sup>351</sup> The 24 Hour Rule applies to all forms of cargo is either brought into or sent from the United States by any mode of commercial transportation (sea, air, rail or truck). See Fed. Reg. Vol. 68 No. 234, p. 68140. This section concentrates on the rule pertaining to sea transportation. According to the GAO, Customs found at the port of Rotterdam that logistical and legal challenges limited the CSI team’s ability to obtain manifest data essential to screen high-risk containers. To ensure that it would obtain complete and timely manifest data, Customs implemented the 24 Hour Rule. Thereby, the GAO clearly portrays the 24 Hour Rule as a pre-condition and not only a component of the CSI. See GAO-03-770, p. 18.

<sup>352</sup> Accordingly, Section 4.7 now provides for *inter alia* the advance filing of cargo declaration. This provision regulates the subject, source of information and addressees of the rule; the method of transmission; third party information; exemptions to the rule and penalties.

<sup>353</sup> By its notice of proposed rule-making of 8 August 2002, the U.S. Customs Service declared its intention to issue the 24 Hour Rule using its existing authority under 19 U.S.C. 1431(d). This provision allows U.S. Customs to issue regulations specifying the form for, and the information and data that must be contained in, the vessel manifest, as well as the manner of production for, and the delivery or electronic transmittal of, the vessel manifest: *see* Fed. Reg. Vol. 67, No. 153, p. 51520. Although the then applicable Section 343(a) of the Trade Act 2002, provided for a procedure of advance submission of cargo information electronically, U.S. Customs claimed relied on its existing

Regulations to require the advance electronic transmission of information pertaining to cargo prior to its being brought into, or sent from the United States by all modes of commercial transport.<sup>354</sup>

The 24 Hour Rule itself is contained in Section 4.7 (b) (2) and applies to vessel-operating and non-vessel-operating common carriers. The subject of the regulation is primarily containerized cargo which is either destined for or being shipped through United States' harbours. It requires that the incoming carrier provide CBP, in respect of every vessel arriving in the US and required to make entry, with the CBP-approved electronic equivalent of the vessel's cargo declaration 24 hours before the cargo is laden aboard the vessel at the foreign port. The time frame of 24 hours enables high-risk containers to be identified and inspected at the foreign harbour without disrupting shipment of containers to the United States. The National Targeting Centre analyses the information received on the container and identifies high-risk shipments which are to be subject to scanning or physical inspection at the foreign harbour by issuing a "no-load order". CSI teams at the harbour then request the host customs authorities to carry out an inspection of the high risk container during the down time while the container is waiting to be loaded onto the vessel.<sup>355</sup>

There are three different types of cargo which are affected by the rule: container cargo, bulk and break-bulk cargo. Whereas container cargo is fully subject to the 24 Hour Rule, special provision is made for the other two classes. The carriers of bulk and break-bulk cargo are exempt from the requirement that they file the cargo declaration with US customs 24 hours before such cargo is laden aboard the vessel at the foreign port.<sup>356</sup> Instead, carriers of break or break-bulk cargo must present their cargo declarations to customs either 24 hours before they arrive in the US (if they

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authority owing to the urgency of the situation. Congress supported U.S. Customs by amending Section 343(a) of the Trade Act 2002 by means of Section 108 of the MTSA: *Cf.* Notice of proposed rule-making in Fed. Reg. 23 July 2003, Vol. 68, No. 141, p. 43574, which refers to the amended Section 343(a) of the Trade Act 2002. For further information see Papavizas and Kiern, pp. 457 – 458.

<sup>354</sup> The first notice was issued on 8 August 2002 whilst the U.S. Customs was still under the Department of the Treasury and acting on reliance of its existing powers under USC 19 1431 (d). There then followed a period of consultation as required by the then applicable Section 343(a) of the Trade Act 2002. However, when the final rule was issued on 5 December, U.S. Customs had become the Customs and Border Protection Bureau and was responsible to the Department of Homeland Security. The statutory authority relied on was Section 343(a) of the Trade Act 2002 as amended. The rule became effective as from 5 January 2004.

<sup>355</sup> CSI STRATEGIC PLAN, p. 17.

<sup>356</sup> Fed. Reg. 5 December 2003, Vol. 68, No. 234, p. 68145; 19 CFR Section 4.7 (b) (4)

are participants of the AMS programme), or upon arrival if they are non-automated carriers. Significantly, “Freight Remaining on Board” (FROB) is also subject to the 24 Hour Rule. This is cargo which is carried on a vessel and destined for a foreign port after the vessel has discharged other cargo at U.S. ports. According to the CBP, such cargo could pose a cargo safety or security risk to the same extent as other cargo that arrives in the United States.<sup>357</sup>

The required data elements on the inward manifest are listed in Section 4.7a. The aim of the rule is to establish the contents of the container as precisely as possible. According to data element (vii), generic descriptions such as “FAK”, “general cargo” and “STC” are not acceptable. Providing information in this way will constitute an infringement pursuant to Section 4.7a (f). According to sub-paragraph (4), the cargo declaration must state information additional to that provided on the cargo manifest. The data elements required are numerous but they can be divided into four classes:

- identity of cargo: (v), (vii), (xii), (xiii)
- identity of parties: (ii), (iii), (viii), (ix), (x)
- route taken: (i), (vi), (xi)
- schedule of the consignment: (iv), (vi), (xv), (xvi)

CBP is engaged on broadening the required data elements for its risk assessment of containers.<sup>358</sup> This is mandated by Section 203(b) of the SAFE Port Act, which orders the Secretary (acting through the Commissioner), to require “the electronic transmission to the Department of additional data elements for improved high-risk targeting, including appropriate elements of entry data ... to be provided as advanced information with respect to cargo destined for importation into the United States prior to the loading of such cargo on vessels at foreign ports”.<sup>359</sup> The

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<sup>357</sup> *Id.* p. 68152.

<sup>358</sup> CBP Proposal for Advance Trade Data Elements, in response to SAFE Port Act, Section 203(b).

<sup>359</sup> The need for improvements to the advanced information requirements were explained by the Permanent Subcommittee on Investigations in 2005. It found that the information used by CBP for risk analysis was unreliable and limited. See ASSESSMENT OF U.S. EFFORTS, p. 27. The limitations to the information currently gathered by the 24 Hour Rule were explained by the World Shipping Council in 2004. In order to obtain as much information on the shipment as possible, CBP were defining commercial terms such as “shipper” in a broad way which did not correspond with commercial usage. As a result of the legal complications resulting from its interpretation, CBP suspended the enforcement of its interpretation of “shipper” in 2004. See WSC, Comments of 22 August 2003;



additional data elements are intended to produce more effective and more vigorous cargo risk assessments.<sup>360</sup>

Considering that the 24 Hour Rule is crucial for obtaining targeting information<sup>361</sup> it is important that the parties responsible comply with its requirements. Section 4.7(e) CFR Title 19, Part 4 imposes substantial civil penalties on a master of a vessel or NVOCC for failing to provide manifest information; transmitting forged, altered or false information or failing to submit information on time. Concerning the masters of vessels, civil penalties are to be assessed pursuant to 19 USC 1436. NVOCCs will be liable to pay liquidated damages as provided in Section 113.64(c) in addition to any other applicable penalties.<sup>362</sup>

One of the parameters contained in Section 343 (a) of the Trade Act 2002 is that regulations should only apply to that party most likely to have direct knowledge of the information in question. This so-called “direct knowledge requirement” has proved especially controversial because, when producing the cargo manifest, the carrier is reliant on third parties to provide accurate information. Questions of liability arise when information provided turns out to be inaccurate. Industry representatives have argued that it would therefore be unfair to punish presenting parties who have no means of verifying the information provided.<sup>363</sup> The solution adopted by CBP is contained in Section 4.7 (b) (2) (iii), where the party electronically presenting to CBP the required information receives the information from another party, CBP will take into

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Petition of the World Shipping Council, the National Transportation League, the National Customs Brokers and Forwarders Association of America, Inc. and the Retail Industry Leaders Association for Reconsideration of the Final Rule before the DHS CP, RIN 1651-AA49: Required Advance Electronic Presentation of Cargo Information’ (RIN 1651-AA49).

<sup>360</sup> The additional data elements (“10+2”) must also be provided 24 hours prior to the loading of the vessel and will be linked to the existing 24 Hour Rule data collected in the AMS. According to CBP, the new data elements are aimed at further identifying the entities involved in the supply chain, their locations as well as a corroborating and potentially more precise description of the commodities being shipped to the United States. Therefore, the new data elements include the name and address of the manufacturer, seller, consolidator and buyer as well as the country of origin of the goods and the container stuffing location. In addition to the ten data elements relating to the movement of goods, the CBP also requires the ocean carrier to provide a vessel stow plan and container status messages. In particular, the latter data set will provide CBP with information on the status of the container (e.g. empty or full) as it moves through the supply chain. See CBP Proposal for Advance Trade Data Elements, p.2.

<sup>361</sup> See United States Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Homeland Security, *Covering the Waterfront – A Review of Seaport Security since September 11, 2001*, (testimony of Robert. M. Jacksta), January 27, 2004.

<sup>362</sup> See Fed. Reg. Vol. 67 No. 211, 31 October 2002, p. 66320.

<sup>363</sup> See WSC, Comments of 22 August 2003, p. 8.

consideration how the presenting party acquired such information and whether and how the presenting party is able to verify this information. Where the presenting party cannot verify the information, CBP will permit the party to electronically present the information on the basis of what the party reasonably believes to be true.

### **1.2.2. Data Processing and Risk Assessment**

The Container Security Initiative is based on risk assessment which is facilitated by an effective system of data processing. The Trade Act 2002 effectively makes an electronic customs environment mandatory because it does not contain any exceptions or waivers to the automation requirement for data. Vessel carriers which continue to present paper Inward Cargo Declarations to CBP will be denied permission to unload their cargo by the Port Director.<sup>364</sup> The automation requirement is essential to the Container Security Initiative because it facilitates the efficient screening of cargo containers. However, this concept of a paperless environment is not a new concept in U.S. Customs: the effectiveness of sharing information through electronic means had already been recognized by the NAFTA Implementation Act 1993.<sup>365</sup> This Act defined the term “electronic transmission” as “the transfer of data or information through an authorized electronic data interchange system [...]”<sup>366</sup>

The technical implementation of the 24 Hour Rule depends on the customs administration having the necessary infrastructure to collect and assess information.<sup>367</sup> In this respect, it is important to note that the term “electronic data entry” does not just verify commercial information (e.g. customs classification and evaluation) but also determines compliance with customs law generally.<sup>368</sup> CBP currently uses the Automated Commercial System (ACS) in order to track, control, and process all commercial goods imported into the United States. However, this system

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<sup>364</sup> See Bureau of Customs and Border Protection, Frequently Asked Questions, Inbound Only (all Modes) – Trade Act of 2002, Final Rule [hereinafter, CBP Trade Act FAQ].

<sup>365</sup> This Act required the Secretary of Transportation to establish the National Customs Automation Program (NCAP), defined under 19 U.S.C. Section 1411 (a) as an automated and electronic system for processing commercial importations.

<sup>366</sup> 19 USC 1401 (n).

<sup>367</sup> See WSC, Comments of 9 September 2002, pp. 6 – 7

<sup>368</sup> 19 USC 1401 (o).

has long been recognized to be outdated and inadequate to meet the needs of commerce.<sup>369</sup> U.S. Customs planned to satisfy the requirements of the NAFTA Implementation Act 1993 by introducing the Automated Commercial Environment.<sup>370</sup> Although initial attempts to implement this new system were started in 1994, the implementation process has proved difficult and is still ongoing.<sup>371</sup> The ACE aims to facilitate the movement of legitimate trade through more effective trade account management<sup>372</sup> and strengthen border security by identifying import and export transactions that could pose a threat to the United States.<sup>373</sup>

CBP employs risk assessment techniques in order to sort through the cargo information including the manifest information, entry data and intelligence inputs and assess the risk rating of the cargo. It carries out this task by means of the Automated Targeting System (ATS).<sup>374</sup> This system measures electronic cargo information on individual shipments against collection of hundreds of weighted rules based on a model shipment profile.<sup>375</sup> The risk level of the container is assessed on the basis of any resultant anomalies. The higher the score, the more attention the shipment will require.<sup>376</sup> The results of the ATS assessment are reviewed by the Manifest Review Unit (MRU). This consists of customs inspectors who review indicators of suspicious shipments (so-called “red flags”). If a container is considered to be high-risk, then a “no-load” order will be issued to the ocean carrier. This means that the container must not be loaded onto the vessel but taken away for scanning or physical examination.<sup>377</sup>

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<sup>369</sup> U.S. GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY COMMITTEE ON GOVERNMENT REFORM HOUSE OF REPRESENTATIVES U.S. CUSTOMS SERVICE: OBSERVATIONS ON SELECTED OPERATIONS AND PROGRAM ISSUES, (STATEMENT OF LAURIE E. EKSTRAND AND RANDOLPH C. HITE), GAO/T-GGD/AIMD-00 150, 20 April 2000, p.7. (“Its existing import processes are paper-intensive, error-prone, transaction-based, and out of step with the just-in-time inventory practices of the trade community”).

<sup>370</sup> 19 USC § 1411, relating to the creation of a National Customs Automation Program.

<sup>371</sup> *Id.*

<sup>372</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, CUSTOMS SERVICE MODERNIZATION: MANAGEMENT IMPROVEMENTS NEEDED ON HIGH-RISK AUTOMATED COMMERCIAL ENVIRONMENT PROJECT, GAO-02-545, May 2002, p. 32

<sup>373</sup> There are currently 52 ACE ports and CBP is “working diligently” to finish deployment at all 99 land-border ports. See CBP, Automated Commercial Environment Fact Sheet (September 2007).

<sup>374</sup> A discussion of issues associated with the Automated Targeting System is available at <[http://www.cbp.gov/xp/cgov/newsroom/highlights/cbp\\_responds/facts\\_automated\\_targeting\\_sys.xml](http://www.cbp.gov/xp/cgov/newsroom/highlights/cbp_responds/facts_automated_targeting_sys.xml)>.

<sup>375</sup> See CSI STRATEGIC PLAN, pp. 15 - 16

<sup>376</sup> According to the U.S. Commissioner for Customs, every container that scores above 190 will be inspected. See S. Hrg. 109-186, pp. 28-29

<sup>377</sup> See *supra* pp. 72.

The ATS represents the foundation of the Container Security Initiative and therefore its effectiveness is a key factor in identifying high-risk cargo containers, a fact recognized by the World Shipping Council in 2002.<sup>378</sup> However, an investigation into the effectiveness of the CSI by the Permanent Subcommittee on Investigations in 2005 found that containers bound for the United States were not being screened effectively.<sup>379</sup> The Automated Targeting System used for evaluating the risk-rating of the container was based on limited and potentially inaccurate information owing to its reliance on the cargo manifest as a source of data.<sup>380</sup>

### **1.3. Pre-Screening Containers at the Port of Departure**

As stated above, the term “pre-screening” is used by CBP in a general sense to refer to the concept of “pushing the borders outwards.” According to this strategy, CSI teams are stationed at foreign seaports in order to ascertain the contents of containers destined for the United States. The strategy is of vital importance in balancing the dual role of ensuring border security and facilitating commercial entry<sup>381</sup> because it allows high-risk containers to be examined during down-time at the foreign seaport (thereby avoiding any delay in the transportation of the container) and prior to their shipment to the United States (thereby eliminating the detonation of a radiological bomb at a U.S. seaport). This is also one of the most controversial aspects of the CSI because CBP uses its trade power to coerce foreign governments into participating in the CSI. It also reflects the unilateral nature of the CSI because “pushing out the borders” primarily protects U.S. security interests by shifting the risk of the detonation of a terrorist bomb from U.S. seaports to the port of departure.

The concept of pushing the borders outwards is clearly a revolutionary concept in customs.<sup>382</sup> Prior to 9/11, the tasks of border protection agencies were generally limited to the territory or coastal waters of the United States. For example, according to the border search doctrine, U.S.

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<sup>378</sup> See WSC, Comments of 9 September 2002, pp. 6 – 8.

<sup>379</sup> ASSESSMENT OF U.S. EFFORTS, pp. 10 – 11.

<sup>380</sup> *Id.*, pp. 26 – 27. Cf. U.S. Customs and Border Protection Report to Congress on the Automated Commercial Environment (ACE) Third Quarter Fiscal Year 2007, pp. 11 – 14.

<sup>381</sup> See the NATIONAL STRATEGY FOR MARITIME SECURITY, p. 2

<sup>382</sup> See CSI STRATEGIC PLAN, Introduction by Ralph W. Basham; see also U.S. Customs Commissioner Statement of 19 February 2002.

Customs only had jurisdiction to inspect people and cargo entering the United States.<sup>383</sup> In addition, the U.S. Coast Guard only had authority to board and inspect suspicious vessels within the coastal waters of the U.S.).<sup>384</sup> However, this was clearly inadequate to prevent WMD from being smuggled into U.S. seaports.<sup>385</sup> Owing to the perceived threat of a radiological bomb being hidden in a container, primed for detonation at a U.S. seaport, CBP therefore decided to transfer border inspection activities to foreign seaports.

This strategy is potentially difficult to implement because under international law, a country cannot extend its jurisdiction over the territory of another state without first obtaining its consent.<sup>386</sup> Obtaining consent to jurisdictional extension is necessary “for purposes of international comity and diplomatic courtesy”<sup>387</sup> and it also respects the principles of sovereignty and the rule of law.<sup>388</sup> It is now a requirement of the SAFE Port Act 2006.<sup>389</sup> The United States Customs Service has entered into bilateral agreements with selected customs administrations which provide for U.S. Customs officers to be stationed at foreign seaports in order to observe inspections of high-risk cargo destined for the United States. The agreements have been designated “Declarations of Principles” and signed by the U.S. Commissioner of Customs.<sup>390</sup>

Before a customs administration can become a member of the CSI, it must satisfy a number of criteria which are laid down unilaterally by the CBP with the approval of the Director of the Department of Homeland Security:<sup>391</sup>

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<sup>383</sup> See *infra* p. 101.

<sup>384</sup> Article 2 of the United Nations Convention on the Law of the Sea (UNCLOS).

<sup>385</sup> Experience from drug interdiction proved that the 12 mile coastal perimeter did not give the U.S. Coast Guard sufficient time to stop the vessels and, moreover, the U.S. coastline was too wide to patrol effectively. See Kramek, pp. 131 - 132.

<sup>386</sup> See *France v. Turkey* (1927) P.C.I.J. Reports, Series A, No.10. See also D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW: 6TH EDITION, p. 268.

<sup>387</sup> *United States v. Greer*, 223 F. 3d 41, 55 – 56 (2<sup>nd</sup> Cir. 2000)

<sup>388</sup> INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 5.

<sup>389</sup> See Section 205 (d) SAFE Port Act 2006. This provision clarifies the parties involved in the negotiation process.

<sup>390</sup> Cf. Section 205 (d) Safe Port Act 2006. The U.S. Customs Commissioner has signed the Declarations of Principles acting under the delegated authority of the Secretary of Homeland Security. For example, The U.S. Commissioner for Customs signed the Declarations of Principles with Sweden, the United Kingdom, Spain, Germany, France the Netherlands, Belgium, Italy and Greece. However, the pan-European agreement was signed by the Secretary of Homeland Security, Tom Ridge. See *infra* n. 395.

<sup>391</sup> See CBP, Minimum Standards for CSI Expansion.

- Seaport must have regular, direct, and substantial container traffic to ports in the United States.
- Customs must be able to inspect cargo originating, transiting, exiting, or being transshipped through a country.
- Non-intrusive inspection (NII) equipment (gamma or X-ray) and radiation detection equipment must be available for use at or near the potential CSI port.

In addition to these mandatory criteria, potential CSI ports must also agree to:

- Establish an automated risk management system.
- Share critical data, intelligence, and risk management information with U.S. Customs and Border Protection (CBP)
- Conduct a thorough port assessment and commit to resolving port infrastructure vulnerabilities.
- Maintain integrity programmes, and identify and combat breaches in integrity.

Some of these criteria for membership have been codified in the SAFE Port Act.<sup>392</sup> The membership procedure runs as follows: CBP dispatches an assessment team to the seaport in order to ensure that it satisfies the security criteria, whereupon it invites the customs authority to join the CSI programme.<sup>393</sup> The next step is the negotiation of a “Declaration of Principles” between the two customs administrations. Generally speaking, this stage has not proved difficult for CBP because the agreements do not confer any powers on the CSI teams and therefore do not interfere with the sovereign powers of the host customs authorities. That said, the EC Commission did object to CBP concluding agreements with individual EC member states.<sup>394</sup> This was solved by the creation of a pan-European Agreement<sup>395</sup> that implements the Container

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<sup>392</sup> Section 205 (b) (1) – (5) SAFE Port Act 2006 which includes: the risk that containers will be compromised at the seaport by terrorists; the volume of cargo; the security standards at the foreign seaport and the willingness of the government in sharing security-related information with the Department of Homeland Security

<sup>393</sup> See GAO-05-557, p. 13; GAO-03-770, pp.10 ff.

<sup>394</sup> Sweden; the United Kingdom; Spain; Germany; France; the Netherlands; Belgium; Italy; Greece and Portugal

<sup>395</sup> See *EU lines up container security expansion*, LLOYD'S LIST INT'L 2004, 16 November 2004 (WLNR 13382151); *Brussels signs box security deal with US*, LLOYD'S LIST INT'L, 19 November 2003 (WLNR 4287154). See also Council Decision on the signature and conclusion of the Agreement between the European Community and the United States of America on intensifying and broadening the Agreement of 28 May 1997 on customs co-operation

Security Initiative in all EC member states by means of a single multilateral agreement under the auspices of the European Commission and United States.<sup>396</sup> Once the bilateral agreement has been signed, CBP designates the seaport a “CSI port.”<sup>397</sup>

The expansion of the CSI has been divided into three stages.<sup>398</sup> In Phase I, the CBP targeted the major trading partners of the United States – primarily the ten “megaports”, which account for the vast majority of US imports. Phase II of the CSI saw the initiative being expanded to seaports which were of strategic importance, including medium-income developing countries.<sup>399</sup> At the end of 2007 there were fifty-eight participating ports which account for approximately 90 percent of containers entering the United States.<sup>400</sup> The third phase of expansion (which has not been officially announced) may see the initiative being expanded to more developing countries.<sup>401</sup>

### 1.3.1. The Declaration of Principles

Notwithstanding the unilateral nature of the CSI, the U.S. government has expressly stated that its security measures must be implemented in co-operation with other states.<sup>402</sup> In this respect, the Declarations of Principles are crucial to the pre-emptive defence strategy pursued by the CSI.<sup>403</sup> Such customs – to – customs partnerships reflect the principles of international conventions such as the Revised Kyoto Convention, which requires customs administrations to co-operate with each other “and seek to conclude mutual administrative assistance to enhance customs

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and mutual assistance in customs matters to include co-operation on Container Security and related matters Brussels, 22 January 2004 COM(2004) 36 final. The Agreement was formulated on November 2003 and accepted by the Council on 30 March 2004. The agreement was signed on 22 April 2004 by the State Secretary Tom Ridge and the Irish Minister of Finance, Charlie McCreevy.

<sup>396</sup> However, the issue still remains controversial. See *Warning on risk posed by Container Security Initiative*, LLOYD'S LIST INT'L, 21 April 2004 (WLNR 7192695).

<sup>397</sup> The CBP website contains a list of participating seaports which is periodically updated, available under <[http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/ports\\_in\\_csi.xml](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml)>.

<sup>398</sup> See Florestal, pp. 392 – 393.

<sup>399</sup> CSI FACT SHEET p. 2 (referring to “phase 2 of the expansion”); see also S. Hrg. 108–55, p.8

<sup>400</sup> CSI STRATEGIC PLAN, p. 36

<sup>401</sup> The CSI is unlikely to be expanded to least developed countries owing to the fact that most of them are landlocked.

<sup>402</sup> See NSPD – 41/ HSPD-13, p. 6.

<sup>403</sup> See THE NATIONAL MARITIME SECURITY STRATEGY, pp. 8 – 9, 14 – 15.

control.”<sup>404</sup> Customs administrations have traditionally preferred a customs-to-customs approach to co-operation because it permits the bilateral agreement to be tailored to meet the specific legal and political conditions in the contracting parties.<sup>405</sup> The Johannesburg Convention provides the necessary framework for concluding such agreements and is *potentially* an important instrument in combating terrorism and transnational crime.<sup>406</sup>

The parties to the Declarations of Principles (DoPs) are the customs administrations of the United States and foreign state in question. An examination of the DoPs reveals a number of shared characteristics. The agreements are formulated in broad terms and follow the same structure. They are divided into a preamble and operative provisions. The Preamble to the Declarations performs four important functions. First, it identifies the subject of co-operation as “intensifying the exchange of information and best practices between the two customs authorities”; second, it confirms the qualification of the port for CSI status by referring to the volume of trade between the port in question and the ports of the United States; third, it places the agreement within a global context by reference to the resolutions or discussions with international organizations. Finally, it provides the reasons for the agreements, namely the need to “deter, prevent and interdict” any terrorist attempt to disrupt global trade or exploit commercial shipping.

The operative provisions also adopt a similar structure and are divided into six paragraphs four of which refer to the customs co-operation:

- **aim of co-operation.** This paragraph consists of three elements: a) to intensify customs co-operation; b) on a reciprocal basis and c) within the framework of the existing Customs Mutual Agreement;
- **scope of the co-operation.** The second paragraph details the activities which are to be the subject of the co-operative agreement. These specifically refer to elements of the

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<sup>404</sup> See Standard 6.7 of the RKC; reference to such co-operation is also referred to in the preamble to the Convention. See also Standard 7.5. of the Framework of Standards (referring to the Johannesburg Convention and the 1996 Model Bilateral Agreement as containing provisions that support international or bilateral co-operation).

<sup>405</sup> See the 1996 Model Bilateral Agreement, p. 2

<sup>406</sup> *Supra n. 272.*



Container Security Initiative, i.e. the sharing of information, the pre-screening of containers and the stationing of U.S. Customs officers at the port in question.

- **jurisdictional conditions** to which U.S. Customs officers are subjected. Generally, the agreements provide that they will work under the authority of the U.S. Ambassador in the country concerned and in accordance with the guidelines set down by the host customs administration.
- **implementation of co-operation.** This paragraph requires the contracting parties to consult closely on the implementation of the CSI at the port concerned, in order to ensure the effectiveness and mutual benefit of the Customs co-operation.

The final two paragraphs concern the validity of the agreement. As a rule, the agreements require a notice of termination to be given in writing three months in advance. In addition, the agreement will cease to have effect once the European Agreement comes into force.<sup>407</sup>

Overall the DoPs are quite limited in scope and do not confer any powers on U.S. customs officers stationed in the foreign seaport. This appears to be borne out by practical experience with reports of host customs authorities declining requests to inspect containers designated high risk by the NTC.<sup>408</sup> Substantively, there is little in the Declarations that reflects the Model Agreement on Bilateral Agreements 1996. There is evidence that the lack of substance in these agreements adversely affects the effectiveness of the CSI.<sup>409</sup>

CBP maintains that the Declarations of Principles are informal and voluntary agreements. Legally, the agreements appear to be non-binding for a number of reasons.<sup>410</sup> The CBP has stated

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<sup>407</sup> These findings derive from a comparison of the Declarations of Principles concluded with the customs administrations of Sweden, the United Kingdom, Spain, Federal Republic of Germany, France, the Netherlands, Belgium, Italy and Greece.

<sup>408</sup> ASSESSMENT OF US EFFORTS, p. 14.

<sup>409</sup> See *id.*, pp. 8 – 9.

<sup>410</sup> In order to determine whether the agreements are binding, the intention of the parties; significance of the agreement; specificity of its terms as well as the form of the agreement must be examined. Concerning the requirements of international law, see Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements* in AM. J. INT'L. L. 1977 and James Thuo Gathii, *The Legal status of the Doha Declaration on Trips and Public Health under the Vienna Convention on the Law of Treaties*, 15 HARV. J. L. & TECH. 291 at p. 314. The United States has not ratified the Vienna Convention. Although U.S. courts have referred to the Convention the United States uses its own rules of national law to determine what constitutes a binding international agreement See Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHTS, May 1997. Available under:

that its intention was to enter into an informal agreement in order to avoid the constitutional formalities associated with formal agreements and the lengthy negotiations involved in the agreement of detailed provisions.<sup>411</sup> The agreements have also been concluded as between the Customs service of the United States and the customs administrations of its trading partners. Therefore, they constitute agency-to-agency agreements as opposed to government-to-government agreements.<sup>412</sup> Also, Article II, Section 2, clause 2 of the United States' Constitution requires international agreements to be entered into "by and with the Advice and Consent of the Senate."<sup>413</sup> Finally, non-binding agreements often use the term "Declaration" and merely state the shared aspiration of the parties.<sup>414</sup> On the other hand, despite the fact that the DoPs are not legally binding, the SAFE Port Act arguably places these agreements on a more formal footing and emphasizes the need to harmonize safety standards at foreign ports.<sup>415</sup>

The CBP has described the agreements as voluntary and mandatory but this may not be the case in practice.<sup>416</sup> There is an inherent conflict between the need for security and the needs of commerce and, in order to persuade governments to agree to CSI, the CBP has granted participating seaports commercial incentives in the form of expedited clearance at U.S. seaports.<sup>417</sup> Although the actual value of this benefit is uncertain, CSI participation is regarded by seaports as a seal of approval which ensures efficient customs clearance by CBP, particularly in the event of a TSI.<sup>418</sup> As a result, there is significant commercial (i.e. from seaports and importers) and political pressure (from domestic political parties and the U.S. government) on customs administrations to sign the Declaration of Principles.<sup>419</sup> Refusal to do so could lead to

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< <http://www.asil.org/insights/insigh10.htm> >; Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 Va. J. Int'l L. 431, p. 434.

<sup>411</sup> See Romero, pp. 600 – 601.

<sup>412</sup> For an overview see generally Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE: ( Monroe Leigh, et al. eds. 2005), Washington DC: American Society of International Law, 1999

<sup>413</sup> Without being submitted to the Senate for advice and consent a treaty may be valid under international law but as far as the United States is concerned, it does not form part of the "Supreme Law of the Land" and is not binding on the U.S. Courts.

<sup>414</sup> See United Nations Treaty Reference Guide, p. 5 ("Declarations").

<sup>415</sup> *Supra n.* 201.

<sup>416</sup> See pp. 77 ff.

<sup>417</sup> See FLYNN, *supra n.* 76.

<sup>418</sup> See e.g. Section 202 of the SAFE Port Act 2006, which states that the Customs Commissioner may give preference to cargo entering a port of entry from a CSI seaport.

<sup>419</sup> See Irvin Lim Fang Jau, *Not Yet All Aboard ... But Already All at Sea Over the Container Security Initiative*, Institute of Defence and Strategic Studies, Singapore (November 2002), p. 12.

economic reprisals in the form of increased inspection of cargo coming from their major seaports (i.e. “redlane” clearance).<sup>420</sup> Delay represents a considerable non-barrier to trade<sup>421</sup> and the risk of increased inspections at U.S. seaports is likely to discourage shippers from using non-CSI ports. Considering that maritime transportation services play a “pivotal role in modern trade oriented economies”,<sup>422</sup> and that the “cost of international (maritime) transportation services are an important determinant of a country’s export competitiveness”,<sup>423</sup> such customs treatment could cause substantial economic damage on a country’s GDP. The passage of the SAFE Port Act 2006 also tends to reduce the voluntary character of the bilateral agreements by e.g. requiring CBP to increase security standards within a fixed time limit.<sup>424</sup>

The CBP has often referred to the reciprocal nature of the agreements and points to the presence of Canadian and Japanese customs officials at their own ports as evidence of this. Reciprocity is a norm of international law and forms the basis for all international agreements.<sup>425</sup> In practice, it is also an important means by which the United States ensures support for the CSI from its trade partners in inspecting containers bound for U.S. seaports.<sup>426</sup> However (in theory at least), full reciprocity appears unworkable because it could lead to numerous customs administrations being stationed at one U.S. seaport.<sup>427</sup> Considering that the U.S. imports far more than it exports as well as the extremely high cost of stationing CSI teams, reciprocity is unlikely to be exercised by all CSI partner administrations.<sup>428</sup>

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<sup>420</sup> FLYNN, *supra n.* 76.

<sup>421</sup> See Shashi Kumar and Jan Hoffmann, *Globalisation: The Maritime Nexus*, in Costas Th. Grammenos (ed), *The Handbook of Maritime Economics and Business*, LLP, London 2002, p. 43.

<sup>422</sup> BENJAMIN PARAMESWARAN, *THE LIBERALIZATION OF MARITIME TRANSPORT SERVICES WITH SPECIAL REFERENCE TO THE WTO/GATS FRAMEWORK*, (International Max Planck Research School for Maritime Affairs at the University of Hamburg), p. 47.

<sup>423</sup> *Id.*, p. 52.

<sup>424</sup> Section 204 and 205 SAFE Port Act 2006.

<sup>425</sup> See Arnold, (*supra n.* 41), p. 211. However, CBP does not recognize other security measures as equal to the CSI.

<sup>426</sup> FLYNN, p. 96.

<sup>427</sup> See also Gregory W. Bowman, *Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border*, 44 HOUS. L. REV. 189, pp. 205 – 206. Arguably, reciprocity reflects the origins of the CSI in the In-transit Container Security programme with the Canadian customs authorities. See Robert C. Bonner, *Statement before the Senate Appropriations Committee Subcommittee on Homeland Security*, 13 May 2003.

<sup>428</sup> Concerning the costs of the CSI, see S. Hrg. 109-186, p. 6; ASSESSMENT OF U.S. EFFORTS, p. 21.

### 1.3.2. Stationing of U.S. Customs Officers at Foreign Seaports

Following the signing of the Declarations of Principles, CBP deploys “CSI teams” consisting of four customs officers to the foreign seaport.<sup>429</sup> Their role is to ensure that cargo shipments which have been deemed “high-risk” by the NTC are scanned or physically inspected by the host customs authority in order to detect WMD or radiological weapons smuggled in containers before they are loaded on a vessel destined for the United States.<sup>430</sup> This aspect of the CSI forms part of the pre-screening component and the presence of U.S. customs officers at foreign seaports is central to the concept of “pushing the borders outwards.” The effectiveness of CSI largely hinges on this component because once the container has been loaded onto the vessel there is no way of examining it prior to arrival at the U.S. harbour.<sup>431</sup>

According to the Government Accountability Office, CSI teams consist of special agents, targeters and intelligence analysts.<sup>432</sup> They perform the following functions:<sup>433</sup>

- Team leader: the immediate supervisor for all CSI team members and coordinates with host-government counterparts in daily operations;
- Intelligence analysts: gathers information to support targeters;
- Targeters: target shipments and refer high-risk shipments to host government officials for investigation;
- Special agents: coordinate all investigative activity connected to CSI and liaise with U.S. embassy attachés.

The stationing of CSI teams is strategically important because it serves to enforce CBP’s unilateral security measures. Theoretically at least, CSI teams ensure that all high-risk containers are inspected using CBP-approved NII equipment prior to their departure for U.S. seaports.<sup>434</sup>

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<sup>429</sup> See GAO-05-557, p.13

<sup>430</sup> See S. Hrg. 108-55, p. 9

<sup>431</sup> Cf. S. Hrg. 109-186, pp. 23 – 24 on the feasibility of carrying out inspections at sea.

<sup>432</sup> See GAO-05-557, at pp. 13 – 17.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at p. 17.

CBP also claims that their presence also acts as a deterrent to terrorists<sup>435</sup> and that interaction with foreign customs officials enhances co-operation and intelligence sharing.<sup>436</sup>

In the United States, CBP is the premier law enforcement agency with powers exceeding even those of the FBI and CIA.<sup>437</sup> In practice, however, CSI teams do not exercise the same powers at the participating seaports of foreign states. Members of the CSI team are non-uniformed representatives of the CBP and do not have any powers of enforcement at the host seaport to enforce no-load orders, or demand the scanning and examination of high-risk containers.<sup>438</sup> In order to carry out inspections, CSI teams must refer the container in question to the foreign officials who then decide whether to scan or examine the container in question.<sup>439</sup> According to CBP, its officers are permitted to observe the inspections and document the results. However, the host customs authority may decide to deny an inspection in which case the CSI team must mark the container for inspection on arrival at the U.S. port.<sup>440</sup> This lack of enforcement power is reflected in CBP's own explanation of how a no-load order functions:

*“The power behind the 24-hour rule derives from the Commissioner Bonner's legal authority to deny a permit to unlade cargo at a U.S. port. If the manifest information [...] doesn't add up, CBP notifies the carrier that a container will not be given a permit to unlade in the U.S. If the carrier cannot unlade, he will not bother to load the container onto the ship. So if there is a security risk with that container or its cargo, it remains in the foreign port.”<sup>441</sup>*

In other words, the carrier's decision to comply with a no-load order is dictated by the powers that CBP officers exercise on their home territory. This clearly shows that the enforcement

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<sup>435</sup> See introduction to THE CSI STRATEGIC PLAN. The plan frequently refers to the deterrence-value of the CSI.

<sup>436</sup> *Id.* at p. 11.

<sup>437</sup> See Robert C. Bonner, *Remarks concerning the Proliferation Security Initiative, Los Angeles, California*, 14 September 2005 [hereinafter U.S. Customs Commissioner, Remarks of 14 September 2004] (“One important point to note is that because CBP is the frontline border agency of the United States, we have broader legal authorities than any other law enforcement agency of the U.S. Government.”)

<sup>438</sup> See CSIFACT SHEET, p. 4, “[...] Officers at these ports are not armed nor do they have arrest powers. The officers work jointly with the host country authorities to screen U.S.-bound containers. They operate in accordance with the guidelines of the host country and the terms of the declaration of principles to implement CSI”; see also Guan Zhao, *US Customs Officials Shall Not Enforce Law in Hong Kong*, WRLDNWSC, 21 June 2002.

<sup>439</sup> GAO-05-557, at pp. 16 – 17.

<sup>440</sup> *Id.*

<sup>441</sup> Woolf, *supra* n. 17.

powers of CBP remain rooted in the territory of the United States.<sup>442</sup> As noted by oversight bodies, the lack of enforcement powers of CSI teams means there is nothing that CBP can do to prevent a foreign seaport from permitting a ship to load its high-risk cargo and depart for the United States (which often happens in practice), thereby leaving U.S. seaports open to the threat of high-risk containers.<sup>443</sup> In reality therefore, the security offered by CSI teams at the seaport of departure is significantly less than the term “pushing out the border” tends to suggest.

The pre-screening of containers at the seaport of departure is crucial to the balance between ensuring security and balancing trade. This is because containers considered high-risk can be examined during the “dwell-time” at the CSI port which avoids causing delays to the transit of the container.<sup>444</sup> Security is ensured by using advanced x-ray equipment to scan high-risk containers. On the other hand, trade facilitation is ensured by granting containers from CSI ports expedited clearance at U.S. seaports.<sup>445</sup>

#### **1.4. Use of Technology to Scan High-Risk Containers**

Strictly speaking, this aspect of the CSI also forms part of the pre-screening component because, like the stationing of CSI teams, scanning technology is a means of accomplishing the screening of containers prior to their shipment to the United States. However, this is treated as a separate component by CBP and is also regulated in a separate section in the SAFE Port Act.<sup>446</sup> This aspect is not specific to the concept of “pushing the borders outwards” because the MTSA 2002 and SAFE Port Act 2006 also requires U.S. authorities to deploy scanning equipment at U.S. seaports.

Section 2 of the SAFE Port Act defines “radiation technology equipment” as “any technology that is capable of detecting or identifying nuclear and radiological material or nuclear and

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<sup>442</sup> It corresponds to the notion of “extrajurisdictionality” employed by the Panel in WTO jurisprudence see *infra pp.* 269 ff. *Contra* Bowman, pp. 216 et seq. (arguing that the CSI “transfer[s] ... certain U.S. government functions traditionally associated with national borders or border security to points well outside the territory or physical jurisdiction of the United States”).

<sup>443</sup> ASSESSMENT OF US EFFORTS p. 12.

<sup>444</sup> See Robert C. Bonner, *Remarks at the Centre for Strategic and International Studies*, 26 August 2002.

<sup>445</sup> See CSI FACT SHEET, p. 4 (which refers to a “competitive advantage”).

<sup>446</sup> Section 232, Subtitle C (Miscellaneous Provisions) of the SAFE Port Act 2006.

radiological explosive devices.” Although WMD also includes chemical and biological weapons, equipment for detecting these classes of WMD does not yet exist.<sup>447</sup> It should also be noted that scanning equipment is not limited to detecting weapons but can also be used to detect smuggled goods in general (e.g. cigarettes).<sup>448</sup> This may enhance the attractiveness of such inspection equipment for host customs authorities.

Radiation technology equipment is to be employed in a range of equipment, including mobile, truck and seaport container x-ray systems.<sup>449</sup> It forms part of the port superstructure (fixed and mobile equipment).<sup>450</sup> In theory, because NII equipment enables CSI teams to find out what is in the container without actually opening it, inspections can be carried out rapidly. The inspections are carried out within the period of “down-time” at the foreign harbour which can last up to seven days. In this way, high-risk containers can be inspected without disrupting its transportation. Physical examinations, on the other hand, take far longer and are only to be carried out in exceptional cases.<sup>451</sup> In practice, however, the use of technology to scan high-risk containers can be problematic because the effectiveness of NII equipment can be compromised by the reliability of the equipment, high costs of running it and the layout of the port. In addition, it has so far proved impossible to penetrate containers transporting trash or rugs.<sup>452</sup>

Host seaports bear the cost of acquiring, operating and maintaining NII equipment, which can be considerable. Such equipment is very expensive with the relevant equipment running into the millions of dollars. They must also bear the related costs of inspections, disposal of any WMD discovered as well as false alarms. The installation of equipment can also require the replanning of harbour operations owing to space and location considerations.<sup>453</sup> More specifically, the costs

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<sup>447</sup> See ASSESSMENT OF US EFFORTS p. 12; Binnendijk et al, *supra n. 2*, pp. 7-9.

<sup>448</sup> Concerning the use of inspection equipment for cigarette inspections, see ASSESSMENT OF U.S. EFFORTS, p. 19.

<sup>449</sup> See CSI Strategic Plan, p. 17.

<sup>450</sup> Lourdes Trujillo and Gustavo Nombela, *Privatization and Regulation of the Seaport Industry*, Policy Research Paper WPS2181, The World Bank, September 1999, p. 7.

<sup>451</sup> See MAARTEN VAN DE VOORT AND KEVIN O'BRIEN, RAND EUROPE, SEACURITY: IMPROVING THE SECURITY OF THE GLOBAL SEA-CONTAINER SHIPPING SYSTEM, (MR-1695-JRC) [hereinafter RAND EUROPE REPORT], pp.10 – 11 (“[The] process of unpacking takes ... approximately 8 hours”).

<sup>452</sup> See ASSESSMENT OF U.S. EFFORTS, pp. 20, 39 – 41.

<sup>453</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES SUMMARY OF CHALLENGES FACED IN TARGETING OCEANGOING CARGO CONTAINERS FOR INSPECTION, (STATEMENT OF RICHARD M. STANA), 31 March 2004 [hereinafter GAO-04-557T], p. 12

of inspection equipment are reported to be borne by seaport authorities,<sup>454</sup> although the exact cost-sharing arrangement may also depend on the organizational mode of the seaport.<sup>455</sup> The lack of funding for security measures at U.S. seaports raises the suspicion that the CSI is simply a means of shifting the cost of security measures to its trading partners. As matters presently stand, the security measures at CSI ports often significantly surpass those at U.S. ports.<sup>456</sup>

Until recently, Section 232(b) of the SAFE Port provided for 100 per cent scanning of *high-risk* containers. Therefore, if a container is deemed by the ATS to be high-risk, it had to be scanned or searched before leaving a United States seaport facility.<sup>457</sup> However, some senators found the existing scanning processes for maritime containers to be insufficient, especially since the findings of the Report by the Permanent Sub-Committee on Investigations had suggested that scanning technology was now sufficiently advanced to permit 100 percent scanning of containers destined for the United States.<sup>458</sup> The model for 100 percent screening of containers was provided by Hong Kong harbour which employs the Integrated Container Inspection System (ICIS).<sup>459</sup> According to the PSI, such a scan did not impede the flow of commerce and the equipment used was equivalent to or exceeded equipment used in the U.S.<sup>460</sup> The PSI found that if this system was widely implemented, it could allow for 100 percent of all containers to be screened upon arrival at any port. At the request of the Hong Kong Container Terminal Operators Association, DHS examined the possibility of linking this concept to the CSI. It was also argued that the

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<sup>454</sup> See *infra n.* 1104.

<sup>455</sup> For example, seaports today are adopting the landlord model with private companies owning assets relating to superstructure and equipment: see Trujillo and Nombela, pp.7, 16. See also OECD REPORT, p. 50.

<sup>456</sup> See e.g. ASSESSMENT OF U.S. EFFORTS, p.28 (comparing imaging machines at the Port of Rotterdam); FLYNN, p.102, referring to the problems of false alarms (“[...] a one percent false alarm rate translates into 180 containers a day that would have to be investigated”). See also S. Hrg. 109 – 186, pp. 28 – 29 (“We know that in every country it exceeds or equals what we have in terms of our own NII equipment...”); Hearing Before The Committee On Commerce, Science, And Transportation United States, *U.S. Seaport Security*, Senate 106<sup>th</sup> Congress, 2<sup>nd</sup> Session, 4 October 2000 [hereinafter S. Hrg. 106–1137], p. 7 (statement of Senator Bob Graham), referring to operations at the Port of Rotterdam.

<sup>457</sup> Although CBP claims that CSI ports account for 90 percent of US trade, a considerable number of containers enter the United States from non-CSI ports. High-risk cargo from these ports can only be examined within the territorial waters of the United States by the U.S. Coast Guard or at the U.S. seaport.

<sup>458</sup> See Assessment of U.S. Efforts, pp. 34 – 36 ff. Research carried out by the Rand Institute, published in 2005, found that 100 per cent scanning with available technology was not viable because of restrictions on land and personnel. By contrast, complete scanning and subsequent inspection of containers at ports would most likely deter terrorists and smugglers under particular circumstances. See Martonisi et al., *Evaluating the Viability of 100 per cent Inspections at America’s Ports*, in THE ECONOMIC IMPACTS OF TERRORIST ATTACKS (Harry Richardson et al, eds., 2005), p. 237.

<sup>459</sup> See ASSESSMENT OF U.S. EFFORTS, p. 34.

<sup>460</sup> *Id.*, p. 35.



implementation of ICIS might yield considerable cost savings to CBP because the majority of targeting and analysis of images could take place remotely, thus reducing the substantial costs of stationing CBP personnel abroad under the CSI programme.<sup>461</sup> On 3 August, the IRCA 2007 entered into force. Section 1701 of this Act mandates the 100 per cent scanning of all containers (i.e. not just high-risk containers) destined for the United States at the port of departure by 2012.

### **1.5. Use of Smarter, Tamper-Evident Containers**

This component of the CSI differs from the others insofar as it attempts to improve the integrity of containers themselves rather than the environment through which they move.<sup>462</sup> Section 2 of the SAFE Port Act defines “container” by reference to the same term in the Containers Convention 1972. This is defined in Article II (1) of the Convention as “an article of transport equipment (a) of a permanent character and accordingly strong enough to be suitable for repeated use; (b) specially designed to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading [...]”

Since its invention in the 1950s the container has undergone few technical changes. It remains little more than a steel box fastened by a “fifty cent tag.” As a result, it is easy for criminals to open containers without leaving any visible traces. Clearly, a container which could record all openings or diversions from the planned route or which could only be opened by authorized persons would provide a considerable standard of security throughout the supply chain. Although smart containers are still undergoing development, they are viewed by CBP as representing the single most important component of the CSI. This was underlined by the U.S. Commissioner for Customs:

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<sup>461</sup> *Id.* p. 36; Cf. Section 205 (h) of the SAFE Port Act,

<sup>462</sup> OECD REPORT, p. 51.

*“The best factory and loading dock security at the point of stuffing of a container, the best CBP targeting, and the best CSI inspections are part of the solution, but after all that has been done, a terrorist must not be able to open a container en route and stuff a bomb in it, or weapon of mass destruction (WMD).”*<sup>463</sup>

Smart containers must be securely sealed and tamper-evident.<sup>464</sup> Therefore, research has concentrated on improving seals and developing an electronic container security device. In order to qualify as a “smart container”, the container must use specific, heavy-duty seals approved by the ISO.<sup>465</sup> The container security device is a plastic box containing sensor circuitry which snaps into the hinge of the container. This device records the times a container is opened and the information stored is downloaded by a “reader” which is small enough to be integrated into a mobile phone.<sup>466</sup> As the research advances and produces containers or container seals capable of mass production, the CBP will incorporate them into its requirements for C-TPAT or the Container Security Initiative.<sup>467</sup> Importers will be required to use smart containers or secure seals or risk having their containers being classified as “high-risk.” According to the U.S. Commissioner for Customs “[i]f the containers entering our ports are not suitably sealed with at least an ISO certified high-security mechanical seal, we simply cannot view them as ‘low risk’.”<sup>468</sup> Shippers who use the smart containers will be rewarded with expedited clearance in the forms of a “green lane.”<sup>469</sup> Therefore, the development of a patented smart container represents a potentially lucrative field of research for companies. The implementation of smart containers could be achieved by means of Articles IX and X of the 1972 Convention, which lay down

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<sup>463</sup> Robert C. Bonner, *Remarks to the C-TPAT Conference San Francisco, California*, 30 October 2003 [hereinafter U.S. Customs Commissioner, Remarks of 30 October 2003].

<sup>464</sup> See Robert C. Bonner, U.S. Commissioner for Customs, *Remarks before the U.S. Customs and Border Protection 2003 Trade Symposium, Washington, D.C.*, 20 November 2003 [hereinafter U.S. Customs Commissioner, Remarks of 20 November 2003].

<sup>465</sup> See US Bureau of Customs and Border Protection, *How Do You Make A Container Smart?*, CUSTOMS AND BORDER PROTECTION TODAY, December 2003; *Technology Adds Some 'Smarts' to Sea Containers*, CUSTOMS AND BORDER PROTECTION TODAY, September 2004.

<sup>466</sup> *Id.*

<sup>467</sup> See Robert C. Bonner, *Remarks to the CBP Trade Symposium, Ronald Reagan Building, Washington, D.C.*, 11 March 2005. (“Developing a container security device is still a work in progress, and I hope this step will be completed this year. [...] It is the lynchpin to achieving the Green Lane”). See also Robert C. Bonner, *Remarks to the U.S. Chamber of Commerce Washington, D.C.*, 18 November 2005.

<sup>468</sup> U.S. Customs Commissioner, Remarks of 30 October 2003

<sup>469</sup> *Id.*

procedures for amending the convention and annexes.<sup>470</sup> The importance of container seals is also recognized by the RKC, which establishes minimum standards for customs seals.<sup>471</sup>

## 1.6. Benefits of CSI Participation

CBP rewards the private sector for investing in inspection equipment and liaising with its officers in the inspection of containers by granting expedited or green lane clearance for containers from the seaport. In the words of one security expert, the aim of this is “[t]o have the incentives for action trump the incentives for inaction.”<sup>472</sup> In the event of a terrorist attack, use of a CSI port guarantees foreign exporters undelayed access to U.S. markets and, according to CBP, constitutes an economic advantage.<sup>473</sup> This represents an important advantage for seaports over their competitors insofar as the former can attract greater business from importers anxious to ensure the reliability of their supplies.<sup>474</sup> The U.S. Commissioner for Customs has described this benefit as follows:

*“If U.S. and host-government’s customs officials have cleared a shipment at the port of export, it will get expedited processing and release upon arriving in the United States. This gets importers’ goods to American markets more quickly [...].”*<sup>475</sup>

The rapid expansion of CSI suggests that this benefit has encouraged seaports to participate in the CSI.<sup>476</sup> The rationale is that expenditure on acquiring inspection equipment and liaising with CBP is more than compensated by the added custom that the seaport will obtain from importers eager for their goods to obtain expedited clearance.

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<sup>470</sup> *Supra n.* 271.

<sup>471</sup> See Standard 16 of the RKC, p. 16, para. 7, “Customs seals and fastenings used in the application of Customs transit shall fulfil the minimum requirements laid down in the Appendix to this chapter.” According to Article 19 of the TIR Convention, “the specification of Customs seals is left to the discretion of national Customs authorities.” It also refers to the Container Convention, see pp. 12 – 13, Standard 10; p.20 para. 8.2., Standard 20.

<sup>472</sup> See Flynn p. 102, referring to the situation that terminal operators may not want to invest in security because shippers may prefer to use smaller ports with less security and its associated costs.

<sup>473</sup> See CSI FACT SHEET, p. 4.

<sup>474</sup> See UNCTAD REPORT 2003, p. 21 at para. 54.

<sup>475</sup> See Bureau for Customs and Border Protection, *CBP’s Container Security Initiative provides roadmap to international trade accord*, CUSTOMS TODAY, July/August 2005.

<sup>476</sup> Concerning the competitive pressures on ports to sign up to the CSI see Jau, pp. 8 and 12. It is notable that even minor ports such as Port Klang in Malaysia and the Port of Gothenburg in Sweden are anxious to join the CSI.

Although the benefit of expedited clearance for containers at U.S. seaports potentially represents a significant competitive advantage (especially considering “just-in-time” delivery practices),<sup>477</sup> it is uncertain how expedited clearance translates into trade figures or whether CSI seaports are actually seeing an increase in custom which justify the costs of acquiring, operating, maintaining and upgrading inspection equipment (which can be considerable). It should also be observed that expedited or “green lane” clearance for imports is also contingent on the satisfaction of other requirements. According to the U.S. Commissioner for Customs, a shipment will receive “green lane” treatment if it comes from a:

- foreign vendor that meets C-TPAT security standards at the point of loading or stuffing, or a C-TPAT importer that has assured its foreign vendors meet C-TPAT security standards at point of stuffing, and
- uses a C-TPAT smart container,
- is shipped through a CSI port, and
- carried on board a C-TPAT carrier's vessel,
- for delivery to a C-TPAT importer.<sup>478</sup>

This gives the impression that shipping goods to the United States from a CSI port, in itself, will not necessarily guarantee expedited clearance by CBP. Considering that C-TPAT is primarily designed for U.S. companies, it also appears that full expedited clearance will only be available to U.S. importers. On the other hand, it has also been reported that cargo from CSI ports is automatically subject to less scrutiny by CBP officers at major U.S. ports.<sup>479</sup>

## **2. Administration**

Prior to 9/11, several government agencies were responsible for the security of containerized transportation<sup>480</sup> and they carried out border inspections in relation to immigration, customs and

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<sup>477</sup> *Contra S. Hrg.* 109-186, p. 31 which refers to CSI ports as “a significant economic advantage” for countries.

<sup>478</sup> U.S. Customs Commissioner, Remarks of 30 October 2003.

<sup>479</sup> ASSESSMENT OF U.S. EFFORTS, p. 19.

<sup>480</sup> For an overview of the government bodies involved in border security see CRS REPORT FOR CONGRESS, BORDER SECURITY: KEY AGENCIES AND THEIR MISSIONS (RS21899), updated 9 May 2005.

animal and plant health. Investigations into 9/11 revealed that the number of agencies involved in international trade hampered the implementation of an effective security policy.<sup>481</sup> The scattered organization of border control hindered the effective exchange of information and formulation of a border security policy, with each government agency pursuing its own strategy<sup>482</sup> and even engaging in interagency “turf fights.”<sup>483</sup> The events of 9/11 therefore led to an extensive reorganization of government departments.<sup>484</sup> With the creation of the Department of Homeland Security, border agencies were integrated into a single department which had overall responsibility for national security. In addition, the Homeland Security Act 2002 implemented the concept of “One Face at the Border.” The United States now has a unified inspections operation at borders; one inspector is charged with examining people, plants, goods and cargo upon entry to the country. This policy now means that Customs and Border Protection (CBP) inspectors are essentially interchangeable and responsible for all primary inspections.<sup>485</sup> As a result of this momentous re-organization, the administration of the Container Security Initiative involves the following bodies:

## 2.1. The Department of Homeland Security

The Department of Homeland Security (DHS) was created by Executive Order on 8 October 2001,<sup>486</sup> in order to develop and co-ordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.<sup>487</sup> The Order was placed on statutory footing by the Homeland Security Act of 2002<sup>488</sup> and the DHS became operational on 1

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<sup>481</sup> REPORT OF THE INTERAGENCY COMMISSION ON CRIME AND SECURITY IN U.S. SEAPORTS 2000 [hereinafter INTERAGENCY REPORT 2000], p. 136. (“In most of the ports we found a lack of coordination among the various police and security personnel and a lack of common standards for ensuring security.”).

<sup>482</sup> *Ibid.* p. 137 – 140, Findings 6i – 6k; *see also* FLYNN, pp. 84 – 85.

<sup>483</sup> Loy and Ross, p. 4.

<sup>484</sup> For an overview of the reorganization of agencies involved in border security following 9/11 see JENNIFER E. LAKE, CRS REPORT FOR CONGRESS, DEPARTMENT OF HOMELAND SECURITY: CONSOLIDATION OF BORDER AND TRANSPORTATION SECURITY AGENCIES, (RL35149), updated 22 May 2003 [hereinafter CRS REPORT FOR CONGRESS 22 MAY 2003], pp. 4 ff.

<sup>485</sup> See generally, CRS REPORT FOR CONGRESS, BORDER SECURITY: INSPECTIONS, PRACTICES, POLICIES AND ISSUES, (RL32399), 26 May 2004 [hereinafter CRS REPORT 26 May 2004].

<sup>486</sup> Exec. Order 13228 Establishing the Office of Homeland Security and the Homeland Security Council, 8 October 2001.

<sup>487</sup> *Id.*, Section 2.

<sup>488</sup> *Supra n.* 170.

March 2003. It is the first single government agency to be responsible for border management and transportation security.<sup>489</sup>

Section 101 (a) of the HSA 2002 establishes a Department of Homeland Security, as an executive department of the United States. The Department of Homeland Security is headed by a Secretary who is appointed by the President (Section 102). The primary mission of the DHS forms a comprehensive counter-terrorist strategy, embracing prevention, protection, response and recovery and is laid down in Section 101 (b):

- prevent terrorist attacks within the United States;
- reduce the vulnerability of the United States to terrorism; and
- minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States.

A major goal of the Department of Homeland Security is to enhance the protection of critical infrastructure and key resources, which includes the nation's shipping routes.<sup>490</sup> It is exclusively focused on counter-terrorism and this anti-terrorist focus is also reflected in the missions of subordinate agencies which are responsible for border and transportation security. At the same time, Section 101 (f) requires the DHS to ensure that the overall security of the United States is not diminished by efforts, activities and programmes aimed at securing the homeland. Therefore, it must strike a balance between improving security and facilitating legitimate travel and trade.

Concerning maritime security, the Department of Homeland Security has the task of implementing the National Strategy for Maritime Security 2005.<sup>491</sup> It carries out comprehensive vulnerability assessments of strategic facilities and coordinates security research and development.<sup>492</sup> It also analyses the threat of terrorism and co-ordinates anti-terrorist strategy

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<sup>489</sup> CRS REPORT FOR CONGRESS, 22 May 2003, p. 4.

<sup>490</sup> See DEPARTMENT OF HOMELAND SECURITY, SECURING OUR HOMELAND, U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN, February 24, 2004, pp. 20 – 21.

<sup>491</sup> See generally NSPD41/HSPD13; THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 10.

<sup>492</sup> For example, during the first year of its creation, the Department for Homeland Security expanded the Container Security Initiative to 17 ports. In addition, \$482 million in port security grants were distributed throughout the country.

within the executive branch. In this respect, the Secretary is required to appoint a Special Assistant to the Secretary who *inter alia* must work with federal entities, academia and the private sector in developing innovative approaches to address homeland security challenges (Sec 102 (f) (5)).

The Department acts as a co-ordinating body for the diverse government departments responsible for national security<sup>493</sup> and administers a number of security measures through several agencies.<sup>494</sup> It requires co-operation at all levels of government to ensure that critical information is shared effectively between the diverse government departments.<sup>495</sup> Accordingly, the Secretary has the authority to enter into agreements with other executive agencies, co-ordinate policy with non-federal entities with regard to homeland security and issue regulations (Section 102 (c) and (e)).

## **2.2. The Directorate of Border and Transportation Security**

The Directorate of Border and Transportation Security is located within the DHS and is responsible for border security. The Directorate consolidates a number of border security agencies including the CBP and the Bureau of Immigration and Customs Enforcement. Section 401 HSA 2002 appoints an Undersecretary for Border and Transportation Security to head the Directorate of Border and Transportation Security and Section 402 (1) – (8) defines his responsibilities. It states that the Secretary, acting through the Under Secretary for Border and Transportation Security is responsible for (1) preventing the entry of terrorists and the instruments of terrorism into the United States; (2) securing the borders, territorial waters ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including

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<sup>493</sup> The DHS is to carry out its coordination function through the Office of State and Local Coordination: see Section 102 (c) of the Homeland Security Act.

<sup>494</sup> Section 101 (b) (2) of the Homeland Security Act declares that the primary responsibility for investigating and prosecuting terrorism does not lie with the Department but in the relevant Federal, State and local law enforcement agencies. However, entities transferred to the Department (e.g. CBP) may have jurisdiction where provided by law. Security programmes administered by the DHS include US-VISIT, NEXUS and SENTRI, FAST lanes and fast and secure visas. For an overview of the efforts of the Department of Homeland Security to secure U.S. transportation systems, see Tom Ridge, Secretary of U.S. Department of Homeland Security, Statement before the Senate Committee on Commerce, Science and Transportation, 9 April 2003; see also U.S. Customs Commissioner, Testimony of 26 January 2004.

<sup>495</sup> Information sharing is facilitated by the Homeland Security Information Network which aims to improve the flow of threat information to state, local and private sector partners.

managing and co-ordinating those functions transferred to the Department at ports of entry. Section 402 (6) requires the Directorate to administer the customs laws of the United States which relate to border security. In particular, Section 402 (8) requires the Under-Secretary to ensure the speedy, orderly, and efficient flow of lawful traffic and commerce in carrying out these responsibilities. The new Directorate improves the coordination of measures to safeguard transportation systems and secure the border by consolidating the agencies responsible for border, coastline, and transportation security. The Directorate is divided into two bureaus: the Bureau for Customs and Border Protection and the Bureau of Immigration and Customs Enforcement.

### **2.3. U.S. Customs and Border Protection Bureau (CBP)**

According to the Revised Kyoto Convention (RKC), customs services perform three functions: to enforce the law, collect duties and taxes and provide prompt clearance of goods and ensuring compliance. Maritime security has also formed a traditional task of the U.S. customs administration.<sup>496</sup> Research has shown that customs procedures have a significant impact on the movement of persons and goods in international trade<sup>497</sup> and customs administrations have attempted to streamline their procedures in response to the growth in international trade.<sup>498</sup> Although 9/11 served to shift the focus to security, the aim of the CSI was (and still is) to strike a balance between trade security and facilitation by using risk assessment techniques. In this respect, it reflects the RKC and Framework of Standards.

According to Article I, Section 8, Clause 3 of the United States Constitution, Congress has the broad power to “regulate commerce with foreign nations.” This power is necessary to prevent smuggling and prohibited articles from entering the United States borders. The responsibility to carry out this role has traditionally been exercised by the United States Customs Service which was created by statute in 1790. In order to prevent illegal goods entering the United States and to

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<sup>496</sup> See DEPARTMENT OF HOMELAND SECURITY, MARITIME COMMERCE SECURITY PLAN, OCTOBER 2005 p. 2.

<sup>497</sup> See RKC, General Annex, Chapter 1, Guidelines on General Principles, p.3, para.1.

<sup>498</sup> The growth in international trade has been driven by electronic commerce, see Columbus Ministerial Declaration on Trade Efficiency, paras. 6 and 7.



assess customs duties and tariffs it has statutory powers to inspect goods imported into the United States.<sup>499</sup>

On 1 March 2003, the United States Customs Service was renamed “The United States Bureau of Customs and Border Protection (BCBP).”<sup>500</sup> The change of name and accompanying reorganization reflected the fact that U.S. Customs was “thrust onto the frontlines of ... [the] war on terrorism.”<sup>501</sup> Today, CBP exists as a government agency under the supervision of the Border and Transportation Security Directorate within the Department of Homeland Security.<sup>502</sup> Section 403 HSA 2002 transfers to the Secretary of Homeland Security the functions, personnel, assets and liabilities of (1) the U.S. Customs Service of the Department of the Treasury including the functions of the Secretary of the Treasury relating thereto.

The primary mission of CBP is to protect America against further terrorist attacks and is the agency responsible for maritime cargo security.<sup>503</sup> However, it must also perform traditional law enforcement tasks of U.S. Customs as well, including illegal drug and contraband interdiction, regulating trade, protecting intellectual property rights by seizing counterfeit goods and investigating money laundering and financial crimes.<sup>504</sup> In accordance with the Trade Act 2002, CBP must also balance the interests of trade and security by facilitating the entry of legitimate trade. Therefore it performs a dual role: protecting both the border and commercial operations. Since 9/11, the “One face at the Border” policy has assigned the responsibility for managing, controlling and securing U.S. borders to CBP alone. The agency has the power to issue regulations concerning border entry and formulates its policy in conjunction with the U.S.

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<sup>499</sup> The main authority to carry out inspections is contained in the Tariff Act of 1930. For an overview of U.S. Customs’ tasks and powers see CRS REPORT, 26 May 2004.

<sup>500</sup> Prior to this reorganization, border responsibilities were distributed amongst four different entities in three different departments of government. The new agency consolidates the U.S. Customs Service, the Immigration and Naturalization Service and Border Patrol from the former INS, the Department of Agriculture’s Animal and Plant Health Inspection Service. See *supra n.* 484, p. 2.

<sup>501</sup> See S. Hrg. 109-186, p.1.

<sup>502</sup> U.S. Customs was originally under the Department of the Treasury. However, Section 403 of the Homeland Security Act transferred most customs functions to the Department of Homeland Security.)

<sup>503</sup> See the mission statement of the CBP: < <http://www.customs.ustreas.gov/xp/cgov/toolbox/about/mission/guardians.xml> >.

<sup>504</sup> U.S. Customs Commissioner, Speech of 17 January 2001 (“Though we continue to devote resources to those traditional threats, our priorities since September 11th have shifted dramatically to the war on terrorism”).

Administration, Congress, the business community and the public.<sup>505</sup> It also shares the task of implementing maritime security measures with the U.S. Coast Guard, which is responsible for the waterborne movement of cargo and security at port facilities.<sup>506</sup>

Like all other law enforcement bodies, the jurisdiction of the U.S. Customs Service is limited to the borders of the United States.<sup>507</sup> This presents a problem in pursuing a pre-emptive counter-terrorism strategy which requires customs to inspect container cargo *before* they arrive at the U.S. port of destination. However, despite their limitations, the Declarations of Principles have enabled CBP to overcome this territorial limitation to a large extent. This is a revolutionary development in mutual assistance which has traditionally permitted the presence of customs officers on foreign territory under limited circumstances (e.g. to continue surveillance or pursuit of offenders).<sup>508</sup> By contrast, the DoPs permit liaison between customs administrations for an unlimited period of time and within relatively undefined parameters.<sup>509</sup>

The United States customs service has a wide range of powers to enforce customs law and regulations. A “customs officer” is defined under 19 U.S.C. 1401 as “any officer of the United States Customs Service or any commissioned warrant or petty officer of the Coast Guard” or any other person duly authorized to perform any duties of a customs officer. The basic provision regulating their powers is 19 U.S.C. 482, which authorizes customs officers to search vehicles and persons both within and without their respective districts. The subject of customs inspections are invariably goods or vessels entering or leaving the country.

The sole authority to examine cargo is contained in U.S. Code 1434. This provision grants U.S. Customs (now CBP) the power to regulate the entry of vessels into the United States. Section 1461 requires all merchandise and baggage imported or brought in from any contiguous country

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<sup>505</sup> CRS REPORT, 26 May 2004, pp. 6 – 8.

<sup>506</sup> Concerning the division of tasks between CBP and the U.S. Coast Guard see S. Hrg. 109–282 (Statement of Rear Admiral Larry Hereth), p.17.

<sup>507</sup> Cf. Mikuriya, pp. 62 – 63. According to 19 USC § 1401 (h), “[t]he term “United States” includes all Territories and possessions of the United States except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the island of Guam.”

<sup>508</sup> See arts. 19 – 23 of the Johannesburg Convention.

<sup>509</sup> For example, the first DoPs were concluded in 2002 and are still in force. None of the DoPs examined stipulates a minimum duration.

to be unladen in the presence of and inspected by a customs officer at the first port of entry at which the same shall arrive. According to Section 1467, whenever a vessel from a foreign port arrives at a port or place in the United States, the appropriate customs officer for such port or place of arrival may “cause inspection, examination and search to be made of the persons, baggage and merchandise discharged or unladen from such a vessel.” Section 1499 requires the customs service to inspect a “sufficient number of shipments” and examine a “sufficient number of entries” to ensure compliance with the laws enforced by the customs service. 19 U.S.C. § 1581 (a)<sup>510</sup> grants a general authorization for performing border searches<sup>511</sup> in respect of persons and things.<sup>512</sup> Customs may carry out the searches without cause<sup>513</sup> at points of embarkation<sup>514</sup> and importation.<sup>515</sup>

Customs officers also have a number of enforcement powers. According to 19 USC Section 1589a, they may 1) carry a firearm; 2) execute and serve a warrant, subpoena or summons or any other process issued under the authority of the United States, and 3) make an arrest without a warrant for any offence against the United States. The power of arrest includes any offence committed within the officer’s presence or to a felony cognizable under the laws of the U.S. which are committed outside the officer’s presence, provided that he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony.

The statutory powers of customs officers are limited to the territory of the United States. However, within its jurisdiction, U.S. Customs enjoys a privileged constitutional position and have broad powers to carry out their law enforcement activities. In *United States v. Ickes*,<sup>516</sup> the U.S. Court of Appeals interpreted §1581 “against the backdrop of an ‘impressive historical pedigree of the Government’s power and interest’ at the border.” The Court noted that this backdrop had traditionally persuaded courts to interpret the provision “in an expansive manner.”

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<sup>510</sup> In the case *United States v. Ali Boumelhem*, 2003 Fed App. 0281P (6th Cir.), 12 August 2003, the United States Courts of Appeals examined *inter alia* the powers of U.S. Customs to conduct searches. It provided an overview of the relevant case law on this statutory provision.

<sup>511</sup> See *United States v. Molina-Tarazon*, 279 F.3d 709, 712 n.4 (9th Cir. 2002).

<sup>512</sup> *United States v. 1903 Obscene Magazines*, 907 F.2d 1338, 1341 (2d Cir. 1990).

<sup>513</sup> *United States v. Glasser*, 750 F.2d 1197, 1204 (3d Cir. 1984).

<sup>514</sup> *United States v. Ajlouny*, 629 F.2d 830, 836 n.7 (2d Cir. 1980).

<sup>515</sup> *United States v. 1903 Obscene Magazines*, 907 F.2d 1338, 1341 (2d Cir. 1990).

<sup>516</sup> *United States v. Ickes* (2005) United States Court of Appeals for the Fourth Circuit, No. 03 – 4907 (CR-03-164).

Although the Fourth Amendment guarantees freedom from unreasonable searches and seizures as a fundamental right,<sup>517</sup> the Courts have granted Customs officers a special constitutional position by means of the “border search doctrine.” Accordingly, in *United States v. Ramsey*, the court held that border searches without probable cause and without a warrant are nevertheless reasonable pursuant to the meaning of the Fourth Amendment.<sup>518</sup> In *United States v. Thirty-seven Photographs* the U.S. Supreme Court held that a port of entry is not a traveller’s home.<sup>519</sup> The Court observed that inspections of luggage was a characteristic function of Customs officers and described it as “an old practice and is intimately associated with excluding illegal articles from the country.”<sup>520</sup>

According to case law, border inspections are not subject to the constraints imposed by the Fourth Amendment for three reasons. First, border searches are carried out in order for the United States to protect itself against unwanted imports or entrants and must therefore be effective for this purpose. Second, a port of entry has a different legal status from other places within the country. A person can only claim his full constitutional rights once he has entered the country lawfully.<sup>521</sup> Finally, there is a public interest in ensuring that narcotics and other threats to public health and security are prevented from entering the country. The courts must satisfy this public interest. These broad powers are justified in the interests of self-protection. The fact that U.S. Customs is now a lead government agency in ensuring national security is likely to reinforce the already broad powers granted to customs officials in the execution of their duties. This was expressly stated by the U.S. Court of Appeals in the recent case *United States v. Ickes*.<sup>522</sup> Section 341 (a) of the Trade Act 2002 is also important in this respect because the provision increases the immunity of Customs officers from civil liability when conducting a search provided that they performed the search in good faith and used reasonable means while effectuating such search.<sup>523</sup>

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<sup>517</sup> The text of the Fourth Amendment states “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

<sup>518</sup> *United States v. Ramsey*, 431 U.S. Supreme Court 606 (1977), pp. 616 – 619.

<sup>519</sup> 402. U.S. 363 (1971) at p. 376 per Mr. Justice White.

<sup>520</sup> *Id.*

<sup>521</sup> The Supreme Court made clear in *Carroll v. United States*, 267 U.S. 132 (1925) at 154, that travellers enjoy their full constitutional rights once they are within the country.

<sup>522</sup> See *United States v. Ickes*, at p. 6 per Wilkinson, Circuit Judge.

<sup>523</sup> 19 U.S.C. 482

As a result of this amendment customs officials no longer have to show “reasonable cause to suspect there is merchandise which was imported contrary to law” before conducting a search.<sup>524</sup>

The U.S. Commissioner for Customs heads the CBP and is responsible for developing strategies, including the Container Security Initiative. He is appointed by the President with the advice and the consent of the Senate.<sup>525</sup> He reports directly to the Secretary for Homeland Security who, in turn, is directly answerable to the President of the United States. The powers of the U.S. Customs Commissioner are largely determined by the Secretary of Homeland Security. According to Section 102 (a) (3), the functions of all officers, employees and organizational units of the Department are vested in the Secretary. The Secretary has the authority to delegate any of his functions to any officer, employee or organizational unit of the Department.<sup>526</sup> The Secretary’s functions includes the authority to enter into “co-operative agreements” as may be necessary to carry out his statutory responsibilities.<sup>527</sup> The U.S. Commissioner for Customs is responsible for the implementation of the Container Security Initiative.<sup>528</sup>

Complaints against Customs policy and decisions are dealt with by the Office of Trade Relations.<sup>529</sup> The financing of security measures is crucial to the effectiveness of security measures and CBP must take into account the recommendations of the Government Accountability Office together with the Committee of Ways and Means when formulating policy. Appeals against the decisions of CBP are made to the Office of Trade Relations. In addition, the Court of International Trade has jurisdiction to hear appeals and protests against the agency’s acts.

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<sup>524</sup> On the legal implications of this amendment see Nathaniel Saylor, *The Untouchables: Protections from Liability for Border Searches Conducted by U.S. Customs in Light of the Passage of the Good Faith Defense in 19 U.S.C. § 482 (B)*, Ind. L. Rev. 37 275, p. 277 (describing the provision as a “radical departure from the traditional protections granted to Customs and was hotly debated in Congress”).

<sup>525</sup> Section 411 (b) of the Homeland Security Act.

<sup>526</sup> *Id.* Section 102 (b) (1).

<sup>527</sup> *Id.* Section 102 (b) (2).

<sup>528</sup> See S. Hrg. 109-186, p. 2 (“Under the leadership of Commissioner Bonner, CBP aggressively implemented these programs rather than endlessly debate the details here in Washington”).

<sup>529</sup> Replacing the Office of Trade Ombudsman, see Bureau of Customs and Border Protection, news release *U.S. Customs Establishes New Office of Trade Relations, Appoints Director*, 7 January 2002.

## 2.4. The National Targeting Centre (NTC)

The Customs and Border Protection National Targeting Centre was formerly known as the Office of Border Security.<sup>530</sup> It was created in October 2001 and forms part of CBP's Office of Field Operations. The priority mission of the NTC is to provide tactical targeting and analytical research support for anti-terrorism efforts using the Automated Targeting System (ATS). The Centre also liaises with other border security agencies including: U.S. Coast Guard, Immigration & Customs Enforcement, Federal Air Marshals, Federal Bureau of Investigation, Transportation Security Administration, Department of Energy.<sup>531</sup> In particular, the NTC also supports the FDA in its administration of the Bio-terrorism Act. The staff of the NTC includes representatives from all CBP disciplines as well as liaison staff from the intelligence community. According to the U.S. CBP, the NTC also supports other CBP field elements, "including Container Security Initiative personnel stationed in countries throughout the world, with additional research assets for passenger and cargo examinations."<sup>532</sup>

## 2.5. Government Accountability Office

The mission of the Government Accountability Office is to "support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people."<sup>533</sup> In fulfilling its mission, the GAO "examines the use of public funds; evaluates federal programmes and activities; and provides analyses, options, and other assistance to help the Congress make effective oversight, policy, and funding decisions."<sup>534</sup> In particular, the "GAO's work includes financial audits, programme reviews and evaluations, policy analyses, legal opinions and analyses, and

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<sup>530</sup> Joint Hearing Before The Subcommittee On Crime, Terrorism, And Homeland Security Of The Committee On The Judiciary And The Subcommittee On Intelligence And Counterterrorism Of The Select Committee On Homeland Security House Of Representatives, *Progress In Consolidating Terrorist Watchlists — The Terrorist Screening Centre (TSC)*, 108<sup>th</sup> Congress (2<sup>nd</sup> Session), 25 March 2004. (Statement by Charles Bartoldus), p. 15.

<sup>531</sup> See Department of Homeland Security, *Fact Sheet: U.S. Customs and Border Protection's National Targeting Centre*, 7 September 2004.

<sup>532</sup> See Bureau of Customs and Border Protection, *National Targeting Centre Keeps Terrorism at Bay*, CUSTOMS AND BORDER PROTECTION TODAY, March 2005.

<sup>533</sup> GAO REPORT, GAO STRATEGIC PLAN 2004-2009, 1 March 2004

<sup>534</sup> *Id.*

investigations.”<sup>535</sup> It plays a leading role in the oversight of homeland security measures and continually monitors “the progress of the department and other critical parts of the federal government in becoming effective structures for meeting national needs.”<sup>536</sup> With regard to the Container Security Initiative and related security measures, the GAO has issued a number of reports which provide valuable insight into their practical effectiveness.

### **3. Conclusion**

The Container Security Initiative therefore builds on existing initiatives in terms of co-operation with the private sector as well as the infrastructure used to process information and its organization. The introduction of the Container Security Initiative could be considered as a programme “aimed at continuously modernizing Customs procedures and practices”, referred to in the Revised Kyoto Convention.<sup>537</sup> The CBP did not approach the need for container security purely from a law enforcement perspective but sought (to some extent) to balance it with the needs of trade facilitation, as required by statute<sup>538</sup> (i.e. by means of risk management). The administration of the measure has been improved since its introduction owing to the investigations of oversight bodies and the enactment of the SAFE PORT ACT 2006 clarifies the definitions and lays down standards which must be achieved within fixed time limits. Finally, although the measure appears based on a hypothetical “nightmare” scenario, its pre-emptive strategy nevertheless corresponds to WMD anti-proliferation efforts at international level.<sup>539</sup> The findings may be summarized as follows:

#### **1. 9/11 made border security the primary mission of the US customs authority**

Customs not only facilitates trade but also enforces the fiscal obligations of importers as well as restrictions and prohibitions on movements of people and goods. The importance of these two activities is recognized by international customs conventions<sup>540</sup> although prior to 9/11 the focus

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<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> See Preamble to Appendix I of the RKC.

<sup>538</sup> See e.g. Section 343 (a) (3) Trade Act 2002.

<sup>539</sup> See e.g. Resolution 1450, adopted by the Security Council at its 4667th meeting, on 13 December 2002 [hereinafter S/Res/1450 (2002)].

<sup>540</sup> See e.g. RKC, General Annex, Chapter 6, Guidelines on Customs Control, p. 6, para. 3; see also Article 5, TIR Convention.

was firmly on trade facilitation. This event served not only to shift the focus of CBP to border security but also to extend the law enforcement activities of border authorities to anti-terrorist activities. According to the WCO's Framework of Standards (FoS) customs administrations have a crucial role to play in counter-terrorism:

*“As government organizations that control and administer the international movement of goods, Customs administrations are in a unique position to provide increased security to the global supply chain and to contribute to socio-economic development through revenue collection and trade facilitation.”*<sup>541</sup>

It is notable that this statement places security next to the traditional tasks of customs. There is a danger that customs could choke off trade through excessive security regulations and the added focus on security could cause it to neglect its other (traditional) which society are also important for society. This need to balance facilitation and compliance is a challenge which pre-dates 9/11<sup>542</sup> and, in fact, the CSI reflects many concepts derived from customs modernization efforts such as electronic data exchange, adoption of risk assessment measures and a reorganization of customs administrations.

## **2. The Container Security Initiative is not novel but builds on earlier strategies**

The strategy of the Container Security Initiative echoes the aims of earlier policies developed by U.S. Customs, particularly those incorporated into the NAFTA Implementation Act 1993.<sup>543</sup> During the 1980s the Customs Service recognized that it was failing to perform its dual roles of trade facilitation and law enforcement properly<sup>544</sup> and undertook modernization measures in recognition of the challenges presented by globalization. On the one hand, it required greater efficiency to cope with increased trade. On the other, it required increased law enforcement to

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<sup>541</sup> See Introduction to the Framework of Standards, p. 6, para. 1.1.

<sup>542</sup> See e.g. Preamble to the RKC, “Noting that the significant benefits of facilitation of international trade may be achieved without compromising appropriate standards of Customs control.”

<sup>543</sup> Most notably, the National Customs Automation Programme and informed compliance, see Section 631 and 637, Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057. The Act entered into force on 8 December 1993. See Message from the Commissioner, Revised Kyoto Convention, General Annex, Chapter 6 (Guidelines on Customs Control), pp. 46 – 110.

<sup>544</sup> See The National Partnership for Reinventing Government, *People, Processes and Partnerships: Customs in, Creating a Government that Works Better and Costs Less*, Status Report September 1994. This report provides an overview of the agency's plans for comprehensive change.



combat cargo crime.<sup>545</sup> U.S. Customs sought to meet these challenges by moving away from the traditional adversarial approach of customs law enforcement to acting in partnership with the private sector in order to ensure compliance (so-called “informed compliance”). In addition, the completion of customs formalities could be speeded up by the electronic submission of data.<sup>546</sup> The partnership between customs and the private sector and the electronic submission of information formed the subjects of the NAFTA Implementation Act 1993. The Act required Customs to provide importers with all the information necessary to ensure compliance with their legal obligations<sup>547</sup> and shifted the legal responsibility for ensuring customs compliance onto importers.<sup>548</sup> It also replaced transaction-by-transaction processing with account-based processing.<sup>549</sup> These developments proved mutually beneficial to the public and private sector and improved customs law enforcement. This public – private partnership also extended to law enforcement activities: in 1994 U.S. Customs announced the initiative “People, Processes and Partnerships”<sup>550</sup> and the Business Anti-Smuggling Coalition (BASC) was also created in 1996 as a business-led alliance supported by the U.S. Customs Service with the aims of combating narcotics smuggling via commercial trade. This programme enabled customs to cut off contraband at its source in foreign ports.<sup>551</sup> Other industry partnership programmes include the Carrier Initiative Programme (CIP, established in 1984) and the Americas Counter Smuggling

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<sup>545</sup> Cf. Preamble to the RKC, “Noting that the significant benefits of facilitation of international trade may be achieved without compromising appropriate standards of Customs control.”

<sup>546</sup> See Bureau of Customs and Border Protection, *Everything Changed 1989 – 2003*, U.S. Customs Today, February 2003.

<sup>547</sup> Section 625 (e) NAFTA Implementation Act 1993 (19 U.S.C. 1625 (e)).

<sup>548</sup> *Ibid.*, Section 637 (a) (19 USC Section 1484 (a) (1) (B)) the “importer of record” must, using reasonable care, file with the Customs Service “the declared value, classification and rate of duty applicable to the merchandise, and other such documentation [...]” The importer must therefore provide customs with all pertinent information on a shipment and properly classify the goods.

<sup>549</sup> *Ibid.*, Section 615 (U.S.C. 1509 (b)): U.S. customs uses audits to test an importer's compliance with his statutory requirements. If Customs decides that an importer is complying with the provisions and has adequate systems to ensure future compliance then the company will receive minimal inspections in future. Otherwise, future inspections could occur at a higher than average rate.

<sup>550</sup> FLYNN, p. 14.

<sup>551</sup> “The Business Anti-Smuggling Coalition, or BASC, and the Carrier Initiative have proven that we can team together to prevent the use of legitimate trade by drug trafficking organizations. We are drawing on that experience, and those models, to strengthen our defenses against the use of the legitimate trading system by international terrorist organizations.” See Robert C. Bonner, *Speech to the Trade Support Network (TSN)*, Washington, D.C., 22 January 2002.

Initiative (ACSI, established in February 1998).<sup>552</sup> The CSI therefore appears as the latest in a long line of security-related initiatives developed by U.S. Customs.

In this context, it is worth mentioning that risk management also reflects a global development as Customs administrations throughout the world are employing risk management techniques in order to identify high risk shipments and target their resources efficiently.<sup>553</sup> The WCO has been involved in creating a global framework for risk assessment through the Revised Kyoto Convention and more recently by the Framework of Standards to Secure and Facilitate Global Trade.<sup>554</sup> The Kyoto Convention recognized that simplification and harmonization can be accomplished by adopting modern techniques such as risk management controls and the application of information technology.<sup>555</sup>

### **3. Effective supply-chain security depends on partnership between customs authorities and the private sector**

As far as the CSI is concerned, partnership with the private sector in order to obtain advance information on cargo shipments and inspect high-risk cargo is essential because “it owns and operates the vast majority of the nation’s critical infrastructure and key resources.”<sup>556</sup> The incentive of expedited clearance to encourage private sector investment in security equipment at seaports resembles a *quid pro quo* arrangement familiar from e.g. concession contracts.<sup>557</sup> Also, the strategy of CBP in targeting CSI on the small number of seaports with the highest trade volumes (so-called megaports) is similar to the approach taken by customs administrations in external audit.<sup>558</sup>

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<sup>552</sup> Details on CBP’s industry partnership programmes can be found under <[http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/partnerships/](http://www.cbp.gov/xp/cgov/border_security/international_activities/partnerships/)>.

<sup>553</sup> See Standard 4 of the Framework of Standards, Annex 1, para. 4.2 defines risk assessment as “the systematic application of management procedures and practices which provide Customs with the necessary information to address movements or consignments which present a risk.”

<sup>554</sup> Risk management has been described as the key element in enabling Customs to adapt to the modern customs environment. Customs authorities must implement risk management techniques in order to simultaneously fulfil their wide range of tasks. See RKC: General Annex, Chapter 6, Guidelines on Customs Control, pp. 10 ff.

<sup>555</sup> Standards 6.3. and 7.4 of the RKC.

<sup>556</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 10.

<sup>557</sup> See Trujillo and Nombela, pp. 7 – 8.

<sup>558</sup> In some industrialized countries, the majority of revenue is collected from a small number of large importers. For example, in Australia 90% of revenue is raised by 15 importers. Ensuring partnerships with these importers lowers their risk and leaves the customs administration free to concentrate on the numerous but economically less significant smaller importers.

#### **4. Electronic data transmission is essential to the CSI but is resource-intensive and difficult to implement**

Concerning electronic data transmission, the NAFTA Implementation Act 1993 also required the Secretary to establish a National Customs Automation Programme.<sup>559</sup> This system aimed to facilitate the movement of trade through more effective trade account management as well as reducing the data reporting burden on the trading community.<sup>560</sup> The benefits of electronic data transmission in accelerating and simplifying customs formalities have also been recognized by international conventions.<sup>561</sup> At the same time, the experience of CBP with the ACE shows that information technology can be expensive to implement and it also requires the necessary skilled staff to operate and maintain it. IT systems can therefore prove a double-edged sword and it is significant that the Revised Kyoto Convention only permits its use “where it is cost-effective and efficient for the Customs and the trade” and requires customs administrations to use the “relevant internationally accepted standards.”<sup>562</sup> As far as the United States is concerned the CSI has provided CBP with added motivation to implement the ACE<sup>563</sup> because any technical problems in IT systems are likely to seriously compromise border security measures, including the CSI. It must also be recognized that an IT system is only as good as the information it processes. In this respect, the cargo manifest which CBP uses to assess the risk of containers is a commercial document and it has been said that it does not provide the necessary information for security purposes.<sup>564</sup>

#### **5. The CSI is essential a unilateral measure but has encouraged multilateral security agreements**

Another problem which arises with the CSI is that it is an uncompromisingly unilateral nature, which could conflict with the obligations of the United States under international law. Although

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<sup>559</sup> Section 411 (a) NAFTA Implementation Act 1993 (19 USC § 1411), defined as “an automated and electronic system for processing commercial importations.”

<sup>560</sup> See GOVERNMENT ACCOUNTABILITY OFFICE, INFORMATION TECHNOLOGY, CUSTOMS AUTOMATED COMMERCIAL ENVIRONMENT PROGRAM PROGRESSING BUT NEED FOR MANAGEMENT IMPROVEMENTS CONTINUES, MARCH 2005 (GAO – 05 – 267), p. 14.

<sup>561</sup> See e.g. Preamble to Appendix I of the RKC; Section B, para. 3 of the Appendix to the Columbus Ministerial Declaration on Trade Efficiency (“Maximize the use of information technology to assist Customs in the efficient performance of their duties.”)

<sup>562</sup> Standards 7.1 and 7.2 of the RKC.

<sup>563</sup> Concerning the steps for preparing for customs modernization, see Mikuriya, pp. 57 – 58.

<sup>564</sup> See WSC, Comments of 9 September 2002, p. 4; ASSESSMENT OF U.S. EFFORTS, pp. 26 – 27.

the subject of the measure is the international supply chain<sup>565</sup> it is important to recognize that the CSI is designed for the singular purpose of protecting U.S. seaports against terrorist attack. This unilateralism is clearly expressed by the National Security Strategy for the United States of America:

*“The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.”*<sup>566</sup>

The essence of the unilateral nature of the CSI is its refusal to recognize the security measures of its trading partners as sufficient to protect U.S. security interests. Accordingly, CBP believes that it is justified in subjecting container cargo to increased scrutiny by the mere fact that the seaports from which they depart for the United States are not members of CSI. The CBP has implemented the CSI by means of bilateral agreement with foreign customs administrations. However, although the criteria for joining the CSI appear objective, CBP does not offer membership to all states.

On the other hand, there are also indications that this unilateral measure could one day be superseded by a multilateral security regime. The United States has been able to use its immense trade leverage<sup>567</sup> to expand the CSI quickly among its major trading partners in accordance with its own security standards.<sup>568</sup> Almost six years after its introduction, the Container Security Initiative involves 58 seaports in 35 countries. According to commentators, bilateral agreement can be used as a means of reaching multilateral agreement.<sup>569</sup> Therefore, it was significant that the CBP decided to “internationalize” the measure by means of multilateral agreement. In June 2006, the Framework of Standards was issued by the WCO. It represents the first multilateral agreement specifically directed towards securing the international supply chain<sup>570</sup> and reflects

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<sup>565</sup> See pp. 21 ff.

<sup>566</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY FOR THE UNITED STATES OF AMERICA, 2002, p. 1. See also THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 20.

<sup>567</sup> WSC, Comments of 9 September 2002, p. 2.

<sup>568</sup> See INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, pp. 4 and 6.

<sup>569</sup> *Supra n. 58.*

<sup>570</sup> However, it is important to recognize that the CSI will continue to exist as a separate measure. According to the World Shipping Council is the world’s largest trading nation and accounts for 20 per cent of the world trade in goods.

many of the concepts used in the Container Security Initiative. Although this measure is voluntary and does not affect the continued existence of the CSI, it does lay the basis for a multilateral regime on supply chain security in the future.

**6. The SAFE Port Act 2006 partially codifies the CSI. However, its provisions are inadequate in a number of respects**

Concerning the administration of the measure, the Container Security Initiative has changed from being a non-regulatory measure to one which is regulated by statute (i.e. the SAFE Port Act 2006). The absence of statutory regulation seriously affected transparency because, in order to define the Container Security Initiative, reference had to be made to a range of sources including primary and secondary legislation,<sup>571</sup> frequently asked questions, speeches, press releases and bilateral agreements. This gave rise to difficulties in ascertaining the requirements of the measure, its strategy, definition of individual components as well as its future development. Owing to its complexity it is important that the CSI reflects the principle of transparency. Although its four components are interrelated, they are also linked to the initiatives of other government agencies and, to a certain extent, are developing at their own pace.<sup>572</sup> The CSI also shows that the introduction of security measures necessitates legal change in a number of different areas (e.g. advanced submission of data, data protection, penalties, appeals, liability, statutory definitions, time limits etc.) and requires the amendment of existing legislation. In addition, those affected by the CSI may also be importers situated in foreign countries which transit their goods through the United States and who may not be fully aware of the CSI's requirements and implications.

The most important piece of legislation relating to the CSI is the SAFE Port Act 2006 which provides a framework for its implementation, administration and monitoring. It requires the

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<sup>571</sup> The Trade Act 2002 and Homeland Security Act 2002 provide for the advance declaration of cargo information. In addition, the Maritime and Transportation Security Act provides for additional security measures at airports and harbours. However, they do not constitute a regulatory framework. There are many aspects of the CSI which require clarification, not least the legal remedies available to importers and the powers and legal status of U.S. Customs officials stationed at foreign seaports.

<sup>572</sup> This applies to the technical aspects of the CSI, namely container scanning and development of smart containers. Although both components are confronted by technical difficulties, the introduction of 100 per cent scanning is scheduled for 2012. However, no date has yet been set for the introduction of smart containers. It is significant that the SAFE Port Act does not make any reference to this latter aspect of the CSI. Section 204 refers generally to "container security standards and procedures."

submission of annual reports documenting operations at different CSI seaports, collation of statistics and presentation of budget requirements. It also provides for technical implementation and compatibility with national and international security measures. This is very important considering the increasing number of national security programmes<sup>573</sup> and the WCO's Framework of Standards. On the other hand, the Act also contains some vague provisions that could create uncertainty in the maritime industry insofar as they provide for more onerous security standards and initiatives.<sup>574</sup> In addition, the Act fails to provide for separate appeals procedure for importers or transit shippers affected by the CSI. This is significant because non-compliance could result in considerable economic loss for US importers or transit shippers owing to physical inspections of containers or heavy statutory penalties.<sup>575</sup> A separate, transparent procedure for lodging complaints and appeals against the decisions of the CBP which relate to security measures is therefore needed in order to ensure that complaints are dealt with efficiently and objectively and to clarify the interpretation of the relevant statutory requirements. This too would ensure the transparency of procedures, due process and accountability – especially with regard to foreign shippers.

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<sup>573</sup> See *supra*, n. 136.

<sup>574</sup> This is particularly the case concerning the amendments of Section 1701 IRCA 2007 to Section 232 of the SAFE Port Act. See WSC, Comments of 30 July 2007, pp. 2 – 5.

<sup>575</sup> See e.g. the statutory penalties in Section 117 of the MTSA 2002; 19 USC 1436.

## C. Compliance with WTO Law

### 1. Introduction

The World Trade Organization was founded on 1 January 1995 as a successor to the trade regime based on the General Agreement on Tariffs and Trade (GATT), which had been created in 1947. It is an international organization with *legal personality*.<sup>576</sup> The Preamble to the WTO agreement<sup>577</sup> declares the primary and overarching aims of the WTO to be the increase of prosperity in the form of living standards and full employment.<sup>578</sup> These principles play an important role in the interpretation of the covered agreements, although the fact that there is no hierarchy among them has made it difficult for the Panel to strike a balance between them which has proved universally acceptable, especially in environmental cases. In fact, the WTO Agreement is an umbrella instrument for a number of different agreements which relate to major aspects of world trade including goods, services and intellectual property.<sup>579</sup> It administers these agreements within a common institutional framework<sup>580</sup> and ensures that the members adhere to the fundamental principles of non-discrimination and national treatment.<sup>581</sup> There are currently 151 members ranging from least developed, developing and developed countries.<sup>582</sup> This diverse membership means that it is increasingly difficult to reach agreement on certain issues owing to competing goals and priorities. Nevertheless, since its creation in 1947, the GATT/WTO has

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<sup>576</sup> Article VIII of the Agreement Establishing the World Trade Organization. The WTO has been repeatedly characterized by the General Council as a “*sui generis* organisation established outside the United Nations systems”: see World Trade Organization, General Council, Conditions Of Service Applicable To The Staff Of The WTO Secretariat, Draft Decision, 14 October 1998 (WT/GC/W/102 Rev.1).

<sup>577</sup> The preamble to the WTO agreement is of fundamental importance in understanding the aims of the WTO. Moreover, the terms of the preamble have binding effect under international law. See Article 31 para. 2 of the Vienna Convention on the Law of Treaties.

<sup>578</sup> The concept of free trade is not even mentioned in the preamble to the WTO Agreement. See STOLL/SCHORKOPF, WTO WELTHANDELSORDNUNG UND WELTHANDELSRECHT, pp. 22 ff., who point out that free trade is only suggested in paragraph 3 of the Preamble (i.e. the reduction of customs and other trade barriers, which indicates a more restricted objective than “free trade”). Accordingly, the authors argue that trade liberalization is not an aim in itself but a secondary aim or instrument of other superior, political aims/objectives.

<sup>579</sup> There is no general hierarchy between the WTO agreements. According to the structure of international law, the WTO agreements have equal standing and are governed by the normal principles of international law.

<sup>580</sup> Article III:1, WTO Agreement.

<sup>581</sup> Article II:1, WTO Agreement.

<sup>582</sup> See CONSULTATIVE BOARD OF THE WTO, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, 2004, p. 9 (describing the creation of World Trade Organization as “the most dramatic advance in multilateralism since the inspired period of institution building in the 1940s”).

played a crucial role in the intensification of globalization.<sup>583</sup> In particular, it has made great progress in liberalizing trade for the benefit of its member states by reducing tariffs (the traditional means of protectionism) to negligible levels and has also provided a forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements.<sup>584</sup> The creation of the WTO as a result of the Uruguay Round extended trade negotiations into new areas such as services and intellectual property, although there has not been the liberalization in certain services (e.g. maritime transportation services) that was originally hoped for. With the Doha Development Agenda the WTO has made the reduction of poverty in developing countries a priority issue and the broad aim of assisting and promoting the interests of developing countries can be found in the WTO Agreement and covered agreements.

Although the WTO is described as a trade organization, issues such as the environment, labour conditions, human rights and now security (so-called “non-trade related issues”) are becoming increasingly important and it is difficult to define the limits to the scope of the WTO with certainty.<sup>585</sup> As one commentator states, “[t]here are no logical or inherent limits to trade regulation, and it remains a matter of political expedience and negotiations, rather than theory and legal classifications, to define the scope of WTO law.”<sup>586</sup>

The United States is also a member of the World Trade Organization and must comply with its obligations under the Agreement Establishing the World Trade Organization 1994 in accordance with the principle of *pacta sunt servanda*.<sup>587</sup> This principle is expressed in Article 26 of the VCLT, which states, “[e]very treaty in force is binding upon the parties to it and must be

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<sup>583</sup> *Id.* p. 10. There is no single definition of “globalization.” It is a term used at the beginning of the 1990s to describe the general increase in economic interdependence resulting from the liberalization of goods, services and capital and, recently, from the improvement of global transportation and the revolution in information and communication technology. See: STOLL/SCHORKOPF WELTHANDELSRECHT (2003), p. 239.

<sup>584</sup> Article III:2, WTO Agreement.

<sup>585</sup> For example, Article XXII GATT requires consultations “with respect to any matter affecting the operation of this agreement.” See JEFF WAENCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT (Cameron May, International Law and Policy), 2002, p. 135ff.

<sup>586</sup> THOMAS COTTIER AND MATTHIAS OESCH, INTERNATIONAL TRADE REGULATION (London 2005), p. 84.

<sup>587</sup> The WTO Agreement was implemented in U.S. domestic law through the URUGUAY ROUND AGREEMENTS ACT 1994. This was emphasized by the Resolution of the Security Council S/RES/1456 of 20 January 2003 (“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law [...]”).



performed by them in good faith.”<sup>588</sup> Accordingly, governments must not take any measures that could frustrate the aims and objectives of the WTO Agreement and covered agreements.<sup>589</sup> Furthermore, they are obliged to exercise their rights in accordance with the *abus des droit* doctrine, which derives from the duty of good faith. U.N. Security Resolution 1456 also obliges states to “ensure that any measure taken to combat terrorism comply with all their obligations under international law.”<sup>590</sup>

Under exceptional circumstances, members are relieved from their obligations under the WTO agreements. As mentioned above, the WTO agreements contain an exception to the general obligations of the agreement for member states’ unilateral measures relating to security. This security exception is fundamentally important to the Container Security Initiative, because it allows states to any measures they consider necessary to protect their essential security interests. This so-called “national security exception” is also found in a number of other covered agreements (e.g. the GATT, GATS and TBT Agreement) and has proved very controversial.

### **1.1. Scope of Investigation**

Considering that the Container Security Initiative has the potential to restrict trade in goods and services,<sup>591</sup> the aim of the investigation is to determine whether the Container Security Initiative infringes the following covered agreements: the GATS, GATT, the Agreement on Pre-Shipment Inspection and the Agreement on Technical Barriers to Trade. The latter agreement, in particular, is very important nowadays concerning the prevalence of non-tariff barriers to trade.

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<sup>588</sup> Quoted in HARRIS, p. 828.

<sup>589</sup> STEIN, TORSTEN AND VON BUTTLAR, CHRISTIAN, VÖLKERRECHT, p. 17, paras. 46 – 49. Good faith also plays an important role in the interpretation of covered agreements by the dispute settlement body because it forms part of the holistic rule of interpretation contained in Article 31 of the VCLT (see below).

<sup>590</sup> S/RES/1456 (2003), para. 6.

<sup>591</sup> See e.g. UNCTAD Report 2003, paras. 54 – 61; e.g. *infra pp.* 88 – 89.

## 1.2. Methodology

The following examines selected provisions of each agreement in three stages. The first stage introduces the agreement and describes its aims. The second stage describes the scope of the agreement, its requirements as well as the way that the Panel and Appellate Body have interpreted its terms (especially in light of contemporary circumstances and the limitation contained in Article 3:2 DSU). The third section examines whether the Container Security Initiative complies with the provision in question and the final section summarizes the findings.

## 2. Trade Effects of the Container Security Initiative

The Container Security Initiative is a security measure which attempts to balance the needs of the public and trade.<sup>592</sup> This corresponds to statutory requirements<sup>593</sup> as well as The National Strategy for Maritime Security, which requires that security measures “be implemented with the minimum essential impact on commercial and trade-flow costs and operations.”<sup>594</sup> At the same time, the United States has stated that it “recognizes the potential for trade disruption and has taken every possible step to ensure that legitimate trade is not disrupted.”<sup>595</sup>

On the other hand, there was always a risk that the introduction of the CSI into an industry where security has traditionally played a relatively minor role could adversely affect existing practices to some extent.<sup>596</sup> In particular, commentators argue that the CSI has the potential to adversely affect trade in services and trade in goods.<sup>597</sup> The WTO Secretariat and WTO members have also expressed concern that the CSI may restrict trade.<sup>598</sup> Owing to the fact that the CSI addresses the seaports of its major trading partners, it mainly affects trade in maritime transportation services.

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<sup>592</sup> Concerning the character of the CSI see generally Math Noortmann, *The U.S. Container Security Initiative: A Maritime Transport Security Measure or an (Inter)National Public Security Measure?*, 10 IUS GENTIUM, 139.

<sup>593</sup> Section 101 (13) (A) of the MTSA 2002; Section 343 (a) (3) of the Trade Act 2002.

<sup>594</sup> NATIONAL SECURITY STRATEGY FOR MARITIME SECURITY, p. 20, pt. 4

<sup>595</sup> See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW – UNITED STATES, MINUTES OF MEETING, ADDENDUM, 22 NOVEMBER 2004 (WT/WTPR/M/126/Add.3), p. 37.

<sup>596</sup> Security measures require improvements to infrastructure in order to facilitate the advance electronic submission of cargo information. In addition, the physical inspection of containers must also be accommodated by seaports which generally do not have much space. Concerning the challenges of implementation see generally GAO-03-297T, pp. 2 (concerning layout of ports); 12 – 19 (concerning administrative issues).

<sup>597</sup> See e.g. Lee, pp. 136 et seq.

<sup>598</sup> WTO TRADE POLICY REVIEW: UNITED STATES 2004, *supra* n. 29.

However, despite the fact that the CSI only appears to regulate seaports and containers, it may be possible for the complainant to prove that it produces a *de facto* restrictive effect on trade in goods by establishing a causal relationship between the CSI and the restriction.<sup>599</sup>

The following sections examine the parties affected by the CSI and the trade effects of the measure in relation to services and goods. The latter section is particularly important because it explains the reasons why these agreements are relevant before their individual provisions are examined. The following section presents a general overview of trade effects whereas the examination of the individual agreements concentrates on trade effects specifically relevant to individual provisions.

## 2.1. Trade in Services

Maritime transportation services are crucial to world trade and form one of the world's most important services markets.<sup>600</sup> The introduction of containerization led to a rapid expansion in seaport services with the result that today approximately 90 percent of international trade is transported by means of container vessels.<sup>601</sup> Such figures suggest that maritime transportation is the driving force behind globalization.

Competition in maritime transport services is intense with ports around the world expanding terminal capacity, modernizing their infrastructure and identifying new service markets in order to stay ahead of the competition. It is a global industry with seaports providing a range of services including infrastructure provision, berthing services, cargo handling, consignees and ancillary services.<sup>602</sup> Seaports perform an important strategic role as regional transshipment hubs and also encourage agglomeration: according to one study "firms' location decisions are based on

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<sup>599</sup> See Report of the Panel, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 19 December 2000 (adopted on 16 February 2001), [hereinafter Panel, *Argentina – Bovine Hides*].

<sup>600</sup> See J. Michael Taylor, *Evaluating the Continuing GATS Negotiations Concerning International Maritime Transportation Services*, 27 Tul. Mar. L.J. 129, pp. 149 – 150; PAREMESWARAN, pp. 7 et seq. (on the general importance of trade in services) and pp. 23 et seq. (on the importance of maritime transport services in particular).

<sup>601</sup> See e.g. PAREMESWARAN, pp. 23 – 27; WTO, COUNCIL FOR TRADE IN SERVICES, MARITIME TRANSPORT SERVICE, BACKGROUND NOTE BY THE WTO SECRETARIAT, (S/C/W/62), 16 November 1998, pp. 3 – 6 and (S/CSS/W/106), 4 October 2001, pp. 4 – 5; Haveman et al, p. 1.; Flynn, p. 84; Kumar and Hoffmann, pp. 36 – 38.

<sup>602</sup> See Trujillo and Nombela, p. 10, box. 2.

price considerations and on ease of access to markets.”<sup>603</sup> At the same time, seaports are fragile installations with their operations being compromised by limited space (leading to bottlenecks), and they are highly vulnerable to natural disasters (e.g. hurricanes, earthquakes, tsunamis), strikes by union workers and the constant demand for lower transport costs (e.g. introduction of new practices and new shipping routes).<sup>604</sup>

Unfortunately, the market for maritime transportation services is also restrictive and many states have traditionally used a variety of measures to protect domestic service providers against foreign competition.<sup>605</sup> 9/11 led to an increase of security in maritime transportation services, thereby “forever altering maritime operations around the world.”<sup>606</sup> Security measures such as the CSI may represent a new breed of non-tariff barrier to trade in services<sup>607</sup> and could interfere with or distort supply and demand in the international maritime transport services market.<sup>608</sup>

The CSI affects trade in seaport services because it distorts the competitive relationship between seaports owing to the grant of expedited clearance CSI shipments (“greenlane”) and increased inspections for non-CSI shipments (“redlane”). The former provides an incentive for seaports to participate in the CSI which is non-market driven<sup>609</sup> and designed to increase the competitiveness of the seaport.<sup>610</sup> As a result, CSI ports can provide a more attractive service than non-CSI ports. By contrast, the absence of a bilateral agreement allowing the stationing of CSI teams means that suspicious cargo from non-CSI ports cannot be inspected prior to export to the United States. As a result, any scanning or physical inspection can only be carried out at a less opportune stage in the supply chain, i.e. at the U.S. seaport or while the ship is still at sea. Increased inspections at U.S. seaports could delay customs clearance, thereby increasing transit costs and leading to the

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<sup>603</sup> J. VERNON HENDERSON ET AL, GEOGRAPHY AND DEVELOPMENT, WORLD BANK POLICY RESEARCH WORKING PAPER 2456 pp. 2 – 6.

<sup>604</sup> The limitations of seaports are recognized to a certain extent in Section 232 (b) (4) (c) of the SAFE Port Act 2006 (as amended by Section 1701 of the IRCA 2007).

<sup>605</sup> See PARAMESWARAN, p. 45.

<sup>606</sup> Lucienne Carasso, *Bulow Charter Party Consequences of Maritime Security Initiatives: Potential Disputes and Responsive Clauses*, 37 J. MAR. L. & COM. 79, p. 79.

<sup>607</sup> PARAMESWARAN (at p. 50), defines a barrier to trade in maritime services as “barriers that limit maritime service providers from accessing, entering or operating in a market or consumers from freely choosing the transport services that best suits their momentary needs.”

<sup>608</sup> One important example of how security measures can restrict the freedom to provide seaport services is the Dubai Ports World controversy: see *infra pp.* 332 – 333.

<sup>609</sup> Lee, pp. 132 et seq.

<sup>610</sup> See FLYNN, *supra n.* 76.

dissatisfaction of customers.<sup>611</sup> There is evidence that CBP is deliberately attempting to create a two-tier system of trade.<sup>612</sup>

Considering the highly competitive nature of the maritime transport industry it is difficult to see how non-CSI ports will survive in the new system of trade envisaged by CBP which effectively relegates them to secondary status.<sup>613</sup> Research by the OECD has also shows that shippers are unlikely to use the services of ports which are at risk of terrorist attacks.<sup>614</sup> Owing to the fact that costs play a decisive role in shippers' choice of markets, non-CSI ports are likely to see a drop in demand for their services as shippers switch to CSI ports in order to avoid discriminatory treatment at U.S. seaports.<sup>615</sup> The diversion of cargo to larger CSI megaports will result in less demand for services offered by non-CSI ports which may even lead to their closure. In this respect, the ports likely to suffer most are large local and regional ports which offer direct routes to the United States.<sup>616</sup> In particular, the development of regional transshipment ports could be affected by the lack of CSI status.<sup>617</sup> Considering that seaports attract agglomeration, the loss of business owing to lack of CSI status is likely to have a knock-on effect in the surrounding area, with manufacturers moving to CSI ports in other countries.

Participation in the CSI therefore has profound economic ramifications for seaports: according to one commentator, the promise of expedited clearance has been the major factor in the rapid expansion of the CSI.<sup>618</sup> This can be shown by the initial reaction of European Commission to the expansion of the CSI at European seaports.<sup>619</sup> It argued that expedited clearance could distort the

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<sup>611</sup> See PARAMESWARAN, p. 64.

<sup>612</sup> See U.S. Commissioner, Remarks of 30 October 2003.

<sup>613</sup> See Nicholas Hughes Allen, *The Container Security Initiative Costs, Implications and Relevance to Developing Countries*, PUBLIC ADMIN. DEV. 26, 439 – 447 (2006), pp. 441 – 445. UNCTAD REPORT 2003, p. 21 at para. 56.

<sup>614</sup> OECD REPORT 2003, p. 26.

<sup>615</sup> UNCTAD REPORT 2003, para. 54

<sup>616</sup> See Tujillo and Nombela, p. 20. Smaller ports usually serve short sea shipping lines and regional distribution centres include the world's largest ports most of which are already members of the CSI. Ports offering direct shipping to the United States are also subject to inspection by the U.S. Coast Guard under Section 108 of the MTSA. If their security standards are found to be ineffective, ports can also be subject to the penalties under Section 110 of the MTSA.

<sup>617</sup> See Allen, p. 444.

<sup>618</sup> Particularly amongst Asian seaports. See Jau, p. 12.

<sup>619</sup> See comments of European officials in Gregory Crouch, *U.S. Port Security Plan Irks Europeans*, NEW YORK TIMES, 6 November 2002 (Reporter). According to this report, "For instance, once a cargo container has cleared United States and Dutch inspections in Rotterdam, it is more than likely to have a quicker ride through customs in

competitive relations between seaports within the European Community by diverting trade flows to CSI ports and threatened to commence infringement proceedings against EU member states which had concluded bilateral agreements with the CBP.<sup>620</sup> In literature, there is also general agreement CSI could adversely effect competitive conditions between seaports, especially in relation to developing countries.<sup>621</sup>

## 2.2. Trade in Goods

Increasing port security can also have an indirect affect on the trade in goods because the importation of products into foreign countries depends on cost-effective and reliable transportation, efficient seaport operations and customs procedures. According to one writer, trade is affected by a wide range of factors including formal trade barriers such as tariffs as well as numerous transport-related aspects, including port privatization.<sup>622</sup> For example, employing non-union labour can lead to the introduction of more efficient work practices, some of which can increase port productivity by up to 30 percent.<sup>623</sup>

Maritime transport is of particular importance to trade in goods<sup>624</sup> because it offers a low cost and predictable means of transport which has provided the foundation for highly sensitive modern business practices such as low inventories and just-in-time deliveries.<sup>625</sup> Any disruption to the supply chain caused by over-zealous security measures will quickly be felt by the end consumer:

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the United States. But cargo leaving a French port like Marseille, which is not a party to such agreements, can expect to face potential delays when it reaches American shores.”

<sup>620</sup> See statement of Frits Bolkestein in Press Release, 18 March 2003 (IP/03/399), “The security concerns of both the US and the EU will best be addressed by reciprocal co-operation rather than by unilateral actions which can impact on trade and cause competitive distortions without necessarily providing increased security assurances.”

<sup>621</sup> UNCTAD REPORT 2003, paras. 54 - 61; Florestal, pp. 403 – 404; Allen, pp. 442 - 443; Lee, pp. 136 – 138; see generally, WSC, Statement of 9 September 2002 (regarding 24 Hour Rule); WSC, Statement of 30 July 2007 (regarding 100 percent inspections).

<sup>622</sup> Kumar and Hoffmann, pp. 41 – 42.

<sup>623</sup> See Alwyn Scott, *Cargo Handlers with Clout: Seattle Stevedoring Firm is a Spark in the Port Battles*, SEATTLE TIMES, October 6, 2002; Al Gibbs, *Port Tests Quicker System for Moving Containers*, THE NEWS TRIBUNE, TACOMA, WASHINGTON, October 9, 2002( describing the “Agile Port” system).

<sup>624</sup> For an overview, see Kumar and Hoffmann, pp. 41 – 43.

<sup>625</sup> Concerning the significance of logistics on consumers, see U.S. DEPARTMENT OF TRANSPORTATION, THE FREIGHT STORY: A NATIONAL PERSPECTIVE ON ENHANCING FREIGHT TRANSPORTATION, p. 3 (“The *Journal of Commerce* estimates that American households, the ultimate beneficiaries of system improvements, have saved an average of \$1,000 annually since 1980 because of reductions in freight logistics costs”).

*“When transportation system performance decreases, freight-related businesses and their customers are affected in two ways. First, freight assets become less productive. Second, more freight transportation must be consumed to meet the needs of a thriving and expanding economy. Thus, when freight transportation under-performs, the economy pays the price.”*<sup>626</sup>

The most popular means of transporting goods is by sea and many of the largest trading nations are heavily reliant on maritime transport. For example, the United States is the world’s largest importer of goods with its total imports for 2006 amounting to \$ 1.86 billion dollars.<sup>627</sup> Each year, 18.5 million seaborne containers enter United States ports,<sup>628</sup> which account for approximately 49% of waterborne imports of goods.<sup>629</sup> The right of WTO members to access U.S. markets using seaborne containers is therefore of crucial importance for the GDP of its trading partners.<sup>630</sup>

Any delay caused by security measures will translate into transport costs which play a crucial role in influencing a shipper’s choice of market.<sup>631</sup> In this respect, the following statement by the former U.S. Customs Commissioner will obviously has implications for the importation of goods into the United States.

*“Finally, being in the “green lane” will have true economic meaning because inspections at CSI ports, U.S. seaports, and all U.S. ports of entry have increased, and they will continue to increase, based on risk management principles and targeting based on risk assessment. [...]*

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<sup>626</sup> *Id.*, p. 5.

<sup>627</sup> US CENSUS BUREAU, US INTERNATIONAL TRADE IN GOODS AND SERVICES, ANNUAL REVISION FOR 2006, 8 June 2007, p. 1. The top ten trading partners of the United States are Canada, China, Mexico, Japan, FRG, UK, South Korea, France, Taiwan and Venezuela (source: Census Bureau for the month of May 2007).

<sup>628</sup> See U.S. Department of Transportation, Maritime Administration, U.S. Waterborne Container Trade by U.S. Ports, 1997 – 2006.

<sup>629</sup> See CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC COSTS OF DISRUPTION IN CONTAINER SHIPMENTS, 29 March 2006, p. 4, fig.1.

<sup>630</sup> For example, container imports from China amounted to 8.5 million in 2006. See U.S. Department of Transportation, Maritime Administration, U.S. Waterborne Container Trade by Trading Partners, 1997 – 2006. See Allen, p. 443.

<sup>631</sup> See e.g. PARAMESWARAN at p. 52: “It is generally acknowledged today that the costs of international (maritime) transport services area an important determinant of a country’s export competitiveness as potential access to foreign markets [...] is determined by the level of transport costs.”

*What will that mean for shipments not in the “green lane”? More inspections, more delays, and more expenses at the ports.”*<sup>632</sup>

There are 360 seaports in the United States and their infrastructure, unloading capabilities and cargo handling capabilities vary greatly.<sup>633</sup> Accordingly, some seaports will cope with added inspections better than others. Increasing inspections at US seaports could therefore interfere with market access for the exporters of WTO member states<sup>634</sup> who are not able to ship containers from CSI ports: increased inspections, delays and expenses at US ports represent considerable trade barriers whose adverse effects on access to many of the world’s largest markets should not be underestimated.

### **2.3. Parties Affected by the Container Security Initiative**

Despite the fact that the WTO Agreement is designed to directly improve the rights of traders (i.e. in the sense of encouraging the import and export of goods and provision of services),<sup>635</sup> the right to bring a complaint under WTO law is limited to states only.<sup>636</sup> The only action which export industries adversely affected by a state’s trading regulations can take is to petition their government to initiate a complaint before the WTO. Although the effects of the CSI are likely to be felt primarily by US importers<sup>637</sup> it can also affect the following foreign entities:<sup>638</sup>

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<sup>632</sup> U.S. Customs Commissioner, Remarks of 30 October 2003.

<sup>633</sup> See BRUCE ARNOLD ET AL, THE CONGRESS OF THE UNITED STATES, CONGRESSIONAL BUDGET OFFICE, ECONOMIC COSTS OF DISRUPTION IN CONTAINER SHIPMENT, 29 March 2006, p. 5.

<sup>634</sup> See PARAMESWARAN, p. 45.

<sup>635</sup> On the ways that private actors can seek to protect their rights under international treaties see Andrea K. Schneider, *Democracy and Dispute Resolution, Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 598, who states at p. 599 (“Basically, trade treaties provide a set of rights for private actors against governments”).

<sup>636</sup> See e.g. Council Decision 94/800/EC Concerning the Conclusion on Behalf of the European Community, as Regards Matters Within Its Competence, of Agreements Reached in the Uruguay Round Multilateral Negotiations, 1994 (OJ L 336, 23.12.1994, p. 1–2), which states in its preamble, “Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.”

<sup>637</sup> “Importer of record” is defined in 19 CFR §1484 (a) (2) (b).

<sup>638</sup> See also Allen, pp. 441 – 443; for information on the actors in the transport chain, see also OECD REPORT, pp. 27 – 28. For possible sources of financing security of international trade see Dulbecco and Laporte, pp. 1205 – 1207.



1. **Foreign seaports:** the seaports and terminal operators which largely bear the costs of implementing security measures according to U.S. security standards.<sup>639</sup> Costs include the acquisition, operation and maintenance of non-intrusive security equipment. However, just as importantly, the seaport must also satisfy the necessary logistical demands that the scanning of high-risk containers entails.
2. **Maritime carriers:** defined by CBP as “the party having operational control of the vessel”, carriers are responsible for complying with the information requirements contained in the 24 Hour Rule. Infringements of this rule can lead to substantial penalties.<sup>640</sup> It has also been reported that the requirements of the 24 Hour Rule and CSI have also affected the way vessel operators do business.<sup>641</sup>
3. **Port users:** seaports and customs authorities may seek to recoup the costs for compliance with the US security standards from port users by means of a security-related user fee. Such fees could be imposed on all port users generally or only on port users who are shipping cargo to the United States. This latter category includes the US importer as well as transit cargo, which will pass through a US seaport en route to its final destination.
4. **Foreign exporters:** US exporters ship goods to the United States. Their main concern is transport costs, which are reflected in the price of the goods. By increasing costs of transit and the risks of delay, the new security regulations increase the price of foreign goods, making them less attractive to US consumers. This could lead exporters to seek alternative markets for their goods.

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<sup>639</sup> Responsibility for providing basis security infrastructure will be the subject of the terms and conditions in the lease agreement between the port authority and the terminal operator. See FRITTELLI, JOHN AND LAKE, JENNIFER, E., CRS REPORT FOR CONGRESS, TERMINAL OPERATORS AND THEIR ROLE IN U.S. PORT AND MARITIME SECURITY (RL33383), 20 April 2006, p. 8.

<sup>640</sup> According to 19 CFR 4.7a, the carrier or master of the vessel is liable for infringements of the 24 Hour Rule. Infringements can lead to the imposition of substantial fines according to 19 USC 1436.

<sup>641</sup> For example, owing to the fact that they cannot verify the contents of cargo containers, cargo carriers are including indemnity clauses in their contracts with shippers and may only be willing to do business with trusted shippers. It has been reported that need to transmit the cargo manifest 24 hours in advance of lading rules out the practice of last gates cargo has required carriers to build buffer periods into their schedules in order to take account of any delay caused by the 24 Hour Rule and CSI. See UNCTAD Report 2003, pp. 23 – 24, para. 65.

## 2.4. Complaints by Private Parties

The WTO Agreements were concluded by sovereign nations and therefore only member states have the necessary standing to bring complaints under the Dispute Settlement Understanding. According to the Appellate Body in *U.S. – Shrimp*, the dispute settlement proceedings are not available to “individuals or private organizations.”<sup>642</sup> member states therefore bring complaints on behalf of their economic participants<sup>643</sup> and have established procedures which enable the private sector to notify the government of the trade restrictive practices of other member states.<sup>644</sup> Private sector complainants bear the burden of proof when bringing a complaint to the competent national authorities. Governments will also take into account legal, commercial and political factors when deciding whether to initiate dispute settlement proceedings.<sup>645</sup>

The EU is a major user of the WTO’s dispute settlement procedure<sup>646</sup> and Council Regulation (EC) No 3286/94 establishes the procedure for lodging a complaint under the Agreement Establishing the World Trade Organization (and other international treaties) by the European Communities (hereinafter “Trade Barriers Regulation”).<sup>647</sup> Private parties are crucial to bringing

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<sup>642</sup> Appellate Body, *U.S. – Shrimp*, para. 101.

<sup>643</sup> The provisions of the DSB only refer to Members and not to private entities. See WAINCYMER, p. 132; VAN DEN BOSSCHE, pp. 190 – 191.

<sup>644</sup> For example, in the United States, Section 301 of the Trade Act 1974 enables private actors (“any interested person”) to make a complaint to the Office of the United States Trade Representative that an “act, policy or practice of a foreign country ... violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under any trade agreement, or is unjustifiable and burdens or restricts United States commerce”.

<sup>645</sup> See WAINCYMER, p. 133ff, who points (at pp. 133 – 134) out that the relations with the state concerned also play a role in deciding whether to bring a complaint: “In some instances, the government may even be concerned that a successful complaint may lead to a ruling which might have an adverse impact upon its own industry policy schemes and hence be an undesirable political outcome.” Accordingly, the decision is unlikely to be taken on purely legal considerations. Concerning the Trade Barriers Regulation of the European Community, it is unlikely that the Commission will take a complaint to the WTO against one of its own members or future members or countries with whom it has bilateral agreements. See Bronckers and McNelis, *The EU Trade Barriers Regulation Comes of Age*, JWT Vol. 35, No. 4 (2001), p 434.

<sup>646</sup> Owing to the joint action principle, the EU has a greater retaliatory power than states which act alone: see Bronckers and McNelis, pp. 452 – 453.

<sup>647</sup> Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 349, 31.12.1994, p. 71–78). The WTO Agreement only applies in relation to states and so the member states of the European Communities were required to sign the WTO Agreement individually. However, within the framework of the WTO, member states coordinate their policies within the framework of the European Communities. Therefore, it is the task of the Community institutions to react to obstacles to trade.

a complaint because the Commission cannot commence a complaint independently of the opinion of member states.<sup>648</sup> According to one commentator:

*“Private parties are the real guardians of the international trade agreements that the EU signs with third countries. They are the ones with the vested interests, and hence they are the most vigilant in highlighting the transgressions of third countries.”*<sup>649</sup>

The following examines the requirements that an EU exporter must satisfy before the European Commission will consider initiating a complaint before the WTO. Any complaint against the CSI will be directed against the United States itself: the Bureau of Customs and Border Protection is a government agency and its acts are directly attributable to the United States government.<sup>650</sup>

The Preamble to this piece of secondary legislation states that its aim is “to provide a legal mechanism under Community law which would be fully transparent, and would ensure that the decision to invoke the Community's rights under international trade rules is taken on the basis of accurate factual information and legal analysis.” The grounds for lodging a complaint lie in “obstacles to trade” or “adverse trade effects.” The former is defined in Article 2 as “any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action.” “Adverse trade effects” are defined as “those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country, and which have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.” However, this is qualified to the effect that “the fact that the complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, that the Community institutions proceed with any action.”

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<sup>648</sup> Bronckers and McNelis, p. 461. See also Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, And Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273 at pp. 299 and 306 (noting that many intergovernmental disputes are triggered by private companies).

<sup>649</sup> Bronckers and McNelis, *id.*

<sup>650</sup> Appellate Body, *US – Shrimp*, para. 173 (“The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.”). See also Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), 29 April 1996 [hereinafter, *US – Gasoline*], p. 28 (“The United States, of course, carries responsibility for actions of both the executive and legislative departments of government”).

Article 3 provides that “any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of obstacles to trade that have an effect on the market of the Community may lodge a written complaint.” Sub-paragraph 2 requires the complainant to provide sufficient evidence of the existence of the obstacles to trade and of the injury resulting therefrom. In particular, evidence of adverse trade effects must be given on the basis of the illustrative list of factors indicated in Article 10, which deals with evidentiary requirements. According to Article 10(1), regard may be had to three factors: (a) the volume of community imports or exports, (b) the prices of the Community industry’s competitors and (c) the consequent impact on the Community industry. As far as the territorial scope of the examination is concerned, paragraph 4 does not refer to adverse effects on individual countries but “on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.” Article 4 also provides that adverse may arise inter alia “in situations in which trade flows concerning a product or service are prevented, impeded or diverted as a result of any obstacle to trade.”

The TBR extends to all the covered agreements of the WTO and permits violation and non-violation complaints.<sup>651</sup> Article (2) (1) also requires complaints to be directed towards practices which are maintained or adopted by the government.<sup>652</sup> Complaints can be made by industry representatives (Article 3 (1)) or individual companies (Article 4 (1)), although the latter’s right is restricted to “obstacles to trade that have an effect on the market of a third country.”<sup>653</sup> Concerning the burden of proof, a complaint under the Trade Barriers Directive of the European Union does not depend on the challenged measure actually causing damage: according to Article 2 (3) an injury can consist in the threat of material injury in respect of a product or service. However, according to Article 2 (4) the fact that the complainant suffers from adverse effects will not by itself justify Community institutions to proceed with any action. Rather, the complainant must show that “it is necessary in the interest of the Community” for the Commission to take

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<sup>651</sup> *Id.* pp. 65 – 66.

<sup>652</sup> This is narrower than GATT jurisprudence which allows complaints to be made against the practices of private actors where there is a sufficient nexus with the government. See Report of the Panel, *Japan – Trade in Semi-Conductors*, (L/6309 - 35S/116), 24 March 1988 (adopted on 4 May 1988), [hereinafter, Panel, *Japan – Trade in Semi-Conductors*], paras. 115 – 117.

<sup>653</sup> By contrast, Article 3(1) provides that representatives of industry can bring complaints about obstacles to trade which “have an effect on the market of the Community.”

action.<sup>654</sup> Individual companies must therefore show that their injury has “a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.”<sup>655</sup> If this requirement is satisfied, the Commission will instigate an examination in accordance with the procedures laid down in Article 5.<sup>656</sup>

Following the consultation of the Advisory Committee, if the Commission decides that there is sufficient evidence to justify initiating an examination procedure for the purpose of considering the legal and factual issues involved and that this is in the interest of the Community it will commence an examination in accordance with Article 8 of the Regulation. According to Article 8 (1) (a), the Commission must announce the initiation of an examination procedure in the Official Journal of the European Communities.<sup>657</sup> The examination procedure will be terminated if there is insufficient evidence (Article 11(1)) or if the country concerned takes measures which remove the source of the complaint (Article 11(2)).<sup>658</sup> However, considering the comments of the Panel in *Argentina – Bovine Hides*, concerning the proof provided by the European Communities in support of its allegation of cartel between Argentinean tanners, satisfaction of the TBR procedure does not necessarily mean that the EC will satisfy the burden of proof imposed by WTO jurisprudence.<sup>659</sup>

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<sup>654</sup> Article 8 (1).

<sup>655</sup> Article 2 (4).

<sup>656</sup> See Bronckers and McNelis, p. 444 (concerning the sufficient evidence requirement).

<sup>657</sup> See Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No 3286/94, consisting of trade practices maintained by Chile in relation to the transit and transshipment of swordfish in Chilean ports (98/C 215/02). In addition to satisfying the evidentiary requirements of the Trade Barrier Regulation, the fact that a major proportion of the Community industry lodges the complaint could support the claim that the alleged adverse effects have a material impact as defined in art. 2(4) of the Regulation. See para. 6. of the Notice.

<sup>658</sup> For an example of the latter case, see Commission Decision of 20 December 1995 (96/40/EC) suspending the proceedings under Council Regulation (EC) No 3286/94 on trade barriers, concerning piracy of Community sound recordings in Thailand and its effects on Community trade in sound recordings. (O.J. L 011 , 16/01/1996 p. 7 – 8).

<sup>659</sup> Panel, *Argentina – Bovine Hides*, para. 11.52 (“The evidence before us is quite thin. We have a newspaper article and opinion piece, a press release from the *frigoríficos* and a statement by a member of the *Congreso de la Nación*. Such evidence would certainly not support a case in a domestic court”). Concerning the burden of proof see the Report of the Appellate Body, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, 25 April 1997 (adopted on 23 May 1997), p. 14. The results of the EU’s examination procedure are contained in the Report to the Committee Established under Article 7 of Council Regulation (EC) No 3286/94 (Trade Barriers Regulation) I.E.3/JVE D(97). See also European Commission, Decision of 23 October 1998 (98/618/EC) under the provisions of Council Regulation (EC) No 3286/94 concerning measures maintained by the Republic of Argentina on the export of bovine hides and the import of finished leather (O.J. L295/46).

## 2.5. Complaints by Member States

This stage of the investigation concerns a violation complaint against the CSI and so the following will provide a brief overview the rules, procedures and practice of the Dispute Settlement Body. The WTO was conceived as a “rules-based organization” equipped with a “quasi-judicial” dispute settlement body (DSB), which plays a crucial role in enforcing the covered agreements and ensuring harmonious relations among a diverse membership.<sup>660</sup> The Panel and Appellate Body view the covered agreements as legally binding (i.e. “rule-based” approach) and their rulings reflect the legal requirements contained in the agreements. This is reflected in Article 6.2 DSU, which states that the covered agreements provide the legal basis for requesting the establishment of a Panel and also form the starting point of any dispute settlement proceedings.<sup>661</sup> The procedure for dispute settlement is regulated by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),<sup>662</sup> which forms part of the multilateral agreements under the WTO and is binding on all members.<sup>663</sup>

The dispute settlement procedure itself is established in Article 3.7 DSU. In cases of dispute, the party filing the complaint will first request the member state concerned to enter into consultations within 30 days. If no settlement has been reached after 60 days, the complaining party may approach the DSB and request the establishment of a Panel to find the Container Security Initiative (“CSI”) violates various provisions of the GATT 1994 and is not justified by Article XXI (i.e. a so-called “violation complaint”).<sup>664</sup> The DSU aims to ensure the full and effective investigation of disputes by the Panels. Article 7.1 provides for standard terms of reference, which stipulates that a Panel must examine a matter referred to it by parties to a dispute. Article

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<sup>660</sup> The Ministerial Declaration of 20 September 1986 contained an express mandate to improve the dispute settlement procedure. See WTO/GATT Ministerial Declaration on the Uruguay Round (Declaration of 20 December 1986), lines 69-70 (“In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines”).

<sup>661</sup> See MITSUO MATSHUSHITA ET AL, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY*, OXFORD 2004, pp. 54 – 55.

<sup>662</sup> Introduced by the Uruguay Round. It allows WTO Members to base their claims on any of the multilateral trade agreements included in the Annexes to the Agreement establishing the WTO

<sup>663</sup> The DSU was signed in 1994 and now forms part of the covered agreements.

<sup>664</sup> Violation complaints are aimed at the withdrawal of measures alleged to have been adopted by another member in breach of the GATT. See WAINCYMER, pp. 91 – 92.

7.2 DSU imposes a positive duty on panels to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” In addition, Article 17.12 DSU requires the Appellate Body to “address each of the issues raised on appeal.”<sup>665</sup> If the Panel finds for the complainant it will recommend that the United States take all necessary steps to bring the CSI into conformity with its obligations under the General Agreement.<sup>666</sup> The Panel report will be adopted unless all member states decide to the contrary.

Considering that countries affected by the Container Security Initiative may include developing countries, Article 3.12 DSU is also relevant. It provides that where a developing country member brings a complaint against a developed country member, the latter can invoke the provisions of the Decisions of 5 April 1966.<sup>667</sup> According to paragraph 1 of this instrument, if consultations between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement, the less-developed contracting party complaining of the measures may refer the matter to the Director-General who, acting in an *ex officio* capacity, will use his good offices with a view to facilitating a solution.

### **3. The General Agreement on Trade in Services**

#### **3.1. Introduction**

The General Agreement on Trade in Services (GATS) was created in response to the growth of trade in services.<sup>668</sup> The GATS entered into force in 1995 and is a framework agreement that provides for the liberalization of international trade. It has 8 annexes dealing with individual service sectors.<sup>669</sup>

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<sup>665</sup> See Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 ICLQ 861, at p. 876 (quoting James Bacchus).

<sup>666</sup> Accordingly, there is no retroactive remedy. See Frieder Roessler, *The Responsibilities of a WTO Member Found to Have Violated WTO Law*, in Yasuhei Taniguchi et al (eds.), *THE WTO IN THE TWENTY-FIRST CENTURY* Cambridge 2007, pp. 141 et seq.

<sup>667</sup> GATT, Decision of 5 April 1966 on Procedures under Article XXIII GATT (BISD 14S/18)

<sup>668</sup> It is estimated that trade in services accounts for approximately one-quarter of international trade. The GATS was signed on 15 April and entered into force on 1 January 1995.

<sup>669</sup> For an overview of the GATS, see VAN DEN BOSSCHE, pp. 50 – 1 et seq.

The structure of the GATS reflects a different approach to liberalization than that adopted by the GATT. Parts II and III of the GATS refer to general obligations and specific commitments respectively. States which have agreed to subject their service sectors to GATS disciplines enter the service sector in question in the so-called 'positive list'. This means that a state undertakes no commitment to liberalize any sector unless it is listed in its Schedule.<sup>670</sup> Any commitments listed in the Schedule must be applied in accordance with general obligations, i.e. most-favoured nation treatment and transparency. Therefore, the first step is to ascertain whether the agreement applies to the services sector in question.

### **3.2. Maritime Transportation Services under the GATS**

Maritime transportation services fall within the scope of the GATS and are divided into three pillars.<sup>671</sup> The first pillar concerns international transportation services which includes passenger and freight international transportation. The second pillar concerns auxiliary services including cargo handling, storage and warehouse, customs clearance, container station and depot, maritime agency and freight services. The final pillar of maritime services relate to the access and use of port facilities. This group includes towage and tug assistance, port captain services, navigation aids, communications, berth and berthing services. The Container Security Initiative affects the third pillar of maritime transportation services, namely access to and use of port facilities.<sup>672</sup>

The question arises as to whether maritime transportation services in the United States are subject to the disciplines in the GATS. During the Uruguay Round, negotiations were held concerning the liberalization of maritime transport services under the auspices of the Negotiating Group on Maritime Transportation Services (NGMTS).<sup>673</sup> However, they were never completed owing to the reservations of some states that the principles of MFN national treatment could not be applied

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<sup>670</sup> The positive list approach is therefore the opposite of that taken by NAFTA, where all items that are not specifically identified are automatically liberalized. See WTO LAW pp. 810 and 821.

<sup>671</sup> According to the Maritime Model Schedule of 15 April 1996. See World Trade Organization, Council for Trade in Services, Maritime Transport Services, Background Note by the Secretariat (S/C/W/62), 16 November 1998, pp. 10 – 18.

<sup>672</sup> See PARAMESWARAN, pp. 341 – 343.

<sup>673</sup> Established by the Decision on Negotiations on Maritime Transport Services, WTO Doc. No. LT/UR/D-5/5 (April 15 1994) [hereinafter NGMTS Decision 1994], para. 2.



to transport services.<sup>674</sup> Moreover, the United States refused to submit an offer, believing that those submitted by other countries simply preserved the *status quo*. According to the United States, they did not meet the aims of the negotiations, namely to liberalize create assurances of open markets and non-discriminatory treatment for shipping companies and related commercial operations.<sup>675</sup> In addition, there was political pressure in the United States not to include maritime transportation services in the GATS discussions, as shown by the 1989 Concurrent Resolution on maritime transportation services.<sup>676</sup>

Despite the opposition of the United States, the importance of maritime transportation services was such that attempts to incorporate this area of services into the GATS continued beyond the Uruguay Round as regulated by the Decision on Negotiations on Maritime Transportation Services 1994 which stated that negotiations were to be completed by June 1996.<sup>677</sup> It also created a Negotiating Group on Maritime Transport Services (NGMTS) to oversee the negotiations. However, owing to the lack of progress, the Council for Trade in Services adopted the Decision on Maritime Transportation Services on 28 June 1996, which suspended negotiations until the 2000 round of negotiations.<sup>678</sup> Paragraph 4 of the Decision declares that the Decision is not to apply to any specific commitment on maritime transportation services, which is inscribed in a member's schedule.<sup>679</sup> The MFN principle will only generally apply once the current negotiations have been concluded. Paragraph 7 of the Decision requires Members not to apply any measures affecting trade in maritime transport services except with a view to

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<sup>674</sup> Concerning maritime services, the UNCTAD Liner Conferences and application of cabotage is incompatible with basic MFN. See Mary E. Footer & Carol George, *The General Agreement on Trade and Services*, in THE WORLD TRADE ORGANIZATION, LEGAL ECONOMIC AND POLITICAL ANALYSIS, p. 813. For an overview of the negotiations see Taylor pp. 158 – 169.

<sup>675</sup> World Trade Organization, Negotiating Group on Maritime Transport Services, Note on the Meeting of 24 May 1996, S/NGMTS/12, P3 (3 June 1996). *Id.* p. 166.

<sup>676</sup> Concurrent Resolution to recognize the uniqueness of and express strong support for the maritime policy of the United States, and to urge the President in the strongest possible terms to ensure that the United States does not propose maritime transportation services for inclusion in the General Agreement on Tariffs and Trade discussions and that any proposal that would consider maritime transportation as an area for negotiation is actively opposed by the United States. 101<sup>st</sup> Congress, August 4<sup>th</sup> (legislative day January 3<sup>rd</sup>), 1989, S. CON. RES. 63.< <http://140.147.249.9/cgi-bin/query/z?c101:S.CON.RES.63>: >.

<sup>677</sup> As declared by the NGMTS Decision 1994.

<sup>678</sup> See Council for Trade in Services, Decision on Maritime Transport Services, 28 June 1996 (S/L/24 dated 3 July), at paragraph 1.

<sup>679</sup> The commitments of most countries are limited to providing non-discriminatory access to and use of port facilities and onward transportation including stevedoring and terminal services.

maintaining or improving the freedom of provision of maritime transport services. The text of this decision was incorporated into Annex 1 of the GATS.

Negotiations on maritime transport services started again in 2000, based on the 1996 conditional offers or improved offers. However, progress was slow. Although member states issued a joint statement in 2003<sup>680</sup> this only led to a limited number of quality offers being tabled.<sup>681</sup> To date, the United States has not submitted any offers in relation to maritime transportation services in the Doha Round.<sup>682</sup> This reflects a general reluctance among member states to liberalize the third pillar of maritime transport services. Under the law of the sea, ports are under sovereign state control and the access to and use of port facilities is controlled by the government. For example, the U.S. government applies port access restrictions based on national security restrictions<sup>683</sup> as well as “state port control” (PSC) regimes.<sup>684</sup>

### **3.3. The ‘Standstill Commitment’**

Paragraph 7 of the Decision on Maritime Transportation Services 1996 states that “participants shall not apply any measure affecting trade in maritime transportation services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage.”<sup>685</sup> The fact that this provision has been included in Annex 3

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<sup>680</sup> World Trade Organization, Joint Statement on the Negotiations on Maritime Transport Services, March 2003 (TN/S/W/11).

<sup>681</sup> See World Trade Organization, Joint Statement on the Importance of Commitments on Maritime Transport Services, 25 February 2005 (JOB(05)/22). The statement urges members to “reassess their current positions and to contribute to the negotiations by tabling high quality and meaningful initial and revised offers.”

<sup>682</sup> See EUROPEAN COMMISSION, UNITED STATES BARRIERS TO INVESTMENT AND TRADE 2006, p. 17 (“[T]he U.S. has not included any maritime services-related commitments within even its most recent Doha WTO Round services offer of May 2005”).

<sup>683</sup> For example, vessels from Cuba, Iran, Iraq and North Korea are prohibited from entering U.S. ports. See World Trade Organization, Communication from the United States of America, Response to Questionnaire on Maritime Transportation Services S/NGMTS/W/2/Add. 11.

<sup>684</sup> According to PSC, governments can order the inspection of foreign ships at its ports to ensure that the condition of the ship complies with international regulations. In particular, states have the right to arrest and detain substandard ships for safety reasons. PSC regimes serve to protect the marine environment, in particular from pollution by oil. The Paris Memorandum of Understanding on Port State Control aims to eliminate the operation of sub-standard ships through a harmonized system of port state control: see 2005 ANNUAL REPORT OF THE PARIS MOU. States are wary of any agreement that might encroach on the port state control principle. See Taylor, p. 175.

<sup>685</sup> See NGMTS Decision 1994.

of the GATS as well as its designation as “the standstill commitment”<sup>686</sup> suggests that it has some degree of legal force.<sup>687</sup> On the other hand, commentators regard the standstill commitment as amounting to nothing more than a political agreement and therefore “not legally binding in the sense of the WTO dispute settlement system.”<sup>688</sup> This question reflects the controversy surrounding the legal status of assurances made during negotiations.<sup>689</sup>

The legal status of the “peace-clause” or “standstill commitment” was considered by the European Commission in its investigation into whether Chile was preventing fishermen from Community states from entering its markets (so-called “Swordfish Dispute”) owing to the provisions of a national law protecting swordfish:

*“Following the 1996 Ministerial decision, all WTO Members, including Chile, are committed to a standstill obligation. In other words, Chile cannot make access to its market more difficult than was the situation in June 1996.”*<sup>690</sup>

In the event, the Commission did pursue this line of enquiry. It held that, as the law had been introduced by Chile in 1990, the standstill commitment had no relevance to the case.<sup>691</sup>

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<sup>686</sup> See e.g. UNCTAD, NEGOTIATIONS ON TRANSPORT AND LOGISTICS SERVICES: ISSUES TO CONSIDER, UNCTAD/SDTE/TLB/2005/3, 2006, p. 1; PARAMESWARAN, p. 286.

<sup>687</sup> See e.g. INTERNATIONAL BAR ASSOCIATION, THE GATS: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS FOR AN EXPLANATION OF THE TERMS USED IN THE GATS, published by the International Bar Association, p. 19. According to paragraph 8, the NGMTS is responsible for the surveillance of this commitment.

<sup>688</sup> See PARAMESWARAN, p. 286; Edwin Vermulst and Bart Driessen, *Commercial Defence Actions and Other International Trade Developments in the European Community, No. XL 1 January 1996 – 30 June 1996*, EJIL, Vol. 7, No. 4 1996 at A., who state “This standstill commitment [...] is merely a political principle without legally binding force.”

<sup>689</sup> For example, the wording of paragraph 7 resembles paragraph C of the Punta del Este Declaration (which provides for standstill and rollback). During the Uruguay Round, the United States interpreted these provisions to be nothing more than political agreements and therefore non-binding. However, this interpretation was flatly rejected by other member states which claimed that the provisions amounted to “a commitment by Ministers to carry out what is the legal obligation of each Contracting Party not to take or maintain protectionist steps in violation of GATT provisions.” See SUNS North – South Development Monitor, Uruguay Round, *US Wants Toothless Surveillance*, 11 November 1986. Similarly, it has been argued that the fact that the deadline for negotiations on maritime transportation services within the framework of the WTO Doha Development Agenda could not be met should not affect the binding effect of the standstill provision in the 1996 Decision. See Newsletter No. 3/06, EUROPEAN COMMUNITY SHIPOWNERS’ ASSOCIATIONS (ECSA), p. 4.

<sup>690</sup> See EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE, TBR PROCEEDINGS CONCERNING CHILEAN PRACTICES AFFECTING TRANSIT OF SWORDFISH IN CHILEAN PORTS, MARCH 1999, p. 46.

<sup>691</sup> *Id.*

A member states could argue that Paragraph 7 is binding on member states on the grounds that it creates reasonable expectations that all member states will pursue negotiations on maritime transportation services in good faith. The duty of states to negotiate in good faith is related to the customary rule of law of *pacta sunt servanda* and recognized as a general principle of law.<sup>692</sup> The concept of the reasonable or legitimate expectations is related to good faith<sup>693</sup> although it protects a wider range of interests.<sup>694</sup> For example, the concept has been said to protect the security and predictability of reducing barriers to trade<sup>695</sup> and the “validity of assumptions on which governments act.”<sup>696</sup>

Although the concept of reasonable expectations is recognized in WTO law<sup>697</sup> it generates controversy owing to the fact that it pits reliance on the agreed wording of the WTO texts against reliance on broad good faith-related concepts. For example, in the *India – Patents* dispute, the Appellate Body held that reasonable expectations could not be considered in isolation because they were already incorporated into the words of the agreements.<sup>698</sup> Considering them separately would effectively impute “into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>699</sup> In the *EC – Computer Equipment* dispute, the Appellate

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<sup>692</sup> See MARION PANIZZON, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT*, Oxford 2006 pp. 27. However, its recognition in international instruments is variable. For example, Article 2:301 (3) of the Principles of European Contract Law (“Negotiations Contrary to Good Faith”) states that “It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.” In UNCITRAL’s Convention on the International Sale of Goods, the principle is not expressly stated. However, the interpretative guidelines (Paragraph C “Interpretation of the Convention”) state that any questions on interpretation are to be settled in conformity with the general principles on which the Convention is based. Arguably, Article 7(1) could offer a basis for a duty to negotiate in good faith to be implied. The Vienna Convention on the Law of Treaties does not make express reference to the duty to negotiate in good faith either. Article 18 simply states that “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty.”

<sup>693</sup> Zeitler, ‘*Good Faith*’ in the *WTO Jurisprudence, Necessary Balancing Element or an Open Door to Judicial Activism?* 8 J. INT’L ECON. L. 721, p. 728.

<sup>694</sup> Adrian T. L. Chua, *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, JWT 1988 p. 31, who presents reasonable expectations as an “umbrella principle” which protects a wide range of interests.

<sup>695</sup> Report of the Panel, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62,67,68/R, 5 February 1998 (adopted on 22 June 1998), para. 8.25.

<sup>696</sup> Chua, at fn 3; World Trade Organization, Note by the Secretariat, Non-Violation Complaints under GATT Article XXIII:2 MTN.GNG/NG13/W/31, 14 July 1989, p. 10

<sup>697</sup> Chua, p. 30

<sup>698</sup> Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997 (adopted on 16 January 1998), para. 45. See also Zeitler, p. 728; cf. Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, JWT Vol. 32, No. 3 1998, p. 134.

<sup>699</sup> Appellate Body, *id.*

Body held that the common intentions of the parties “cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of one of the parties to a treaty.”<sup>700</sup> On the other hand, the Panel in *Korea – Procurement* adopted a broader view of legitimate expectations:

*“Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith. It is clear to us [...] that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.”*<sup>701</sup>

Article XXIII:1 (b) GATT protects legitimate or reasonable expectations<sup>702</sup> by providing a remedy for the nullification or impairment of benefits resulting from the Agreement owing to measures which do not contravene the wording of the agreement.<sup>703</sup> Article 26 DSU provides that Article XXIII (1) (b) can also form the basis of a complaint for other WTO agreements as well,<sup>704</sup> although there have as yet been no complaints made in respect of the GATS.<sup>705</sup> That said, Article XXIII:2 of the GATS expressly limits non-violation complaints to benefits arising from specific commitments made by WTO Members under Part III.<sup>706</sup> Owing to the fact that the United States has not undertaken any agreement relating to maritime transportation services, there does not appear to be any possibility of using a non-violation complaint under the GATS in order to protect assurances made in respect of negotiations for maritime transportation services.

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<sup>700</sup> Report of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68/AB/R, 5 June 1998 (adopted on 22 June 1998), para. 84. See also Zeitler, pp. 728 – 729.

<sup>701</sup> Report of the Panel, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, 1 May 2000 (adopted on 19 June 2000), para. 7.100. Zeitler argues (at p. 752) that this can lead to “an enormous broadening of the non-violation concept.”

<sup>702</sup> According to Article XXIII GATT a contracting party may make written representations or proposals to another member state if it considers that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded owing to measures applied by that member, whether or not it conflicts with the provisions of this Agreement. This provision contains the basis for a so-called “non-violation complaint” under Article 23 DSU.

<sup>703</sup> For an explanation of the remedy see Locknie Hsu, *Non-Violation Complaints – World Trade Organization Issues and Recent Free Trade Agreements*, JWT Vol. 39, No.2, 2005, pp. 205 – 208.

<sup>704</sup> Article 26 of the DSU which states that a nullification or impairment complaint is available “where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement.” See also Chua p. 37; Hsu, p. 212.

<sup>705</sup> However, it has been argued that the provision has a wider scope and applies to any benefit granted under the GATT: see Chua pp. 32 and 40; Malaguti, pp. 133 and 136; World Trade Organization, Note by the Secretariat (Non-Violation Complaints), p. 22, which states that Article XXIII has not been used as broadly as it was conceived.

<sup>706</sup> See Hsu, p. 212, at fn. 24.

### 3.4. Result

The United States has not undertaken any commitments in respect of maritime transport services. The lack of agreement among member states means that the disciplines of the GATS, including the MFN principle, do not apply to this market sector. It is not possible to protect the legitimate expectations of member states arising from paragraph 7 of the Decision on Maritime Transportation Services because Article XXIII:2 of the GATS limits violation complaints to specific commitments under Annex III. As the EC – Chile swordfish dispute shows there is a risk that member states could exploit the inapplicability of the GATS to restrict maritime transport services thereby frustrating the aims of the GATT relating to competitive equality and market access.

## 4. Relationship between the GATS and the GATT

The fact that the GATS and the GATT concern different trade markets raises the question whether they are mutually exclusive. This was considered by the Appellate Body in *Canada – Periodicals*, which concerned Canada's excise tax on split-run editions of periodicals. Canada argued that the Panel had erred in law by characterizing Part V.1 of the Excise Tax Act as a measure regulating trade in goods subject to the GATT 1994.<sup>707</sup> Instead, the provision of magazine advertising services fell within the GATS and Canada had not undertaken any commitments in respect of the provision of advertising services.<sup>708</sup> The United States rejected this argument stating that the GATT 1994 was capable of applying to measures whose application affects both goods and services.<sup>709</sup> The Appellate Body held that there was nothing in the GATS to suggest that a measure that came within the scope of the GATS could not be equally subject to the GATT.<sup>710</sup> It agreed with the Panel's statement that the two agreements were not mutually exclusive:

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<sup>707</sup> Report of the Appellate Body, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997 (adopted on 30 July 1997), [hereinafter Appellate Body, *Canada – Periodicals*], p.3.

<sup>708</sup> *Id.* p. 4.

<sup>709</sup> *Id.*, p. 9.

<sup>710</sup> *Id.*, p. 17.

*“The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.”*<sup>711</sup>

The Appellate Body held that the entry into force of the GATS did not diminish the scope of application of the GATT 1994.<sup>712</sup> Although periodicals consisted of editorial content and advertising content they nevertheless constituted goods for the purposes of the GATT 1994.<sup>713</sup> The Appellate Body did not go on to examine overlaps between the GATS and the GATT but this issue was the subject of *EC – Bananas III*.<sup>714</sup> In this dispute, the European Communities argued that the GATS did not apply to the EC import licensing procedures because they were not measures “affecting trade in services” pursuant to Article I:1 of the GATS.<sup>715</sup> This argument was rejected by the Panel which held that the scope of the GATS encompassed any measure of a Member to the extent it affected the supply of a service.<sup>716</sup> The Appellate Body upheld the Panel’s finding that there was no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS owing to the broad scope of the GATS as evidenced by the use of the term “affecting” in Article I:1.<sup>717</sup> The Appellate Body also reiterated its ruling in *Canada – Periodicals*, namely that there could be measures which fall under both agreements:

*“There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS.*

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<sup>711</sup> *Id.*, p. 19 quoting Report of the Panel, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997, [hereinafter Panel, *Canada – Periodicals*], para. 5.17.

<sup>712</sup> Appellate Body, p. 18.

<sup>713</sup> *Id.* p. 28.

<sup>714</sup> Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997 (adopted on 25 September 1997), [Appellate Body, *EC – Bananas III*], para. 137.

<sup>715</sup> *Id.*, para. 218.

<sup>716</sup> Report of the Panels, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, (adopted on 25 September 1997) [hereinafter Panel, *EC – Bananas*], paras. 7.285 – 7.286.

<sup>717</sup> Appellate Body, *EC – Bananas III*, para. 220.

*However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different.”*<sup>718</sup>

Despite the fact that the CSI primarily affects maritime transport and seaport services, member states which suffer adverse effects from the CSI could also argue that it constitutes a *de facto* or indirect discrimination against products and seek remedies under the provisions of the GATT. The “Swordfish Dispute” of 2003 between Chile and the European Union concerning port access for EC fisherman<sup>719</sup> offers another example of a measure which falls under both the GATS and the GATT. The reason for the dispute was that the Chilean authorities wished to conserve the stocks of swordfish and prohibited the landing or transit of swordfish on the basis of Article 165 of the Chilean Fishery Law.<sup>720</sup> The EC alleged that prohibiting Community fishermen from accessing port facilities in Chile contravened WTO law and sought to challenge the measure as a violation of Articles V and XI of the GATT.<sup>721</sup> Concerning the former provision, the EC claimed that, by being forced to land or transship their catches in the ports of third countries, Community vessels suffered a loss of competition. In addition, the Chilean measure prevented Community fishermen from accessing certain non-EU markets. In the event the parties reached a provisional agreement and a Panel was never convened.<sup>722</sup>

## **5. Compliance with the General Agreement on Tariffs and Trade**

### **5.1. Introduction**

The General Agreement on Tariffs and Trade regulates trade *in goods* and its main aim is to eliminate discriminatory treatment in world trade.<sup>723</sup> Since the signing of the original agreement in 1947, GATT has liberalized world trade by progressively reducing tariff barriers that traditionally represented the primary means of protecting the domestic economy against foreign

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<sup>718</sup> *Id.* para. 221.

<sup>719</sup> See European Commission, Decision 5 April 2000, (2000/296/EC), under the provisions of Council Regulation (EC) No 3286/94 concerning the Chilean prohibition on unloading of swordfish catches in Chilean ports, O.J. L 96/67 (18.4.2000), paras. 15 – 20.

<sup>720</sup> *Id.*, paras. 5 – 6.

<sup>721</sup> *Id.*, paras. 10 – 11.

<sup>722</sup> For an overview of this dispute see PARAMESWARAN, pp. 128 – 129.

<sup>723</sup> VAN DEN BOSSCHE, pp. 308 – 309.



competition.<sup>724</sup> The agreement consists of five legal principles or pillars of which the unconditional most-favoured nation treatment, elimination of quantitative restrictions and transparency are particularly important in the following investigation.<sup>725</sup> It also deals with non-tariff barriers to trade. The basis of a claim under the GATT 1994 is Article XXIII, which provides that a member can refer to the dispute settlement bodies if it believes that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of the failure of another contracting party to carry out its obligations under this Agreement.<sup>726</sup>

The following section examines whether the Container Security Initiative complies with the GATT on the basis of a violation complaint brought against the United States by another WTO Member. It provides a brief overview of the complainant's burden and standard of proof together with general rules of interpretation applied by the Panel and Appellate Body. The main section examines a wide range of provisions which affect various aspects of the CSI. The provisions are categorized into two groups: the first deals with the general principles of the prohibition on discriminatory treatment (Article I:1) and quantitative restrictions (Article XI) and the second deals with the provisions relating to customs formalities and customs clearance, (Article V, VIII and X). Both groups concern the same issue, however, namely the practices that customs should or should not employ when issuing and administering customs formalities. The Container Security Initiative is a form of customs control and so the investigation will refer to the definitions and principles contained in international conventions (particularly the Revised Kyoto Convention and Framework of Standards).

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<sup>724</sup> *Id.*, p. 82 (pointing out that between 1947 and 1994, the average level of tariffs in developed countries was reduced from over 40 per cent to less than 4 per cent).

<sup>725</sup> Kevin Kennedy, *GATT 1994*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, VOL. I (Patrick F. J. Macrory et al., eds.), Springer Verlag 2005, pp. 99 – 100.

<sup>726</sup> The chapeau of Article XXIII:1 of the GATT 1994 provides that a Panel can be requested “if any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.”

### 5.1.1. The Complainant

Possible complainants against the CSI are likely to fall into two categories: countries which are not members of the CSI and those which are such as the European Community. The nature of the complaint is likely to vary considerably between them; whereas a country which is not a member of the CSI is likely to attack the measure as a whole, a complainant such as the European Union that already has CSI ports is likely to attack those aspects of the measure with which it disagrees.

The first class of complainant are countries which are not members of the CSI, and in this respect developing countries are the most likely candidates. They are likely to complain about the measure as a whole because they are largely excluded from the measure, do not obtain any benefit from it and are seeing their opportunity to access markets in the United States restricted. Considering that many developing countries are landlocked and may not have access to major shipping routes, their complaints are also likely to deal with the side-effects of the CSI. For example, they may complain about the effects of the CSI on transshipment services as well as the imposition of port user fees by CSI participants in order to cover the costs of implementing the measure. International donor organizations (e.g. OECD, UNDP, IMF etc.) with their long experience of working in developing countries may be able to assist in detailing the effects of the CSI in this respect.

The second category of complainant is already a member of the CSI initiative and likely to gain benefits from the initiative in the form of expedited clearance, and possibly, enhanced status as a political ally of the United States. As such, a potential complaint in this category is likely to be far more limited in scope. A prime candidate for initiating this complaint is the European Union, which is one of the most frequent users of dispute settlement as well as one of the few WTO Members which have sufficient trade power to impose retaliatory measures.<sup>727</sup> However, the major motivation for bringing a complaint may be due to political reasons rather than trade effects under the Trade Barriers Regulation.

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<sup>727</sup> *Supra*, n. 646.

Economic injury arising under the CSI is most likely to affect smaller economic participants with limited resources. Larger companies, on the other hand, are likely to have the necessary resources to comply with U.S. security requirements. As a result, the economic injury inflicted on European companies by the CSI may not be deemed significant for the Community as a whole, as required by Article 2(4) of the Trade Barriers Regulation. Smaller importers are also unlikely to have sufficient administrative resources to compile the necessary evidence of a case or be able to exert sufficient political pressure<sup>728</sup> over industry representatives to commence an investigation of their complaint – especially considering the potentially explosive trade war that could result from a dispute about measures designed to protect national security.<sup>729</sup>

A complaint may therefore represent a political decision taken by the European Commission in response to an aspect of the CSI that it particularly disagrees with, rather than as a response to significant economic injury. This sort of politically-motivated complaint by the European Community has been seen before – in relation to the so-called “Helms-Burton” Act of 1996. In that particular dispute, the EC was accused of abusing the DSB in order to thrash out a political dispute with the United States.<sup>730</sup> Considering the highly sensitive nature of the CSI, it may well be prudent to ensure that a similar suspicion of a politically-motivated complaint be avoided in accordance with Article 3.10 DSU.<sup>731</sup> The EU could accomplish this by concentrating its complaint onto a single aspect of the CSI which is unpopular with all stakeholders in the supply chain, namely Section 1701 of the IRCA 2007. In this way, the EC could use the dispute settlement procedure constructively: moreover, the fact that the current administration has also spoken out against the measure suggests that the United States would be willing to participate in consultations.<sup>732</sup>

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<sup>728</sup> See Petersmann, p. 306 (pointing out that “several WTO complaints initiated by the United States[...] were linked to election campaign promises in exchange for financial campaign contributions in U.S. federal elections”).

<sup>729</sup> See Schneider, pp. 636 – 637, pointing out that, unlike private actors, the government will be mindful of the effects that raising disputes will have not only on its trading and diplomatic relationships with other states as a whole but also on the dispute settlement system of the WTO; *contra* Bronckers and McNelis p. 67 and esp., p. 84 (“It is not easy to conceive of political factors that would militate against an investigation of an injurious trade practice of a third country which is arguably illegal”). In addition, Article 3:7 of the DSU must also be considered.

<sup>730</sup> See generally, Spanogle, p. 1333.

<sup>731</sup> Article 3.10 DSU provides that “it is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.”

<sup>732</sup> Statement of Administrative Policy, H.R.1 Implementing the 9/11 Commission Recommendations Act of 2007, 9 January 2007.

In any case, the European Community is unlikely to complain about the CSI as a whole, because this measure is based on concepts adopted by the EC in its own measures, such as the advanced submissions of cargo declarations, the risk assessment of maritime containers and simplified customs formalities for low risk cargo. Initial objections of the EU Commission to CBP's conclusion of Declarations of Principle with individual member states were also settled through the conclusion of a pan-European agreement. Although the 10 + 2 data set exceeds the standards of the European Community and World Trade Organization there would be little point in basing a complaint on this measure (should it be implemented) because it simply responds to well-known inadequacies of using the cargo declaration as a source of information for risk assessment. On the other hand, the introduction of 100 per cent scanning by Congress as part of the CSI not only contradicts these concepts but also threatens to make redundant the security regime which has been painstakingly constructed by the European Community and the CBP over a four year period. This also appears to be the only maritime security measure in the world today that is not based on risk assessment and is universally opposed by those involved in maritime transportation. This element of the CSI may therefore motivate the EC Commission to launch a violation complaint. It should not be forgotten, however, that the fact that 100 per cent scanning forms part of the CSI will permit the Panel to make general observations about the measure as a whole.

The following investigation takes the position that the complainant is not a member of the CSI and has launched a complaint against all four components of the CSI. This "scattergun" approach to a violation complaint not only permits a wide-ranging examination of the CSI under WTO law, but, in practice may ensure the best chances of success. The scope of the GATT is inherently uncertain in this dispute because, as stated above, the CSI is a measure which primarily affects maritime transportation services rather than the trade in goods.

### **5.1.2. Burden of Proof for General Measures**

The burden of proof has been described as a mechanism by which an adjudicating body allocates the duty to prove facts and determines the outcome where evidence is evenly divided.<sup>733</sup> Its allocation was dealt with by the Appellate Body in *U.S. – Wool Shirts and Blouses*. The DSU

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<sup>733</sup> WAINCYMER, p. 536, para. 8.22

itself does not allocate the burden of proof for making a complaint<sup>734</sup> and so the Appellate Body referred to principles of general customary law for guidance. It noted that it was a general principle in all legal systems that the party making a complaint bore the burden of proving that complaint.<sup>735</sup> Accordingly there was a presumption that states were meeting their obligations which the complainant had to rebut by adducing sufficient evidence.<sup>736</sup> This would then establish a presumption that the measure in question was inconsistent with its obligations under the WTO agreements. It would then be incumbent on the Defendant state to adduce sufficient evidence to rebut the presumption.<sup>737</sup> The benefit of the doubt is to be given to the defending party in cases of uncertainty,<sup>738</sup> which accords with the presumption of good faith.<sup>739</sup>

### 5.1.3. Standard of Proof

According to one commentator, the standard of review “refers to the manner in which Panels are required to review member state measures in order to determine if such measures are in conformity with obligations under the various WTO agreements.”<sup>740</sup>

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<sup>734</sup> Article 3.8 DSU only deals with the burden of proof once a violation is established and does not explain which party bears the burden of proving a violation of the WTO agreements in the first place.

<sup>735</sup> *Id.*

<sup>736</sup> See Zeitler, pp. 724 – 725; Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL’Y 647 (1994), p. 657, who describes this principle (within the context of national law) as representing the principle of civility, “One ought to presume, until sufficient evidence is adduced to show otherwise, that any given person has acted in accordance with serious social obligations.” He explains this presumption in the following terms (p. 653), “[T]o presume that someone has breached his or her duty fails to accord that person the dignity associated with the status of membership in the community that is governed by the norms whose breach is at issue.” See also Report of the Appellate Body, *Chile – Alcoholic Beverages*, (WT/DS187/AB/R and WT/DS110/AB/R), 13 December 1999 (adopted on 12 January 2000), para. 74 (“Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith”). The Appellate has stated the presumption in good faith in a number of cases see Report of the Appellate Body, *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (WT/DS202/AB/R), 15 February 2002 (adopted on 8 March 2002), para. 110, “(As always, we must assume that WTO Members seek to carry out their WTO obligations in good faith.)”.

<sup>737</sup> See Appellate Body, *U.S. Wool Shirts and Blouses*, p. 13; see also Panel, *Argentina – Bovine Hides*, paras. 11.11 – 11.14 (stating that the complainant must provide evidence in support of each of its particular assertions). Concerning the burden of proof, see generally: VAN DEN BOSSCHE, pp. 210 – 211; WAINCYMER, pp. 536 ff.

<sup>738</sup> See Report of the Panel, *U.S. – Sections 301 – 310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999 (adopted on 27 January 2000), [hereinafter, Panel *US – Section 301*] para. 714.

<sup>739</sup> Zeitler, p. 724.

<sup>740</sup> Ross Becroft, *The Standard of Review Strikes Back: The US – Korea DRAMS Appeal*, 9 J. INT’L ECON. L. 207, p. 208.

The Dispute Settlement Understanding does not specify the standard of review to apply<sup>741</sup> and so this question has been left to the Panels and Appellate Body. In *U.S. – Wool Shirts and Blouses* the Appellate Body held that, “in the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.”<sup>742</sup> In *US – Gambling*, the Appellate Body held that the complainant could not simply submit evidence and expect the Panel to determine a claim nor could it allege facts without relating them to the legal arguments. Rather, its claims had to be based on “sufficient” evidence and legal argument put forward in relation to each of the elements of the claim.<sup>743</sup>

The standard of review extends to questions of law and fact and requires the Panel to review the factual situation (the “raw” facts), the conclusions which the government authority has drawn from them as well as the interpretation of the member state’s national law.<sup>744</sup> In both branches of the review, the major question is always the degree of deference which the Panel should show member states. The standard of review ranges from absolute deference (amounting to little more than a review of whether the member states adopted the correct procedures when making the decision) to *de novo* review (i.e. “a new and independent fact-finding exercise”).<sup>745</sup> In the latter case, the panel would have to “verify whether the determination by the national authority was ‘correct’ both factually and procedurally.”<sup>746</sup>

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<sup>741</sup> WAINCYMER, p. 563. It reflects the disagreement on this issue during the Uruguay Round; Oesch, pp. 645 – 646. The GATT and SPS Agreement are silent on the level of review. Only Article 17.6 (i) of the *Anti-Dumping Agreement* has language on the standard of review to be employed by panels. See Report of the Appellate Body in *EC Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, (adopted on 13 February 1998), [hereinafter Appellate Body, *EC – Hormones*, para. 114.

<sup>742</sup> Appellate Body, *US – Wool Shirts and Blouses*, p. 325. However, the standard of review in WTO jurisprudence is “far from settled”, see Becroft, p. 217. Many cases relate to specific agreements such as the SPS Agreement or Agreement on Safeguard Measures. Although the Panel and Appellate Body have made general comments on the standard of review in such cases, there is a tendency to employ a standard of review specific to the agreement in question: see Becroft, pp. 213 – 215, who argues that the standard of review is becoming increasingly “agreement-specific.” See also Oesch, p. 657.

<sup>743</sup> Report of the Appellate Body, *United States – Measures Affecting the Supply of Cross-Border Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, (adopted on April 20, 2005), paras. 138 – 141.

<sup>744</sup> Review of domestic law is treated as a question of fact: see Oesch, pp. 653 – 656.

<sup>745</sup> Report of the Appellate Body, *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 22 October 2001, (adopted on 21 November 2001), para. 56.

<sup>746</sup> Appellate Body, *EC – Hormones*, para. 111.

The question concerning the standard of review in relation to facts arose in *EC – Hormones*. The EC argued that that WTO panels should adopt “a deferential “reasonableness” standard when reviewing a Member's decision to adopt a particular science policy or a Member’s determination that a particular inference from the available data is scientifically plausible.”<sup>747</sup> This standard of review should apply in all “highly complex factual situations.”<sup>748</sup> The Appellate Body rejected this argument and, referring to Article 11 of the DSU, stated that the appropriate level of review was neither *de novo* nor ‘total deference’ but an objective assessment of the facts.<sup>749</sup>

As far as questions of law are concerned, the Panel adopts a *de novo* review which is dictated by the customary rules of interpretation contained in Articles 31 and 32 of the VCLT.<sup>750</sup> On the other hand, the Panels have recognized the need to show deference to member states’ interpretation of their own laws.<sup>751</sup> For example, the Panel in *US – Stainless Steel* held that Article X did not justify the review of the continuity of domestic decisions or judgments within the national legal system and practice. This was a task reserved for the member states and which the Panel was unsuited to carry out.<sup>752</sup>

In establishing appropriate standards of review, Panels have looked to Article 11 DSU for guidance. Accordingly, in *US – Cotton Underwear*, the Panel held that a policy of “total deference to the findings of the national authorities could not ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU.”<sup>753</sup> On the other hand, it did not regard its review “as a substitute for the proceedings conducted by national investigating authorities.”<sup>754</sup> Instead, its function should be to assess objectively the review conducted by the national investigating Authority. The Panel in *US – Wool Shirts* ruled that Article 11 required the Panel to “make an

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<sup>747</sup> *Id.*, para. 14.

<sup>748</sup> *Id.*, para. 15.

<sup>749</sup> *Id.*, para. 117. With regard to questions of fact, Panels must not simply accept the conclusions of the competent authorities: see Report of the Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/AB/R, 1 May 2001 (adopted on 16 May 2001), para. 106.

<sup>750</sup> Oesch, pp. 656 – 657.

<sup>751</sup> *Id.*

<sup>752</sup> Report of the Panel, *United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, 22 December 2000 (adopted on 1 February 2001), [hereinafter *US – Korean Steel AD Measures*], paras. 6.50 –6.51.

<sup>753</sup> Report of the Panel, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* WT/DS24/R, 8 November 1996 (adopted on 25 February 1997), [hereinafter *US – Cotton Underwear*], para. 7.10.

<sup>754</sup> *Id.*, para. 7.12.

objective assessment of the matter before it; including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB [...].”<sup>755</sup> The Panel adopts an inquisitorial approach to the review of facts which can include substantial re-evaluation of the facts and logic developed by the competent authority.

Concerning *de facto* measures, the standard of proof is particularly important because the complainant seeks to establish a violation of the agreement(s) based on the effects of the measure in question. In *Argentina – Bovine Hides* the Panel held that trade statistics alone would not be sufficient to establish the restrictive effect of a measure; rather, the complainant had to establish a causal link between the contested measure and the low level of exports. His arguments would also have to be buttressed by sufficient *factual* evidence.<sup>756</sup> In the case of circumstantial evidence, the Panel held that it must “lead clearly and convincingly to the conclusion proposed by the complainant and no other.”<sup>757</sup> The Panel reinforced the quasi-judicial nature of the dispute settlement body by holding that the burden of proof under WTO law “was comparable to that in a domestic trial.”<sup>758</sup>

The standard of evidence depends on the wording of the provision and can therefore vary within an individual paragraph. For example, Article X:3 (a) obliges all member states to “administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings.” Arguably, the standard of proof for “reasonable” is higher than that for “uniform” and “impartial” because an accusation of “unreasonableness” could also imply “bad faith.” According to the Appellate Body in *United States – Sunset Reviews of Anti-Dumping Measures*, an accusation of “bad faith” was a particularly serious allegation and imposed a particularly high standard of proof.<sup>759</sup>

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<sup>755</sup> Report of the Panel, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 6 January 1997 (adopted on 23 May 1997), WT/DS33/R, para. 7.16.

<sup>756</sup> Panel, *Argentina – Bovine Hides*, paras. 11.12 – 11.14; 11.20.

<sup>757</sup> *Id.*, para. 11.41.

<sup>758</sup> *Id.*

<sup>759</sup> *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/AB/R), 20 November 2004 (adopted on 17 December 2004), para. 217.



#### 5.1.4. Right of the Panel to Seek Information

The Panel is a fact-finding organ<sup>760</sup> and, according to Article 11 of the DSU is required to make an objective assessment of the matter before it, including the facts of the case. In order to do this, Article 13:1 gives it the right to seek information “from any individual or body which it deems appropriate.”

This fact-finding function is unique to the Panel and, in principle, its findings cannot be reviewed by the Appellate Body.<sup>761</sup> Article 13:2 allows the Panel to request an advisory report in writing from an expert review group concerning factual aspects of a scientific or technical nature raised by a party to a dispute. This provision grants the Panel discretionary authority (i.e. it is not duty-bound to seek information in each and every case).<sup>762</sup> The Appellate Body in *US – Shrimp* explained this authority of the Panel as follows:

*“We consider that a panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.”*<sup>763</sup>

The Appellate Body believed that the Panel had “ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the

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<sup>760</sup> See Report of the Appellate Body in *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, (adopted on 19 January 2001), [hereinafter Appellate Body, *Wheat – Gluten*], 22 December 2000, para. 151.

<sup>761</sup> Article 17.6 of the DSU limits the Appellate Body’s review to questions of law or the legal interpretations adopted by the Panel. See Appellate Body, *EC – Hormones*, para. 132 (“Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body”).

<sup>762</sup> Report of the Appellate Body, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 22 April 1998, WT/DS56/AB/R, paras. 84 – 86.

<sup>763</sup> Appellate Body, *US – Shrimp*. para. 104.

legal norms and principles applicable to such facts.”<sup>764</sup> On the other hand, the Panel’s function as a fact-finding organ is limited by the burden and standard of proof on the parties as well as its terms of reference. The Appellate Body in *Japan - Agricultural Products II* observed that this authority “cannot be used by a Panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.”<sup>765</sup> Rather, the Panel should seek information and advice from experts in order to understand and evaluate the evidence submitted and the arguments made by the parties.<sup>766</sup> In addition, the Panel cannot act *ultra petita* and make a ruling on a claim which was not made by the complainant.<sup>767</sup> The effect of Article XXI(a) on the Panel’s fact-finding function is examined under Part D, Section 2.1.

#### 5.1.5. Rules of Interpretation for General Obligations

According to the Appellate Body, the Vienna Convention on the Interpretation of the Law of Treaties represents the main mechanism for treaty interpretation used in the WTO.<sup>768</sup> The rules impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.<sup>769</sup> Many provisions of the WTO are not ideally clear (e.g. Article XXI), and these rules of interpretation provide the basis for constructing an interpretative framework.

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<sup>764</sup> *Id.*, para. 106. See also Report of the Appellate Body, *European Communities-Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, 12 March 2001 (adopted on 5 April 2001), [hereinafter, Appellate Body, *EC – Asbestos*] para. 161.

<sup>765</sup> Appellate Body, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 22 February 1999 (adopted 19 March 1999), paras. 127 – 130.

<sup>766</sup> *Id.*

<sup>767</sup> Report of the Appellate Body, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002 (adopted on 23 October 2002), para. 173.

<sup>768</sup> Appellate Body, *U.S. – Gasoline*, at p. 17.

<sup>769</sup> Report of the Appellate Body, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001 (adopted on 23 August 2001), para. 60. Article 3.2 of the Dispute Settlement Understanding directs Panels to apply “customary rules of interpretation of public international law” in seeking to clarify the provisions of the General Agreement and other agreements of the WTO Agreements. One source of such rules has been the Vienna Convention on the Law of Treaties. Although the WTO, as a non-state organization is not a signatory to the Convention, 31 and 32 VCLT have attained the status of customary rules of general international law.

Article 31 VCLT consists of three elements, “the ordinary meaning of the words”, “in their context” and “in the light of its object and purpose.”<sup>770</sup> According to the Panel in *U.S. Section 301*, these elements are to be viewed as a holistic rule of interpretation.<sup>771</sup> In practice, however, the Panels and Appellate Body attach the greatest importance to the ordinary meaning of words by reference to their dictionary meaning.<sup>772</sup> In *US – Shrimp*, the Appellate Body held that the object and purpose of the parties to the agreement must first be sought in the words constituting that provision.<sup>773</sup> If the meaning is equivocal or inconclusive, the Panel may refer to the context as well as the object and purpose of the treaty.<sup>774</sup> Article 31 (2) states that the “context” includes the preamble and annexes of a treaty. The preamble to the WTO Agreement states the overarching aims of the treaties and can also play an important role in the interpretation of the provision.<sup>775</sup>

Article 31 (3) (b) VCLT allows reference to subsequent practice of the parties in the application of the treaty which establishes agreement regarding its interpretation. In *Japan – Alcoholic Beverages*, it was held that the Panel reports adopted by the contracting parties constitute subsequent practice in a specific case. However, this decision was overruled by the Appellate Body which held that subsequent practice was a “concordant, common and consistent set of acts.”<sup>776</sup> In this connection, the prior practice of only one party may be relevant to the examination but it may not represent the common intention of the parties.

According to Panel in *EC-Equipment*, Article 31 is usually sufficient to establish the meaning of a term. Only if the meaning of the term in question remains ambiguous or obscure or leads to a result which is “manifestly absurd or unreasonable” can the treaty interpreter refer to Article 32

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<sup>770</sup> See Steinberg, at p. 261.

<sup>771</sup> Report of the Panel, *United States – Sections 301 – 310 of the Trade Act of 1974*, WT/DS152/R, 22 September 1999 (adopted on 27 January 2000), para. 7.22.

<sup>772</sup> According to the Panel in *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R; WT/DS234/R, 16 September 2002 (23 January 2003), para. 248, “dictionaries are important guides to, but not dispositive statements of, definitions of words appearing in agreements and legal documents.”

<sup>773</sup> Appellate Body, *US – Shrimp*, para. 114.

<sup>774</sup> *Id.*; cf. Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R; WT/DS142/R, 11 February 2000 (adopted on 19 June 2000), para. 10.12 [hereinafter Panel, *Canada – Autos*], (which argued that even though the text of a term is the starting-point for any interpretation, the meaning of a term cannot be found exclusively in that text).

<sup>775</sup> See e.g. Panel, *US – Shrimp*, para. 7.35.

<sup>776</sup> Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 (adopted on 1 November 1996), pp. 12 – 13.

of the Vienna Convention. This Article allows the interpreter to have recourse to supplementary means of interpretation including the preparatory work of the treaty and the historical background against which the treaty was negotiated.

### **5.1.6. Role of Previous Decisions**

The following investigation relies heavily on decisions of the Panel and Appellate Body relating to certain aspects of Article XX. Therefore, the role that previous decisions plays in the interpretation of the WTO agreements both in terms of *stare decisis* and *obiter dicta* is of particular importance.

According to Article 32 of the VCLT, previous decisions only play a secondary role in the interpretation of the agreements and are not binding in later disputes. However, they have persuasive effect and, in practice, are often referred to by Panels and the Appellate Body.<sup>777</sup> Like national courts, the dispute settlement organs of the WTO refer to *obiter dicta* as assistance for future decisions and developing the law.<sup>778</sup> However, this practice has also been questioned by commentators who argue that the requirement of Article 3.2 limits Panels to examining issues within the context of a dispute.<sup>779</sup> Although controversial, the Panels and the Appellate Body do refer to previous decisions when interpreting the covered agreements.

## **5.2. Preamble to the Marrakech Agreement**

### **5.2.1. Introduction**

Before examining the individual provisions of the WTO agreements, it is important to remember that over two-thirds of the WTO members are developing countries. Therefore, it is important to

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<sup>777</sup> See Ragosta et al p. 706 (accusing the Panels and Appellate Body of applying “*de facto* stare decisis”). See also WAINCYMER, p. 510 – 511.

<sup>778</sup> Appellate Body, *Canada – Periodicals*, p. 33 (referring to a statement of the Panel as “obiter dicta”). See also WAINCYMER, p. 515. For an example of *obiter dicta* in relation to Article XXI see Report of the Panel, *United – States – Trade Measures Affecting Nicaragua* 13 October 1986, (L/6053), [hereinafter, *US – Nicaragua II*], para. 5.17, where the Panel addressed the issue of the interpretation of Article XXI, despite the fact that it was specifically excluded from its review; see also Ragosta et al, p. 731; Richard H. Steinberg, *Judicial Lawmaking At The WTO: Discursive, Constitutional, and Political Constraints*”, 98 AM. J. INT’L L. 247, p. 254.

<sup>779</sup> See Ragosta et al, p. 706.

consider the effects of the CSI on such countries when examining the provisions of the WTO agreements. In particular, the preamble to the Marrakech Agreement Establishing the World Trade Organization 1994 stresses the importance of integrating developing countries into world trade. The principles contained in the preamble reflect the fact that developing and least developed countries have special needs that must be taken into account.<sup>780</sup> A major aim of liberalization and capacity-building measures introduced by international organizations such as the WTO was to enable developing countries to participate in world trade.<sup>781</sup>

### 5.2.2. Requirements

The second paragraph to the Preamble of the Marrakech Agreement acknowledges the need that members make “positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development”. In order to achieve this, the next paragraph expresses the intention of member states to contribute to these objectives by “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”. Therefore, the preamble imposes dual obligation with regard to developing countries: positive efforts at integration and agreements to enhance market access.

The dispute settlement bodies have recognized that the principles contained in the Preamble to the Marrakech Agreement are binding on member states. In the *Shrimp – Turtle* dispute, after stating that international agreements had to be carried out in good faith in accordance with the principle of *pacta sunt servanda*<sup>782</sup>, the Panel stated that, as a general rule, the Preamble of an agreement could be referred to in order to determine its object and scope. It held that:

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<sup>780</sup> Van den Bossche, pp. 694 ff.

<sup>781</sup> See e.g. World Trade Organization, Ministerial Declaration, Ministerial Conference, 4<sup>th</sup> Session, Doha WT/MIN(01)/DEC/1, 14 – 20 November 2001 (adopted on 14 November 2001) [hereinafter, Doha Declaration].

<sup>782</sup> Report of the Panel, at para. 7.1.

*“[T]he central focus of [the WTO Agreement] ... remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a non-discriminatory basis.”*<sup>783</sup>

The Appellate Body upheld the Panel’s interpretation of the Preamble and stated that its principles formed an integral part of the WTO obligations:<sup>784</sup>

*“As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.”*<sup>785</sup>

Therefore, the Panel and Appellate Body will take the principles of the Preamble to the WTO Agreement into account when examining the individual provisions of the GATT, including the security exception of Article XXI<sup>786</sup>.

### **5.2.3. Examination**

The Container Security Initiative is a measure that addresses a risk to a transnational asset, namely the international supply-chain. Like the environment, supply-chain security is a global concern and, in accordance with the Preamble to the WTO Agreement, the United States are bound to take positive measures to ensure that the CSI does not jeopardize the integration of developing and least developed countries into world trade.<sup>787</sup> Evidence of such efforts can take the form of reciprocal agreements designed to eliminate trade barriers and discriminatory

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<sup>783</sup> *Id.*, Para. 7.2.

<sup>784</sup> See Report of the Appellate Body, paras. 129 and 131.

<sup>785</sup> *Id.*, para. 153.

<sup>786</sup> General Agreement on Tariffs and Trade, Minutes of Meeting, C/M/109, 31 October 1975, p. 9, (representatives of developing countries also objected to the fact that Sweden had not taken the needs of developing countries into account pursuant to Part IV of the GATT).

<sup>787</sup> The preamble to the Agreement Establishing the World Trade Organization states, “seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, [...]” Considering that the environment is a “pure public good”, this link would arguably also apply to other such goods, including security.

treatment by the CSI. The Panel has held that the objectives of the WTO Agreement would be undermined if a member were to jeopardize “the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible.”<sup>788</sup>

Currently, the Container Security Initiative includes the seaports of few developing countries<sup>789</sup> despite the fact that they are important trading partners of the United States<sup>790</sup> and are located in countries struggling with real terrorist threats.<sup>791</sup> There is no evidence that the United States has taken positive steps to ensure that developing and least developed countries will be able to participate in the measure. On the one hand, the initiative is only open to selected countries which CBP invites to participate in the measure.<sup>792</sup> On the other hand, the entry requirements appear highly restrictive and it is unlikely that the seaports of any developing countries will be in a position to satisfy those relating to seaport infrastructure.<sup>793</sup>

Considering the discriminatory treatment of containers subject to red-lane inspections, it is highly likely that the refusal of the United States to integrate developing countries into the CSI could cause them severe economic disadvantages. Research has shown that maritime transportation plays a crucial role in States’ economic development and the development of the global economy has ensured that shipping lanes are enormously important for the security and prosperity of states – including those which are landlocked.<sup>794</sup> One writer points out the “close relationship between the existence of efficient shipping services and international development, especially in the case

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<sup>788</sup> Report of the Panel, para. 7.44.

<sup>789</sup> See Florestal pp. 393 – 394.

<sup>790</sup> See UNCTAD REPORT, pp. 6-7 at para. 15. The report points out that “almost 90% of U.S. inbound maritime container trade originates in 30 countries, several of which are small developing nations.” For example, South and Central American countries account for almost 10% of all US foreign trade; see also UNCTAD Newsletter, February 2003, (UNCTAD/WEB/TLOG/2003/1), p. 10 (“the United States accounted for 23 per cent of global imports in value terms in 2000, with about 50 per cent of these imports coming from developing countries”).

<sup>791</sup> See comments of Senator Lautenberg in S. Hrg. 109 – 186, p. 27 ([W]hy aren’t we focusing our efforts on cargo originating in countries that pose some real threat?”); cf. CSI STRATEGIC PLAN, p. 22 (Objective 2.2. is to expand the measure to locations of high terrorist activity or seaports serving high-risk areas). One seaport which fits this profile is Port Qasim, Pakistan or Port Salalah, Oman: see CBP, Ports in CSI, 29 August 2007, p.2.

<sup>792</sup> *Supra* pp. 78 – 80.

<sup>793</sup> For the criteria see *supra* p. 79

<sup>794</sup> NATIONAL STRATEGY FOR MARITIME SECURITY, p. 1 and p. 20 (aiming to “support the accelerating growth of global commerce); see also NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, p. 17 (“A strong economy enhances our national security by advancing prosperity and freedom to the rest of the world”).

of less developed countries.”<sup>795</sup> This observation is particularly important with regard to the United States, which is the leading importer of goods from developing countries.<sup>796</sup> Therefore, discrimination against non-CSI seaports has the potential to unravel the progress made in trade facilitation by complicating customs procedures.<sup>797</sup>

In this respect, the Panel has held that the objectives of the WTO Agreement would be undermined if a member were to jeopardize “the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible.”<sup>798</sup>

The refusal to involve developing countries in the CSI and the discriminatory treatment that this entails has wider ramifications. Trade plays a crucial role in the fight against terrorism because, as the preamble to the WTO Agreement states, it can lead to increasing the standard of living and full employment and real income.<sup>799</sup> This, in turn provides the basis for political and social stability – pre-conditions for stamping out terrorist activities. The World Summit Outcome, for example, recognizes this by urging states to build national and regional capacity to combat terrorism.<sup>800</sup> Accordingly, there is a risk that the negative economic effects of non-CSI participation could actually contribute to creating the conditions for terrorism by destabilizing weak states most at risk to terrorism.<sup>801</sup> As one writer has observed:

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<sup>795</sup> PARAMESWARAN, p. 23.

<sup>796</sup> Fact Sheet, Bureau of Public Affairs, U.S. Department of State, Washington DC, 14 September 2006.

<sup>797</sup> WORLD BANK RESEARCH REPORT DECEMBER 2003, p. 2 (“Inefficient procedures undermine the intended benefits not only of liberalized trade policies, but also of investments in border infrastructure and information technologies”). See UNCTAD Transport Newsletter, February 2003 (UNCTAD/WEB/TLOG/2003/1), pp. 17 – 18; Florestal, p. 395.

<sup>798</sup> Report of the Panel, para. 7.44.

<sup>799</sup> The Preamble to the Agreement Establishing the World Trade Organization states “with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand [...]”.

<sup>800</sup> A/Res/60/1 at para. 88

<sup>801</sup> See S. Hrg. 109 – 186, (Stephen E. Flynn, *Addressing the Shortcomings of the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative*), pp. 97 – 98. For details on countries most at risk to terrorism, see the *International Country Risk Guide* published by the PRS Group, which assesses the risk of doing business in 139 countries. The United Nations refers to the vulnerability of certain states in a number of its counter-terrorist resolutions, e.g. S/Res/1456 (2002) states that “terrorists and their supporters exploit instability [...] to justify their criminal acts”; Resolution 1625 (2005) on strengthening the effectiveness of the Security Council’s role in conflict prevention, particularly in Africa; S/Res/1631 (2005), para. 2 (which “urges all States and relevant international organizations to contribute to strengthening the capacity of regional and subregional organizations, in particular of African regional and subregional organizations”).



*“If we derail the engine of economic growth and retreat from Wilsonian values, which are indispensable to sustaining the promise and reality of a better life around the globe, we will end up fuelling the threatening environment from which we are trying to protect ourselves. Security without openness is as self-defeating as openness without security.”*<sup>802</sup>

The United States itself has recognized that terrorism is more likely to flourish in impoverished and undemocratic states.<sup>803</sup> According to the UN, economic and social development depends on governments creating “a conducive environment for vigorous private sector-led growth.”<sup>804</sup> In this respect, it has been stated that the greatest disadvantage of non-CSI participation is likely to be felt by small and medium-sized companies in developing countries.<sup>805</sup> These companies play a major role in small economies, being “a major instrument of employment creation and technology transfer.”<sup>806</sup> This is also short-sighted, considering that the creation of a customs union (e.g. by the SADC) could enable its member states to team up more effectively to combat

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<sup>802</sup> FLYNN, p. 13.

<sup>803</sup> There is debate as to the root causes of terrorism. According to a UN report, developing countries could be vulnerable to terrorist activities. Advancing prosperity and freedom in the rest of the world will enhance national security by eliminating the socio-economic problems in such states which create the conditions for potential recruits: see *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY*, p. 14 – 15, para. 21. However, cf. *REPORT OF THE SECRETARY GENERAL, UNITING AGAINST TERRORISM RECOMMENDATIONS FOR A GLOBAL COUNTER-TERRORISM STRATEGY*, (A/60/825), 27 April 2006, paras. 8 (“terrorist acts do not occur in a social or political vacuum”) and 36 (pointing out the danger of youth unemployment); *NATIONAL SECURITY STRATEGY OF THE UNITED STATES*, Foreword by the President (“Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.”); see also pp. 17ff.; cf. *NATIONAL STRATEGY FOR COMBATTING TERRORISM*, p. 9 (“Terrorism is not the inevitable by-product of poverty [...]”). On the other hand, measures to achieve democratic change demand economic stability: see *9/11 Five Years Later: Successes and Challenges*, September 2006, p. 5. See also *THE NATIONAL STRATEGY FOR MARITIME SECURITY*, p.5; Clark, pp. 67 – 68 (pointing out that impoverished populations in Africa accuse Western oil companies of exploitation and similar grievance motivated Osama bin Laden to establish Al Qaeda); *Osama bin Laden: Der Mann, der die Welt zum Weinen Brachte*, P.M. Biografie, 2/2007, pp.67 – 68; FLYNN, pp. 3 – 4 (arguing that anti-Americanism also plays a role in terrorism).

<sup>804</sup> *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY*, p. 27, para. 58.

<sup>805</sup> According to the UNCTAD, there are 54 countries in Africa, 39 of which have sea access and 15 of which are landlocked: see UNCTAD Secretariat Transport Newsletter, No. 21, November 2001, p. 9. This is generally accepted by writers, see e.g. Allen, Florestal, *OECD REPORT 2005, UNCTAD REPORT*. See also *TRANSPORT INFRASTRUCTURE FOR TRANSIT TRADE OF THE LANDLOCKED COUNTRIES IN WEST AND CENTRAL AFRICA: AN OVERVIEW* (UNCTAD/LDC/2007/1), 12 April 2007, p. 9. There is a growing market for seaport services in Africa, with container traffic growing at a rate of 12 – 15 percent. See *REPORT BY THE UNCTAD SECRETARIAT, ANNUAL REVIEW OF MARITIME TRANSPORT 2006*, p. 76.

<sup>806</sup> See Preamble to Columbus Ministerial Declaration on Trade Efficiency, para. 5.

transnational organized crime by improving the exchange of information and provision of administrative assistance.<sup>807</sup>

#### **5.2.4. Result**

The Container Security Initiative contravenes the requirements of the Preamble to the Marrakech Agreement. The CBP has not made positive attempts to integrate developing countries into the Container Security Initiative and the measure's selective, unilateral nature has the potential to restrict market access for goods from developing countries. The economic effects of non-participation in the CSI could seriously affect the economic and political stability of developing and least developed countries.

### **5.3. Article I:1 GATT: Most Favoured Nation Treatment**

#### **5.3.1. Introduction**

Article I:1 GATT reflects the general principle of equality in the WTO Agreement, whose preamble states that the parties desire the “elimination of discriminatory treatment in international trade relations.”<sup>808</sup> It requires member states to grant all the benefits they grant to other states – whether members or non-members of the WTO – to all member states of the WTO. This so-called “most favoured nation principle” can be found in many provisions of the covered agreements<sup>809</sup> and ensures that WTO members enjoy the same competitive conditions in relation to each other on the global market.<sup>810</sup> This contributes to the multilateral system of world trade by eliminating protectionist measures and allowing the unrestricted flow of goods which may

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<sup>807</sup> The following information was derived from interviews carried out with 14 customs officials from the following Southern African states: Tanzania, Botswana, Zambia, Swaziland, Mozambique, Namibia and Mauritius in July 2005.

<sup>808</sup> The MFN principle aims to eliminate so-called ‘horizontal discrimination’, which refers to members states discriminating against same or similar products on the basis of their origin. See MEINHARD HILF/STEFAN OELER, *WTO RECHT*, BADEN-BADEN 2005, p. 178.

<sup>809</sup> See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, p. 255 at § 11.3

<sup>810</sup> According to the Appellate Body, the prohibition of discrimination in Article I:1 “serves as an incentive for concessions ... to be extended to all other members on an MFN basis.” Report of the Appellate Body, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R; WT/DS142/AB/R, 4 October 2000 (adopted on 19 June 2000), [hereinafter, *Canada – Autos*], at para. 84.

otherwise lead to disputes and retaliatory actions.<sup>811</sup> The MFN principle includes four areas of government activity, three of which take place at the border.<sup>812</sup>

### 5.3.2. Requirements

Article I:1 GATT applies to all “rules and formalities in connection with importation.” The term “customs formalities” is defined in the Revised Kyoto Convention as “all the operations which must be carried out by the persons concerned and by the Customs in order to comply with the Customs law.”<sup>813</sup> Therefore, on the basis of international convention, Article I:1 GATT applies to all procedures required to ensure compliance with Customs law.

Article I:1 prohibits discrimination between like products and relates to tariff (i.e. “customs duties”) and non-tariff measures (i.e. “other rules and formalities”). A measure can discriminate against like products expressly (*de jure*) or indirectly (*de facto*).<sup>814</sup> Although the former measure will automatically violate Article I:1, there was uncertainty about the situation regarding *de facto* measures. In *Canada – Autos*, Canada argued that a measure which provided “a duty exemption for the importation of certain automobiles, buses and other specified commercial vehicles” could not be deemed discriminatory according to Article I:1 GATT because it did not impose limitations “with respect to the origin of products that may be imported.”<sup>815</sup> In other words, the provision was origin-neutral and seemingly non-discriminatory. However, the Panel held that the measure was inconsistent with Article I:1 GATT because it had *the effect of* discriminating against imports from certain countries. On appeal, the Appellate Body upheld the ruling of the Panel stating that there was nothing in the wording of Article I:1 “which restricted its scope only to cases in which the failure to accord an “advantage” to like products of all other members appeared *on the face* of the measure, or can be demonstrated on the basis of the words of the measure.” One reason for this ruling is that limiting the scope of Article I:1 to origin-based

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<sup>811</sup> Concerning protectionism, see JACKSON, *WORLD TRADE AND THE LAW OF GATT*, p. 307; see also Kennedy, pp. 100, 102

<sup>812</sup> Kennedy, p. 102.

<sup>813</sup> See RKC, Chapter 2. The validity of referring to international conventions when interpreting provisions of the GATT has been recognized by the Appellate Body: see *infra pp.* 235 – 236.

<sup>814</sup> See MICHAEL J. TREBILCOCK AND ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, (3rd ed.), pp. 72 ff.; MATSUSHITA ET AL, p. 148.

<sup>815</sup> Panel, *Canada – Autos*, para. 10.39.

measures would mean that states could circumvent the provision by formulating their discriminatory measures in origin-neutral language.<sup>816</sup> For example, in *Belgian Family Allowances*, the Belgian government adopted a measure which distinguished goods based on the characteristics of their country of origin. The Panel held that this violated Article I:1 and “was difficult to reconcile with the spirit of the General Agreement.”<sup>817</sup>

The requirements of Article I:1 relate to scope and obligation.<sup>818</sup> In the dispute *Indonesia-Autos*, the Panel clarified the order of examination in relation to Article I:1 by referring to the report of the Appellate Body in *EC-Bananas III*<sup>819</sup> and identified four requirements which the complainant must satisfy:

- There must be an advantage of the type covered by Article I;
- The measure must affect “like products”;
- The disputed measure must be a type regulated by the MFN provision;
- The advantage must be offered to all like products immediately and unconditionally.<sup>820</sup>

The scope of Article I:1 is limited to benefits granted in relation to the importation and exportation of products. The meaning of benefits is not defined but in *Canada – Autos*, the Appellate Body formulated the language of the provision in the broadest possible sense to include “any advantage, favour, privilege or immunity.”<sup>821</sup> Therefore, the wording clearly includes not only benefits in the form of an advantage (i.e. the grant of greenlane clearance) but also the avoidance of a disadvantage (such as a reduced risk of redlane clearance).<sup>822</sup>

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<sup>816</sup> See BHALA, pp. 58 – 59 at paras. 3-001 – 3-003; MATSUSHITA ET AL, p. 149 (referring to “indirect discrimination”).

<sup>817</sup> Belgian Family Allowances (Allocations Familiales), Report adopted by the Contracting Parties on 7 November 1952 (9/132 – 1S/59), 6 November 1952, p. 2. para. 8; see also BHALA, p. 59; Florestal, p. 406.

<sup>818</sup> See JACKSON, p. 256 at § 11.3.

<sup>819</sup> Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, 2 July 1998 (adopted on 23 July 1998), [hereinafter, *Indonesia – Automobiles*], para. 14.138.

<sup>820</sup> Cf. BHALA, p. 70 at para. 3-024; VAN DEN BOSSCHE, p. 312.

<sup>821</sup> Appellate Body, *Canada – Autos*, para. 79.

<sup>822</sup> Report of the Panel, *United States – User Fee* (L/6309) 159, 25 October 1987 (adopted on 2 February 1988), [hereinafter Panel, *US – User Fee*], para. 22 (which held that an exemption from a fee for products from least developed countries violated Article I:1).

The advantage can take a wide range of forms, including a procedural requirement or practice.<sup>823</sup> For example in *U.S. – Non-Rubber Footwear*, the Panel held that “the automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1.”<sup>824</sup> Also, the MFN principle is not limited to benefits granted to member states. Therefore, if a member state grants a benefit to a state which is not a member of the WTO, it must do the same with regard to its fellow member states.<sup>825</sup>

Member states must offer the benefit in question to a “like product.” This term frequently appears in the WTO agreements and refers to the equal treatment of foreign goods in relation to each other. It is different treatment of like products which distorts the competitive conditions between states. Products that are not alike can be treated differently.<sup>826</sup> Despite its crucial importance, the GATT 1994 does not define this term. In *Japan - Alcoholic Beverages* the Panel and Appellate Body held that the interpretation of “like products” within the context of Article III applied equally to the same term in Article I:1.<sup>827</sup> The Panel pointed out that previous cases had determined the question of likeness on a case-by-case basis in accordance with the recommendations of the Report of the Working Party on *Border Tax Adjustments* 1970.<sup>828</sup> According to this report, the crucial question was whether the goods, owing to their characteristics and qualities, were considered to be in competition, were destined for the identical end-use or were at least substitutable, i.e. mutually interchangeable.<sup>829</sup> The Appellate Body upheld this approach stating that the question whether products are “like” was “a discretionary decision that must be made in considering the various characteristics of products in individual cases.” However, it added that “no one approach to exercising judgement will be appropriate for all cases.”<sup>830</sup>

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<sup>823</sup> MATSUSHITA ET AL, at p. 149

<sup>824</sup> Report of the Panel, *United States – Non-Rubber Footwear*, (BISD 39S/128), 10 January 1992 (adopted on 19 June 1992) para. 6.9.

<sup>825</sup> Appellate Body, *EC – Bananas III*, para. 190 (“The essence of the non-discrimination obligations is that like products should be treated equally, regardless of their origin”).

<sup>826</sup> VAN DEN BOSSCHE, p. 314 – 317.

<sup>827</sup> Appellate Body, *Japan – Alcoholic Beverages*, p.21; Panel, *Indonesia – Automobiles*, para. 14.141.

<sup>828</sup> Panel, *Japan – Alcoholic Beverages*, WT/DS8/R; WT/DS10/R; WT/DS11/R, 11 July 1996 (adopted on 1 November 1996), p. 136, para. 6.21.

<sup>829</sup> REPORT OF THE WORKING PARTY ON BORDER TAX ADJUSTMENTS, (BISD 18S/97), para. 18.

<sup>830</sup> Appellate Body, *Japan – Alcoholic Beverages*, p. 21

In *Canada – Periodicals*, the Panel held that hypothetical imports could be used to determine whether a measure violates Article III:2.<sup>831</sup> According to the Panel, “an origin-based distinction is sufficient to violate Article III:2 without the complainant having to demonstrate the existence of actually-traded ‘like’ products.”<sup>832</sup> The provision only applies to those “like products” which are “originating in or destined for the territories of all other contracting parties.” This limitation on the scope of the provision was a point at issue in *EC-Bananas III* where the European Community argued that it had set up two regimes for the importation of bananas but that these regimes did not contravene Article I:1 because this provision only applied *within* these regimes.<sup>833</sup> The Panel held that these regimes had contravened Article I:1 and this ruling was upheld on appeal by the Appellate Body which stated that “the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons.”<sup>834</sup> To hold that the provisions applied only *within* regulatory regimes established by that Member would make it very easy for member states to circumvent the obligations imposed by Article I:1.<sup>835</sup>

Article I:1 also obliges the member states to accord any benefit falling within its scope “immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” According to the Panel in *Canada – Autos*, the requirement of “immediate and unconditional” means that the advantages may not be subject to any delay *or* conditions.<sup>836</sup> Awarding a benefit in stages, for example, results in unequal treatment because states given priority would enjoy a competitive advantage over other member states during a certain period. In addition, the Panel held that the requirement of “unconditionally” did not mean that the grant of an advantage could not be made dependent on the satisfaction of certain requirements. The Panel distinguished between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 was subject to conditions, and, on the other, whether an advantage, once it had been granted to the product of any country, was accorded

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<sup>831</sup> Panel, *Canada – Periodicals*, p. 72 at para. 5.23.

<sup>832</sup> *Id.*, para 14.133.

<sup>833</sup> Appellate Body, *EC – Bananas III*, para. 25.

<sup>834</sup> *Id.* at para. 190.

<sup>835</sup> *Id.*

<sup>836</sup> Panel, *Canada – Autos*, paras. 10.22 – 10.25.

“unconditionally” to the like product of all other Members.<sup>837</sup> In other words, the Article I:1 prohibits *conditional most favoured nation treatment* by requiring that a conditional benefit must be made available to all other member states unconditionally once the relevant conditions had been fulfilled.<sup>838</sup>

### 5.3.3. Examination

The CSI falls within the meaning of “rules and formalities in connection with importation and exportation” for the purposes of Article I:1 because it represents an administrative measure of the CBP, a government agency<sup>839</sup> and consists of a statutory regulations which affect the importation of goods into the United States. There are three aspects which appear relevant to Article I: the risk assessment of containers, stationing of CSI teams and the post-incident resumption of trade.<sup>840</sup>

In order to fall within the scope of Article I:1, these three measures must confer an advantage that applies to “any product originating in or destined for any other country”. Each of these measures can confer an advantage on the importation of products. First, the risk assessment process divides containers into low risk and high risk shipments. The designation of a container as “low risk” is advantageous because it reduces the risk that a container will be subject to inspection by the CBP. Secondly, the stationing of CSI teams at foreign seaports can also confer an advantage on products. The presence of such teams permits high-risk containers to be inspected while the container is waiting to be loaded on the vessel (so-called “dwell” or “down” time) thereby reducing delay in the transportation. The fact that a container is shipped from a CSI port also grants it preferential treatment. According to Section 202 (c) (1), “in determining the prioritization of the flow of cargo [...] the Commissioner may give preference to cargo [...] entering a port of entry directly from a foreign seaport designated under the Container Security

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<sup>837</sup> *Id.*, at para. 10.24.

<sup>838</sup> See generally, VAN DEN BOSSCHE, pp. 317 – 318.

<sup>839</sup> *Id.*, pp. 312 – 313.

<sup>840</sup> The 24 Hour Rule is contained in 19 CFR 4.7; parts of the CSI have been codified by the SAFE Port Act 2006.

Initiative.”<sup>841</sup> The post-incident resumption of trade confers a similar benefit on products shipped from CSI ports. Section 205 (j) of the SAFE Port Act states:

*“Lesser Risk Port – The Secretary, acting through the Commissioner, may treat cargo loaded in a foreign seaport designated under the Container Security Initiative as presenting a lesser risk than similar cargo loaded in a foreign seaport that is not designated under the Container Security Initiative, for the purpose of clearing such cargo into the United States.”*

CBP itself has admitted that CSI status amounts to a competitive benefit for shippers using CSI ports<sup>842</sup> and the promise of a competitive advantage has made states eager to sign up to the Container Security Initiative.<sup>843</sup> States are also eager to avoid any disadvantages caused by increased inspections: any delay in customs clearance could increase the costs of transit considerably and make foreign products uncompetitive.<sup>844</sup>

The CSI is of great significance to the importation of goods into the United States because risk assessment and “CSI port” status directly affect container transportation and customs procedures. The former is the most popular and, in some cases, the only viable means of transporting products. As stated earlier, it is estimated that 90 – 95 percent of the international trade in goods is transported by container.<sup>845</sup> Customs procedures can also influence the importation of goods:<sup>846</sup> as explained in Section 2.2., any delay in customs clearance could increase the costs of transit considerably.

These advantages conferred by the CSI are permissible provided that they do not discriminate against “like products.” Panels determine whether a product is “like” on a case-by-case basis,

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<sup>841</sup> See FLYNN, p. 103 who refers to “green lane” and “red lane” clearance. U.S. Customs Commissioner, Remarks of 9 October 2002 (“[O]nce the screening is done “there” - at a CSI port - it will not, except in rare cases, need to be done again here in the U.S. You do not need to do the security screening twice. Nearly all CSI-screened cargo will speed right through on arrival in the U.S. It will get the fast lane into U.S. commerce”).

<sup>842</sup> CSIFACT SHEET, p. 4

<sup>843</sup> See Jau, p. 8 (“Overall, the competitive pressure to get onboard CSI appears to have generated a momentum of its own [...]”).

<sup>844</sup> *Supra n.* 631.

<sup>845</sup> PARAMESWARAN, p 1.

<sup>846</sup> Lewis E. Leibowitz et al, *WTO Negotiations on Trade Facilitation: Prospects for Cutting Red Tape at the Borders and Opening Doors for Developing Countries*, Int. T.L.R. 2007, 13(1), pp. 4 – 5.



taking into account a number of different factors including the product's end-uses in a given market, consumers' tastes and habits and the product's properties, nature and quality.<sup>847</sup> Considering that containers transport almost half of all waterborne imports entering the United States, it would be easy to construct an example of hypothetical like products. The complainant could demonstrate this by comparing the customs treatment of two identical consignments exported to the United States via a CSI and non-CSI port and calculating differentials in the transit time and costs. The complainant could argue that each of the three aspects referred to: risk assessment, the stationing of CSI teams and the post-incident resumption of trade discriminates against "like products" and thereby creates a "substantively unequal, or unlevel, playing field"<sup>848</sup> with regard to the exportation of products to the United States.

The European Communities has stated that "[t]he principle of non-discrimination should not of course interfere with Members' rights to treat consignments differently according to objective risk assessment criteria."<sup>849</sup> However, the complainant could argue that the risk assessment of containers according to the 24 Hour Rule does not follow objective criteria because, according to the following statement by the WTO Secretariat, CBP distinguishes between the same products on the basis of their origin:

*"According to the authorities, under the current 24-hour system (see below), some products are more apt to be examined than others. While CBP maintains a programme of random examination throughout its automated systems, enforcement and security concerns based on country of origin and identity of companies involved, may also result in examination. In addition, goods considered to be trade-sensitive, such as textiles and clothing products, are subject to a higher percentage of examinations than other commodities."*<sup>850</sup>

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<sup>847</sup> Appellate Body, *Canada – Periodicals*, pp. 20 – 21.

<sup>848</sup> Cf. BHALA, p. 58 at para. 3-001.

<sup>849</sup> See World Trade Organization, Communication from the European Communities, Improvements to GATT Article VIII on Formalities and Requirements Connected with Importation and Exportation and Related Proposals on Special and Differential Treatment and Technical Assistance, 9 June 2005 (TN/TF/W/46), p. 3, para. A. 1. However, this statement refers to two different issues. The question whether the criteria employed in risk assessment are non-discriminatory is the subject of Article I. On the other hand, the *administration* of customs procedures is dealt with under Article X GATT.

<sup>850</sup> WORLD TRADE ORGANIZATION, UNITED STATES TRADE POLICY REVIEW 2004, p. 34, para. 17.

A report by the OECD also states that origin is crucially important in assessing the risk-rating of containers.<sup>851</sup> The complainant could therefore argue that singling out any products as high risk on the basis of their origin is discriminatory because it ensures that the container will be subject to inspection. Inspections are considered disadvantageous because they increase the risk of delay in customs clearance which, in turn, could increase transit costs.<sup>852</sup> It is for this reason that customs conventions provide for simplified customs procedures and authorized consignee status.<sup>853</sup> As a result, this treatment could place like products from countries deemed low risk at an unfair advantage.<sup>854</sup>

The stationing of CSI teams and the post-incident resumption of trade could also discriminate against like products because the CSI makes a distinction between CSI and non-CSI ports. This could result in a situation similar to that considered by the Panel in *Indonesia – Autos*, where an imported product alike in all respects is subject to different clearance procedures simply because of the location of the seaport from which it departs.<sup>855</sup> As far as the CSI is concerned, this distinction between seaports is discriminatory because it confers an advantage which is not offered to all like products “immediately and unconditionally.”

The complainant could argue that the CSI violates Article I:1 because membership is not offered to the seaports of all countries “unconditionally.” On the one hand, countries (i.e. their customs administrations) must be invited to join the CSI by the CBP. As a rule, CBP has limited membership to its major trading partners or strategic seaports. On the other hand, membership of

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<sup>851</sup> According to the OECD certain countries of origin for either the goods or the shipment will automatically give the container a high risk rating or fail the goods outright. See OECD REPORT 2003, pp. 48-49, para. 140. See also Jon D. Haveman et al, *The Container Security Initiative and Ocean Container Threats*, JHESM: Vol. 4 [2007] No.1 Article 1, p. 4. On the other hand, the origin of products may not necessarily prove decisive in the issue of a no-load order. See e.g. S. Hrg. 109 – 186, p. 23 (remarks of the U.S. Customs Commissioner regarding the sensitivity of no-load orders).

<sup>852</sup> *Supra n.* 631. However, there is conflicting evidence on the effects of risk assessment, see *infra n.* 925.

<sup>853</sup> See e.g. Revised Kyoto Convention, General Annex, Chapter 3, Part 7, which provides for special procedures for authorized persons. See also Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) 1975 as an example of simplified customs procedures to assist the efficient transportation of goods.

<sup>854</sup> MATSUSHITA ET AL, p. 149. See also Panel, *U.S. - User Fee*, paras. 84 - 86, 107 – 108 which in effect held that an advantage may also be granted to a member state in the form of avoiding cumbersome formalities. There may be evidential problems with this Complaint because the rules used in risk assessment are confidential on grounds of national security.

<sup>855</sup> Panel, *Indonesia – Autos*, para. 14.113

CSI is dependent on the satisfaction of certain criteria<sup>856</sup> some of which are inherently discriminatory. For example, the first criteria for selection is that the “seaport must have regular, direct, and substantial container traffic to ports in the United States.”<sup>857</sup> Not all seaports will be able to satisfy this requirement: figures show that a substantial number of countries ship less than 30,000 containers to the United States each year.<sup>858</sup> In addition, many countries (not only developing countries) may not be able to afford the inspection equipment required.<sup>859</sup> The cost of acquiring, operating and maintaining equipment has been estimated to lie in the region of \$1 – 5 million.<sup>860</sup> Upgrading security may also require major changes to harbour infrastructure and working practices.<sup>861</sup> Such requirements could amount to hidden discrimination because they prevent certain countries (especially developing countries) from participating in the CSI, even if CBP allowed all states to participate. This is demonstrated by the fact that of the 54 CSI ports only 3 are found in developing countries.<sup>862</sup> Moreover, the United States has not confirmed that it will expand the CSI to such countries or provide financial assistance for security measures.<sup>863</sup>

The complainant could also claim that the advantage of CSI is not offered immediately to all states because its implementation has taken place in three phases with some seaports having to wait more than four years to join the programme.<sup>864</sup> Such a “phased-in approach” is also likely to be held discriminatory<sup>865</sup> because some states have enjoyed a competitive benefit for a considerably longer period of time.

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<sup>856</sup> UNCTAD REPORT 2003, p. 6 at para. 15. See also Douglas Browning, *Co-operation on Trade Security Must Be a Top Priority*, EUROPEAN AFFAIRS, Summer/Fall 2003. Concerning the selection of CSI ports, Browning states: “It must be noted, however, that the CSI sites were chosen based on existing maritime trade lanes and the volumes of U.S.-bound exports. The designated ports were already doing high volumes of business outbound to the United States and CSI simply acknowledged and capitalized on that reality.”

<sup>857</sup> See *supra* p. 79.

<sup>858</sup> Although, if this were the sole criterion for CSI membership, the condition of “substantial trade” would cast a wide net ranging from China (8.5 million containers) to Barbados, (1,184 containers). See Maritime Transportation Administration, U.S. Waterborne Container Import by Trading Partner, 2006.

<sup>859</sup> For example, the United States provided the port of Piraeus in Greece with inspection equipment. See Declaration of Principles Governing the US Container Security Initiative at the Port of Piraeus, Greece between Directorate General of Customs and Excise of the Hellenic Republic and United States Customs and Border Protection, 22 June 2004. See also Florestal, p. 402 – 403.

<sup>860</sup> See OECD REPORT, p. 51.

<sup>861</sup> See GAO-05-375, p. 24

<sup>862</sup> South Africa, South America and the Caribbean represent developing countries of the medium income bracket.

<sup>863</sup> Allen, p. 445.

<sup>864</sup> See CBP Press Release, *Container Security Initiative Port of Santos, Brazil Is Targeting and Pre-Screening Cargo Destined for U.S.*, 22 September 2005. See also Florestal, p. 394.

<sup>865</sup> Appellate Body, *U.S. – Shrimp*, paras. 173 – 175.

#### 5.3.4. Result

The CSI falls within the scope of Article I:1 as a collection of “rules or formalities” affecting the importation of products into the United States. It has been reported that CBP deliberately targets products based on their origin in assessing the risk of containers. This could place such goods at a competitive disadvantage by increasing the risk of delay caused by inspections. CSI status also grants products an “advantage” in the form of more opportune inspections and preferential post-incident clearance. Owing to the fact that 49 percent of U.S. waterborne cargo is transported by container, it will be easy for the complainant to create hypothetical “like products.” In practice, the advantages in question have not been offered to all countries immediately or conditionally. In particular, the fact that some countries will not be able to satisfy the criteria to join the CSI suggests hidden discrimination. As a result, it is likely that the complainant could adduce sufficient evidence to prove that the CSI discriminates between ‘like products’ from different countries.

#### 5.4. Article XI GATT

##### 5.4.1. Introduction

The success of the GATT in reducing tariffs has induced member states to employ non-tariff barriers in order to avoid their obligations under the GATT.<sup>866</sup> Quantitative restrictions, in particular, have been described as representing “the single most debated non-tariff barrier to international trade.”<sup>867</sup> Customs formalities and rules – like the CSI – can represent a considerable barrier to trade.<sup>868</sup> Article XI confronts this practice with a broad prohibition on export and import prohibitions and restrictions other than by means of duties, taxes or charges

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<sup>866</sup> If a state wishes to restrict trade it may only do so by means of tariff-measures, i.e. duties, taxes or other charges. Tariff measures are easier to deal with because they are more transparent than non-tariff measures and can be reduced through trade rounds. See Report of the Panel, *Turkey – Restrictions on Import of Textiles and Clothing Products*, WT/DS34/AB/R, 22 October 1999 (adopted on 19 November 1999), [hereinafter *Turkey – Textiles*], para. 9.63 (“[q]uantitative restrictions impose absolute limits on exports, [...] usually have a trade distorting effect and their administration may not be transparent”).

<sup>867</sup> See JACKSON, p. 305 at §13.2.

<sup>868</sup> Leibowitz et al *supra n.* 846.

and has been described as one of the cornerstones of the GATT system.<sup>869</sup> Despite its broad wording Article XI does not represent a blanket prohibition on restrictions.<sup>870</sup> Article XI:2 GATT contains a number of exceptions to this prohibition which are subject to the principle of non-discrimination. Article XI represents the fourth pillar of the GATT and ensures that the price of goods is determined by the law of supply and demand, rather than by artificial restrictions on supply created by the government.<sup>871</sup>

#### 5.4.2. Requirements

Article XI has a broad scope: according to the Panel in *Japan – Semi-Conductors*, it is not limited to specific types of “restrictions and prohibitions” such as quotas, import or export licenses but also includes a residual category of “other measures.”<sup>872</sup> This term covers “virtually any requirement or regulation designed to inhibit imports or exports” and includes measures which do not refer to the quantity or value of the goods (e.g. security measures).<sup>873</sup> It is also “inherently malleable” and allows GATT to catch new forms of non-tariff measures.<sup>874</sup> The term “prohibition” means a total prohibition, whereas “restriction” refers to measures which limit but do not make import and export impossible.<sup>875</sup>

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<sup>869</sup> Panel, *Turkey – Textiles*, paras. 9.63 – 9.65. However, the importance of the article has been reduced owing to the conclusion of specific agreements dealing with non-tariff trade barriers during the Uruguay Round (e.g. PSM, TBT, TRIPS and TRIMS agreements).

<sup>870</sup> See WEISS who compares Article XI with Article 28 of the EC Treaty (itself based upon Article XI GATT); see also Panel, *Argentina – Bovine Hides*, at para. 11.20 (declaring that the aim of the provision was to protect competitive opportunities of imported products, not trade flows).

<sup>871</sup> See Kennedy, p. 100.

<sup>872</sup> Panel, *Japan – Trade in Semi-Conductors*, paras. 104 – 109.

<sup>873</sup> MATSUSHITA ET AL, p. 125.

<sup>874</sup> See RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE, p. 358 at para 14.004. RICHARD SENTI, WTO SYSTEM, UND FUNKTIONSWEISE DER WELTHANDELSORDNUNG, p. 245 at para. 549 (“Other measures” can include provisions stipulating maximum and minimum prices, the requirement of import and export licenses, administrative measures and all other conditions affecting trade which a trade partner can apply to goods at the border crossing).

<sup>875</sup> Report of the Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 6 April 1999 (adopted on 22 September 1999), at para. 5.128, the term “restriction” is interpreted according to its ordinary meaning as a “limitation on action, a limiting condition or regulation.”

As the words “made effective” suggest, the measure in question does not have to expressly prohibit or restrict imports or exports.<sup>876</sup> It is the effect of the restriction, prohibition or other measure and not its legal status or objective that is decisive.<sup>877</sup> Therefore, both mandatory and voluntary measures can violate Article XI if they produce a *de facto* restrictive effect on trade. This is significant in relation to security measures whose implementation and maintenance entails a great deal of expense and training which some countries could find prohibitive. The provision has been held to apply to a wide range of measures including administrative guidelines and customs inspection procedures for goods destined for export.<sup>878</sup>

In *Japan – Trade in Semi-Conductors*, the Panel established a two-stage test to determine whether legally informal, non-mandatory measures contravened Article XI. First, the complainant had to prove reasonable grounds for believing that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measure in question had to be essentially dependent on government action or intervention. Subject to these criteria, measures will be deemed to operate in a manner equivalent to mandatory requirements and therefore come within the scope of Article XI. The Panel held that the absence of formal legally-binding obligations amounted to “a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements.”<sup>879</sup>

The burden of proof varies according to whether the measure is *de jure* or *de facto* in nature.<sup>880</sup> In the case of the former, there is a presumption that the measure prohibits or restricts trade. According to the Panel in *EEC – Payments*, a *de jure* restriction will breach Article XI if it distorts conditions of competition, “whether or not it actually impeded imports.”<sup>881</sup> The

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<sup>876</sup> Panel, *Argentina – Bovine Hides*, para. 11.17 (“There can be no doubt in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”).

<sup>877</sup> Panel, *US – Shrimp*, p. 283 at para 16: “In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions.”

<sup>878</sup> See e.g. Panel, *Japan – Trade in Semi-Conductors*; Panel, *Argentina – Bovine Hides*.

<sup>879</sup> *Id.* Panel, *Japan – Trade in Semi-Conductors*, para. 117.

<sup>880</sup> See Panel, *Argentina – Bovine Hides*, paras. 11.11 – 11.14.

<sup>881</sup> Report of the Panel, *European Economic Community – Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (L/6627 - 37S/86), 14 December 1989 (adopted on 25 January 1990), para. 150.

complainant does not have to prove an actual trade restrictive effect.<sup>882</sup> The mere existence of a quantitative restriction violates Article XXI because it adversely affects the equality of competitive conditions.<sup>883</sup> However, in the case of *de facto* restriction, the complainant must prove an *actual* restrictive effect on trade<sup>884</sup> by establishing a causal link between the contested measure and the trade effect.<sup>885</sup> The Panel held that “a demonstration of causation must consist of a persuasive examination of precisely how the measure at issue causes or contributes to the low level of imports.”<sup>886</sup> In *Japanese Measures on Imports of Leather*, the Panel held that the effects of a measure are not limited to its effects on the volume of trade; other relevant effects of the measure could be increased transaction costs or uncertainties which could affect investment plans.<sup>887</sup>

Article XI:2 contains exceptions to the general prohibition. However, these are not relevant to the investigation because they relate to agricultural and fisheries products which are necessary to enforce government measures designed to stabilize national markets for these products.<sup>888</sup>

### 5.4.3. Examination

The complainant could argue that the 24 Hour Rule and the CSI fall within the scope of “other measures” because they are government measures relating to the importation process which can potentially restrict and prohibit imports. On the other hand, it could be argued that Article XI does not extend to these measures because they primarily concern the transportation of goods whereas Article XI primarily applies to quantitative restrictions.

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<sup>882</sup> Panel, *Argentina – Bovine Hides*, paras. 11.20 – 11.21 (holding that the complainant did not have to prove actual trade effects in order to establish that a particular measure infringes Article XI).

<sup>883</sup> Kennedy, p. 127 (“[W]hether a quantitative restriction has actual trade effects is irrelevant”).

<sup>884</sup> *Id.*

<sup>885</sup> *Id.*

<sup>886</sup> *Id.* On the other hand, the defendant party does not have to prove that the measures are consistent with Article XI:1. However, it must prove that they involve a justified use of the exemption from the terms of that provision allowed, on certain precise conditions, under Article XI:2. See e.g. Report of the Panel, *European Economic Community — Restrictions on Imports of Dessert Apples — Complaint by Chile*, (BISD 36S/93) 18 April 1989 (adopted 22 June 1989), [hereinafter Panel, *EEC – Desert Apples*], at para. 12.15.

<sup>887</sup> Panel, *Japanese Measures on Imports of Leather* (L/5623, 31S/94), 2 March 1984 (adopted on 15/16 May 1984), para. 55.

<sup>888</sup> For further details on the exception in Article XI:2, see Kennedy, pp. 129 – 131.

The argument against the application of Article XI to the CSI is contradicted by the case law which shows that the Panels and Appellate Body have interpreted the wording of the provision expansively. For example, in *Japan – Semi-Conductors*, the Panel pointed out that the provision used the term “measures” which was broader than e.g. “laws or regulations.” Although the Panel was more concerned with the legal status of the measure in question, it made clear that it was the intention to restrict imports rather than the means of doing so that was crucial:

*“The wording indicated that any measure instituted or maintained by a Contracting Party which restricted the exportation or sale for export of products was covered by this provision.”*<sup>889</sup>

An expansive interpretation of Article XI:1 is also supported by the fact that the provision complements Article I:1 which the Panel has also interpreted expansively (e.g. in the Belgium Family Allowances case it looked to the spirit of the agreement).<sup>890</sup> Excluding measures from the scope of Article XI:1 because they are not directly linked to products would also weaken the effectiveness of the provision. Considering that maritime transport is “a pre-requisite for the expansion of trade”<sup>891</sup> it would be easy for governments to restrict imports by imposing onerous requirements relating to maritime transportation. Alternatively, the complainant could argue that the fact that the CSI affects transportation is irrelevant because it falls within the scope of Article XI as a form of customs control which affects the importation of goods.

The 24 Hour Rule could represent a *de jure* prohibition of certain cargo containers owing to the high regulatory burden it places on foreign exporters to the United States. CFR 4.7 is a mandatory measure which prohibits the importation of high-risk containers into the United States by means of a no-load order.<sup>892</sup> Despite the fact that CSI teams have no legal authority to actually enforce such orders, the risk of sanctions at the US port of arrival persuades carriers not to load such containers.<sup>893</sup> Considering that there is a presumption that *de jure* prohibitions contravene

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<sup>889</sup> Panel Report, *Japan-Semi-Conductors*, para. 106.

<sup>890</sup> BHALA, p. 359, who also argues (on p. 358) that “case-law counsels in favour of an expansive, if not outright literal interpretation so as to give the discipline as much strength as possible.”

<sup>891</sup> PARAMESWARAN, p. 22.

<sup>892</sup> See ASSESSMENT OF U.S. EFFORTS, pp. 2 – 3.

<sup>893</sup> WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW 2003, (WT/TPR/S/126), p. 130, para. 119 (“[The Trade Act 2002] ... forbids any marine terminal operator to load any cargo unless instructed by the vessel carrier that such cargo has been properly documented. Cargo that is not properly documented and has remained in the marine



Article XI:1, the complainant could argue that a no-load order contravenes Article XI:1 because it is designed to prevent certain containers entering U.S. seaports. In this case he would not be required to prove actual trade effects or provide empirical evidence of injury.<sup>894</sup>

The complainant could also argue that the 24 Hour rule contravenes Article XI:1 because it restricts trade indirectly (i.e. *de facto* restriction on trade), although there are conflicting views on the effects of risk-assessment on trade flows. There is evidence that the 24 Hour Rule could operate to restrict trade in goods owing to the high costs of its implementation and the disruption it causes to traditional shipping practices. For example, the World Shipping Council has pointed out that the delay and cost caused by the measure may prove intolerable for small entities and major enterprises alike.<sup>895</sup> The OECD has estimated the costs of the 24 Hour Rule to be in the region of \$ 281.7 billion a year<sup>896</sup> and this may be beyond the reach of seaports in poorer countries. Its restrictive effect on trade appears to be substantiated by a report issued by the Santiago Chamber of Commerce of Chile according to which Chilean exporters lost \$3.75 million between March and April of 2003.<sup>897</sup> Although Standard 7.4 of the RKC states that national legislation is to provide for electronic commerce methods as an alternative to paper-based documentary requirements, this is qualified by Standard 7.1 which states that IT can only be applied “where it is cost-effective and efficient for the Customs and for the trade.”<sup>898</sup> On the other hand, the complainant must also be aware of the fact that risk assessment is considered an integral part of trade facilitation efforts – as shown by its incorporation into the WCO’s Revised Kyoto Convention and the Framework of Standards. Evidence has also shown that it actually

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terminal for more than 48 hours after being delivered to the marine terminal operator is subject to search, seizure, and forfeiture”).

<sup>894</sup> See BHALA, p. 367 at para. 14-017 (“The presence of or absence of actual trade effects is irrelevant. All that matters is that a quantitative restriction exists”).

<sup>895</sup> See WSC, Comments 9 September 2002, p. 5 (“The government may determine that this proposal is necessary for security reasons, but it should do so only with the understanding that it will delay commerce, it will significantly increase carrier and shipper costs, and it will require trade processes to change significantly”).

<sup>896</sup> OECD REPORT 2003, p. 49, para. 146; see also UNCTAD REPORT 2003, para. 66, pointing out that the figure suggested by the OECD is based on documentation fees alone and does not take into account the costs of creating the infrastructure necessary for the operation of the advance submission of cargo information. See also WSC, Comments 9 September 2002, p.5 (“[The 24 Hour Rule] will delay commerce, it will significantly increase carrier and shipper costs, and it will require trade processes to change significantly”).

<sup>897</sup> See Lee p. 138. It is also worth noting that, according to one report, “for some countries, such as Chile and Ecuador transport costs exceed by more than twenty times the average tariffs they face in the US markets”. See Ximena Clark et al, *Maritime Transport Costs and Port Efficiency*, WORLD BANK, POLICY RESEARCH WORKING PAPER 2781, FEBRUARY 2002 [HEREINAFTER WORLD BANK RESEARCH REPORT, FEBRUARY 2002], p. 2.

<sup>898</sup> Standard 7.1. of the RKC.

speeds up the importation process by obviating the need for 100 percent inspections which have been traditionally employed in Africa and South Asia.<sup>899</sup>

Unlike the 24 Hour Rule, the Container Security Initiative is a voluntary measure which will only fall within the scope of Article XI if it satisfies the two stage test established by the Panel in *Japan – Semi-conductors*. The first stage of the test is satisfied because CBP divides cargo into greenlane and redlane clearance in order to exert maximum possible pressure<sup>900</sup> on countries to participate in the CSI. Therefore, its effect is similar to that of a mandatory measure. Concerning the second stage of the test, the operation of the CSI is under the exclusive control of the U.S. government. The CSI was created by CBP, is regulated by statute and administered under the auspices of the Department of Homeland Security. The role of the foreign customs authority in the CSI is limited to examining high-risk containers referred to it by CSI teams using inspection equipment approved by CBP. Therefore, the CSI satisfies the two requirements established by the Panel.

Despite the fact that the CSI attempts to balance trade facilitation and supply chain security, the complainant could argue that it restricts trade indirectly by adducing sufficient evidence showing that it increases costs, delay or causes competitive distortions.<sup>901</sup> As in the swordfish dispute between the EC and Chile, the complainant would have to demonstrate how a measure which ostensibly relates to seaport services is also capable of indirectly affecting trade in products.<sup>902</sup>

The CSI could constitute a non-tariff barrier to trade owing to the arbitrary way in which CSI ports are identified by the US. There is evidence that seaports are not admitted to the CSI despite satisfying the criteria for CSI membership. For example, For example, the port of Santos in Brazil only became a member of the CSI in June 2005. Despite the fact that this seaport exports a substantial number of containers to the United States there was a delay of three years before it

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<sup>899</sup> Leibowitz et al, p. 14. See also WORLD BANK, *DOING BUSINESS IN 2006: CREATING JOBS* [hereinafter WB REPORT 2006], p. 57. On the implementation of risk management in customs see RKC *supra n.* 540.

<sup>900</sup> Panel, *Japan – Trade in Semi-Conductors*, para. 117 (“All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs”).

<sup>901</sup> *Supra n.* 756

<sup>902</sup> The EU also based their claim on Article XI of the GATT.

became CSI operational. By contrast, the port of Gothenburg became a member of the CSI in January 2003 despite the fact that it appears to have a far lesser commercial and strategic importance than its South American counterpart. South and Central America account for almost 10% of maritime containers shipped to the United States. Moreover, Brazil is 14<sup>th</sup> in the list of top U.S. importers.<sup>903</sup>

The CSI could restrict trade owing to the discriminatory treatment of goods from seaports or countries which do not participate in the CSI. It does this by dividing containers into greenlane and redlane clearance depending on whether the departure seaport is a member of the CSI or not.<sup>904</sup> The discriminatory treatment which shippers can suffer as a consequence of this rule includes increased transit costs owing to no-load orders and increased inspections<sup>905</sup> as well as increased fees for port services.<sup>906</sup> In the event of a terrorist attack, non-CSI ports will not be eligible for “special continuity considerations” and their cargo will not receive “facilitated handling”, which could also lead to great financial loss owing to increased inspections.<sup>907</sup> The result of these factors will be to restrict foreign trade with the United States.<sup>908</sup>

The complainant could argue that, at the U.S. arrival port, containers from non-CSI seaports are more likely to be deemed high-risk and therefore scanned and physically inspected (“redlane clearance”). Inspections at the arrival port will be carried out at a less convenient stage in the supply chain than those at CSI ports<sup>909</sup> with the risk that products transported by non-CSI containers may experience delay.<sup>910</sup> Such delay could be very damaging for perishable products

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<sup>903</sup> See *supra* n. 892.

<sup>904</sup> Section 205 (j). SAFE Port Act 2006.

<sup>905</sup> See comments of Senator Levin, Hearing of 25 May 2005, p. 20.

<sup>906</sup> For details on port fees see MARIA DEL PILAR LONDONO-KENT AND PAUL E. KENT, A TALE OF TWO PORTS, THE COST OF INEFFICIENCY, RESEARCH REPORT DECEMBER 2003 [hereinafter WORLD BANK RESEARCH REPORT DECEMBER 2003], pp. 3 – 5.

<sup>907</sup> CSI STRATEGIC PLAN, p. 9.

<sup>908</sup> See PARAMESWARAN, p. 50.

<sup>909</sup> In the absence of a bilateral agreement with CBP there is no provision at non-CSI ports for the inspection of containers prior to their departure for United States, see *supra* pp. 160 – 161.

<sup>910</sup> At the US port of arrival, CBP concentrates its limited resources on the scanning and inspection of cargo containers from non-CSI ports. This can lead to a great deal of uncertainty with regard to access to port services and customs clearance: the US Coast Guard has the power to intercept vessels and inspect cargo containers deemed to high-risk; CBP and port authorities may deny foreign vessels permission to dock owing to anomalies in cargo manifests or may refuse permission to unload certain containers. At the seaport customs officials may order the non-intrusive and/or physical inspection of containers. Severe financial penalties can be imposed for infringement of the 24 Hour Rule.

or fashion items such as clothing and children's toys.<sup>911</sup> The delays which followed increased inspection after 9/11 led to long delays at border crossings and caused many companies reliant on just-in-time delivery to shut down their plants.<sup>912</sup> Transit delays owing to increased inspections can make a shipment of goods more expensive than a shipment within a domestic market.<sup>913</sup> These increased costs are likely to end up being incorporated in the retail price thereby making products less competitive. The restrictive effects that customs treatment can have on trade should not be underestimated,<sup>914</sup> especially considering that nowadays importers operate under very competitive conditions, which allow "little or no excess capacity or redundancy."<sup>915</sup>

Overall, the costs incurred by the 24 Hour Rule and CSI have been reported as substantial and could adversely affect products from some countries more than others.<sup>916</sup> Research has shown that transport costs are a greater barrier to US markets with regard to Sub-Saharan African countries than tariffs.<sup>917</sup> For example one report states that landlocked states have to pay considerably more in transport costs than coastal states: according to one report, being landlocked is equivalent to being 10,000 km further away from markets.<sup>918</sup> Such extra costs could affect optimal purchasing arrangements<sup>919</sup> for the export of raw materials and semi-finished products,<sup>920</sup> which largely accounts for the trade of less developed countries.

The complainant will not be able to discharge the burden of proof by adducing circumstantial evidence alone. Rather, he has to prove that the only explanation for the restriction of trade

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<sup>911</sup> See S. Hrg. 108 – 55, p. 35 ("There is a window of about two weeks when you can sell a toy."); WORLD TRADE ORGANIZATION, US TRADE POLICY REVIEW 2004, Add. 3, p. 31 ("Cumbersome inspection and approval procedures for goods entering the U.S. often lead to perishable goods being damaged with resulting commercial losses for exporters").

<sup>912</sup> U.S. Customs Commissioner, Testimony of 26 January 2004.

<sup>913</sup> See JACKSON, p. 439 at § 17.1.; Allen, p. 442 (referring to research showing that every day spent in customs adds almost 1 percent to the costs of goods).

<sup>914</sup> See PARAMESWARAN, p. 64.

<sup>915</sup> THE FREIGHT STORY, p. 7.

<sup>916</sup> See e.g. Nigel Brew, *Ripples from 9/11: The U.S. Container Security Initiative and its Implications for Australia*, CURRENT ISSUES BRIEF NO. 27 2002-03, p. 7; on the conditions facing traders in African and Southern Asian countries see WB REPORT 2006, pp. 53 – 59.

<sup>917</sup> PARAMESWARAN, p. 52.

<sup>918</sup> See WORLD BANK RESEARCH REPORT FEBRUARY 2002, pp. 4-5; see also UNCTAD ANNUAL REPORT 2006 [hereinafter UNCTAD REPORT 2006], pp. 14 – 16 concerning the economic value of the Trans-Caprivi Corridor in Zambia.

<sup>919</sup> Kumar and Hoffmann, p. 46.

<sup>920</sup> PARAMESWARAN, p. 23.

complained of is the adverse economic effects of the 24 Hour Rule and CSI and no other.<sup>921</sup> It is significant in this respect that the WTO Secretariat has stressed the need for more information on the costs of the security measures in order to assess their impact on trade.<sup>922</sup> The EC – Chile swordfish dispute itself provides evidence of how restricting seaport services can also restrict access to national markets. However, direct evidence of the restrictive effect of the 24 Hour Rule and CSI is provided by the Market Access Database<sup>923</sup> of the European Union, which states:

*“According to the European Engineering Industry, the CSI screening and related additional US customs routines are causing significant additional costs and delays to shipments of EU machinery and electrical equipment to the U.S. This burden is so severe that a number of small European engineering companies have decided not to export to the US any longer because of CSI. There is also competitive distortion in this fiercely competitive engineering market between EU and US engineering companies since up to now there is, de facto, no reciprocity between the EU and the US in this issue.”*<sup>924</sup>

On the other hand, it must also be recognized that there is conflicting evidence about the effect of customs inspections, with some commentators arguing that redlane clearance does not significantly delay cargo.<sup>925</sup> However, the availability of NII equipment appears crucial in this respect.<sup>926</sup>

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<sup>921</sup> Panel, *Argentina - Bovine Hides*, para. 11.41.

<sup>922</sup> See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW, REPORT BY THE SECRETARIAT: UNITED STATES 2006, WT/TPR/S/160, 15 February 2006, p. viii at para. 8 (“An assessment of the economic impact of the new regulations would be valuable to ascertain their actual costs and benefits”).

<sup>923</sup> This is a service provided by DG Trade and is intended to contribute to achieving the goals of the EU’s Market Access Strategy: < <http://madb.europa.eu/mkacceb2/indexPubli.htm> >. It appears to form part of DG Trade’s transparency policy in the administration of the TBR; see Bronckers and McNelis, p. 75.

<sup>924</sup> See Trade Barrier Fiche, 060106-Container Security Initiative (CSI) Market Access Database, Market Access Sectoral and Trade Barriers Database. This finding is confirmed in the EUROPEAN COMMISSION, UNITED STATES BARRIERS TO TRADE AND INVESTMENT REPORT 2006, p. 9, which states that the CSI “is causing additional costs and delays in shipments from the EU to the U.S.”

<sup>925</sup> See WB REPORT 2006, p. 57 (“Risk analysis can reduce delays. Ten years ago shipments took nearly 20 days to clear customs in Peru. By 2000 the introduction of risk analysis meant that green channel goods were cleared in 90 minutes, and even those in the red channel were cleared overnight”).

<sup>926</sup> See e.g. WSC, *In-Transit Container Security Enhancement*, p. 11.

An additional aspect to be considered under Article XI is the recent amendment to the SAFE Port Act 2006 to scan 100 percent of containers prior to their importation into the United States.<sup>927</sup> As with the CSI, the complainant could argue that this measure falls under Article XI GATT as constituting a form of customs control, regardless of the fact that it primarily concerns the transportation of products rather than the products themselves. In particular, he could argue that this measure would constitute both a *de facto* and *de jure* restriction on imports. Article 1701 of the IRCA 2007 makes the importation of cargo into the United States dependent on 100 per cent scanning. As a result, failure to scan would be met with a prohibition on importation. As with the no-load order, the presumption against *de jure* prohibitions means that the complainant would not have to show evidence of injury. The measure could also amount to a *de facto* restriction on imports owing to the problems of implementation. According to the World Shipping Council, the costs of delayed or non-delivery would be “enormous” and the “compliance and consequential costs of the bill would be staggering.”<sup>928</sup> In fact, it considers the rule to be practically unworkable.<sup>929</sup> Industry representatives have also voiced their concerns about the vague wording of the bill and have drawn attention to the potential delays that 100 percent scanning would entail. Moreover, it could lead to trade disputes as foreign countries impose reciprocal requirements on import shipments from the United States.<sup>930</sup>

#### **5.4.4. Result**

Provided that the scope of Article XI:1 is held to extend to measures primarily affecting transportation, then both the 24 Hour Rule and 100 per cent scanning could amount to a *de jure* prohibition on trade and *de facto* restriction on trade. On the other hand, the Container Security Initiative could amount to a *de facto* prohibition of trade. In the event that the scope does not extend to such measures, it may be possible for the complainant to raise a complaint against these measures under Article V, which specifically deals with transit.

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<sup>927</sup> *Supra pp.* 39 – 40.

<sup>928</sup> Testimony of Christopher Koch Regarding H.R. 4954, “The SAFE Port Act” Before the House Committee on Homeland Security, 4 April 2006, p.12.

<sup>929</sup> See WSC, Comments of 30 July 2007, p.1.

<sup>930</sup> See Coalition for Secure Ports, Letter to Member of Congress, 3 May 2006, p. 10, at para. 5.

## 5.5. Article X: Publication and Administration of Trade Regulations

### 5.5.1. Introduction

Transparency is especially important with regard to the maritime domain which is characterized by complexity and ambiguity.<sup>931</sup> As a complex unilateral security measure which regulates foreign trade, it is important that CBP notifies foreign traders of its requirements and ensures transparency. Article X of the GATT sets out the principles and procedures governing the way in which member states publish and administer their trade regulations.<sup>932</sup> It represents the fifth pillar of the GATT and serves as a guarantee of due process and a “partial shield against arbitrary government action.”<sup>933</sup>

Article X consists of three paragraphs and three sub-paragraphs which relate to publication (X:1); disclosure (X:2) and principles derived from the rule of law (X:3). It ensures compliance with GATT principles and is also reflected in the Revised Kyoto Convention.<sup>934</sup> At national level, transparency and availability of information to traders is important in the United States owing to the concept of informed compliance.<sup>935</sup> Generally speaking, the secrecy of trader rules can constitute a trade barrier<sup>936</sup> because a lack of knowledge about a country’s laws can discourage

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<sup>931</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 2 (“[M]uch of what occurs in the maritime domain with respect to vessel movements, activities, cargoes, intentions, or ownership is often difficult to discern”). See also pp. 3 & 14

<sup>932</sup> Their implementation is left to other instruments, however. See Council for Trade in Services, World Trade Organization, *Trade Facilitation Issues in the Doha Ministerial Declaration, Review of the GATT Articles: Article X, Communication from the World Customs Organization (G/C/W/392)*, 11 July 2002.

<sup>933</sup> Kennedy, pp. 100, 134.

<sup>934</sup> See e.g. Preamble to App. 1 of the RKC. The importance of Article X is reflected in the fact that conformity with the provision was a condition of China’s membership of the WTO: see People’s Republic of China – United States: Memorandum of Understanding Concerning Market Access 10 October 1992, 31 ILM 1274, art. I. See also Kennedy pp. 138 – 140 for additional transparency commitments.

<sup>935</sup> Title VI of the NAFTA Implementation Act 1993 (the so-called “Customs Modernization Act 1993”) was based on the theory that, “in order to maximize voluntary compliance with Customs laws and regulations, the trade community needed to be fully and completely informed of its legal obligations”: see GAO REPORT, CUSTOMS SERVICE MODERNIZATION, IMPACT OF NEW TRADE COMPLIANCE STRATEGY NEEDS TO BE ASSESSED, [hereinafter GAO – GGD – 00 – 23], December 1999, p. 5. The website of CBP contains a list of informed compliance publications, see < [http://www.cbp.gov/xp/cgov/toolbox/legal/informed\\_compliance\\_pubs/](http://www.cbp.gov/xp/cgov/toolbox/legal/informed_compliance_pubs/) >. See also RKC *supra* n. 540 at p. 55.

<sup>936</sup> JACKSON, p. 462.

traders from competing on its markets and thereby give an unfair advantage to the importing nation's government and established traders.<sup>937</sup>

### 5.5.2. Requirements

Article X:1 requires laws and regulations to be published in a way that allows governments and traders to become acquainted with them. It requires publication to be made in a prompt and accessible manner but does not state when the measure has to be published.<sup>938</sup> The importance of publication is also reflected in the Kyoto Convention, which requires that all “interested parties” must be provided with all the “necessary information” connected to customs formalities.<sup>939</sup> In *Canada – Alcoholic Drinks*, the Panel held that the member state did not have to publish trade regulations prior to their entry into force nor did it have to make the relevant information available to domestic and foreign suppliers at the same time.<sup>940</sup> On the other hand, Article X:2 expressly requires prior publication for all measures which impose a new or more burdensome requirement, restriction or prohibition on imports.<sup>941</sup>

The reference to “publication and administration” means that the Panel cannot consider the regulation's substance.<sup>942</sup> Article X is applicable only to laws, regulations, judicial decisions and administrative rulings “of general application.”<sup>943</sup> In *U.S. – Cotton Underwear*, the Panel held that the term “general application” excluded measures relating to individual companies or

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<sup>937</sup> *Id.* p. 462. WEIB/HERMANN, *WELTHANDELSRECHT*, p. 195, § 499. The importance of transparency is also recognized by the RKC, General Annex, Chapter 1, Guidelines on General Principles, p. 2 para. 1 (“To reduce the Customs intervention in the international flow of goods to a minimum, modern Customs administrations must develop comprehensive and transparent Customs legislation”).

<sup>938</sup> Panel, *EEC – Dessert Apples*, para. 12.29.

<sup>939</sup> Preamble to Annex 1 of the RKC.

<sup>940</sup> Report of the Panel, *Canada – Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R, 16 October 1991 (adopted on 18 February 1992), BISD 39S/27, 85 – 86, para. 5.34. This decision was upheld in Report of the Panel, *EEC – Restriction on Import of Apples*, L/6513 – 36S/135, 9 June 1989 (adopted on 22 June 1989), 166 – 167, paras. 5.20 – 5.23. However, as one commentator has pointed out, these opinions are difficult to reconcile with Article X:2: see *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, VOL. I, p. 134.

<sup>941</sup> Report of the Appellate Body on *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*. WT/DS24/AB/R, 10 February 1997 (adopted on 25 February 1997), p. 21.

<sup>942</sup> Report of the Appellate Body, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998 (adopted on 23 July 1998), para. 115.

<sup>943</sup> Report of the Panel, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, 12 March 1998 (adopted on 23 July 1998), para. 269.



shipments. In other words, the measure must affect an unidentified number of economic operators.<sup>944</sup> Measures “of general application” can refer to a specific country, however,<sup>945</sup> and include non-regulatory measures.<sup>946</sup>

Article X limits publication where it would be contrary to the public interest or commercial interests of enterprises but it does not indicate how much information the member states are to publish or how it should be published.<sup>947</sup> In *EEC – Desert Apples*, the Panel held that the publication of a Regulation in the Official Journal of the European Communities satisfied the publication requirement.<sup>948</sup> With regard to Article X:2, the Appellate Body stated in *U.S. – Underwear* that the provision promoted “full disclosure of governmental acts affecting members and private persons and enterprises, whether of domestic or foreign nationality.”<sup>949</sup> The policy principle underlying the provision was “the principle of transparency” and had “due process dimensions.”<sup>950</sup> Moreover, publication should grant traders “a reasonable opportunity to acquire authentic information about such measures and, accordingly, to protect and adjust their activities or, alternatively, to seek modification of such measures.”<sup>951</sup> However, some member states demand that publication should not only include all trade-related laws and regulations, procedures and administrative rules of border agencies<sup>952</sup> but also the reasoned motivations for such a measure.<sup>953</sup> This is contradicted by the Revised Kyoto Convention, which refers in its

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<sup>944</sup> Report of the Panel, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*. WT/DS24/R, 8 November 1996 (adopted on 25 February 1997), para. 7.65. See also Kennedy, p. 134 – 135.

<sup>945</sup> *Id.*, para. 21.

<sup>946</sup> Panel, *Japan – Film*, para. 10.386 (holding that “administrative rulings in individual cases that establish or substantially revise criteria or principles which may be applied in future cases” would also be of “general application”).

<sup>947</sup> See Council for Trade in Goods, World Trade Organization, *Trade Facilitation: Improvement of Article X (Communication from Japan)*, (G/C/W/376), 22 May 2002, p.1.

<sup>948</sup> That official publication is all that is required is suggested by Article I of the Memorandum of Understanding, which refers to publication of “all current customs laws in a designated official journal; confidential information is exempt.”

<sup>949</sup> Appellate Body, *U.S. – Cotton Underwear*, para. 21.

<sup>950</sup> See also BHALA, p. 452 (“At least from an Anglo-American perspective, [...] the indicia are inextricably linked to fairness or due process”).

<sup>951</sup> *Id.*

<sup>952</sup> See World Trade Organization, Council for Trade in Goods, *Trade Facilitation: Improvement of Article X (Communication from Japan, Mongolia and the Separate Customs Territory of Taiwan, Pengshu, Kinmen and Matsu)*, (TN/TF/W/8), 28 January 2005, para. 10.

<sup>953</sup> See World Trade Organization, Council for Trade in Goods, *Review, Clarification and Improvement Of GATT Articles V, VIII And X, Proposals Made By Delegations: Compilation by the Secretariat* (G/C/W/434), para. 2.4.

preamble to “all *necessary* information regarding Customs laws, regulations, administrative guidelines, procedures and practices.”<sup>954</sup>

Article X:3 contains three sub-paragraphs relating to the administration of Article X:1.<sup>955</sup> In particular, sub-paragraph (a) requires contracting parties to administer their laws and regulations referred to in X:1 in a “uniform, impartial and reasonable manner.”<sup>956</sup> These requirements are also reflected in the Revised Kyoto Convention, which requires customs procedures and practices to be applied “in a predictable, consistent and transparent manner.”<sup>957</sup> The application of Customs laws and regulations must satisfy each of these criteria.<sup>958</sup> Paragraph (b) requires the establishment of tribunals to deal with appeals against administrative decisions. Such tribunals must be independent of agencies entrusted with administrative enforcement.

In *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, the Panel held that the ordinary meaning of the word ‘reasonable’, refers to notions such as ‘in accordance with reason’, ‘not irrational or absurd’, ‘proportionate’, ‘having sound judgement’, ‘sensible’, ‘not asking for too much’, ‘within the limits of reason, not greatly less or more than might be thought likely or appropriate’, ‘articulate.’<sup>959</sup> The administration of the measure was held to be unreasonable because the Dominican Republic had failed to base its decision on one of the bases provided by statute and ignored the end-price of the imported cigarettes.<sup>960</sup> According to the Panel in *Argentina – Bovine Hides*:

*“[Article X:3(a)] requires an examination of the real effect that a measure might have on traders operating in the commercial world. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it*

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<sup>954</sup> Emphasis added. Cf. standard 1.3, RKC, which requires customs administrations to institute and maintain “formal consultative relationships with the trade to increase co-operation and facilitate participation.”

<sup>955</sup> For an overview of this paragraph see Daniel H. Erskine, *The U.S. – EC Dispute over Custom Matters: Trade Facilitation, Customs Unions and the Meaning of WTO Obligations*, 18 FLA. J. INT’L L. 423, p. 432 – 433.

<sup>956</sup> BHALA p. 461 (arguing that Article X:3 embodies an ideal. The provision “cannot be interpreted literally because human beings will always administer laws differently”).

<sup>957</sup> Preamble to Appendix I, RKC.

<sup>958</sup> Panel, *Argentina – Bovine Hides*, para. 11.86; Report of the Panel, *Dominican Republic – Cigarettes*, WT/DS302/R, 26 November 2004 (adopted on 19 May 2005), [hereinafter Panel, *Dominican Republic – Cigarettes*] para. 7.383. For an overview of the meaning of these terms see Erskine, p. 432.

<sup>959</sup> Panel, *Dominican Republic – Cigarettes*, 26 November 2004 (adopted on 19 May 2005), para. 7.385.

<sup>960</sup> *Id.* paras. 101 – 105.

can involve an examination of whether there is a possible impact on the competitiveness situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc.”<sup>961</sup>

The Panel in *EC-Bananas III* held that the scope of Article X:3 (a) is defined by Article X:1.<sup>962</sup> As a result, the provision appears to apply to the *administration* of laws, regulations, decisions or rulings.<sup>963</sup> In *U.S. – Hot-Rolled Steel*, the Panel required the actions in question “to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question.”<sup>964</sup> The Appellate Body held that Article X:3 applied in relation to governments and members and focused on the day-to-day application of customs laws.<sup>965</sup> Laws which are substantively discriminatory must be dealt with under the relevant provisions of the GATT.<sup>966</sup> This would be the case with e.g. rules pertaining to the confidentiality of cargo information obtained by the CBP<sup>967</sup> because they relate to the substance rather than administration of the CSI<sup>968</sup> and are therefore outside the scope of Article X.

In *Argentina – Bovine Hides*, the Panel noted that Article X:1 specifically referred to the importance of transparency to individual traders. Therefore, the requirement of a “uniform, impartial and reasonable manner” of administration related to the treatment accorded by government authorities to the traders in question.<sup>969</sup> The Panel also held that the term “uniformity” did not constitute a “broad anti-discrimination provision.” Rather, the term “meant that Customs law should not vary, that every exporter and importer should be able to expect

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<sup>961</sup> Panel, *Argentina – Bovine Hides*, paras. 11.77.

<sup>962</sup> Panel, *EC – Bananas*, para. 7.206.

<sup>963</sup> See also Appellate Body, *EC – Bananas*, para. 200; Panel, *Argentina – Bovine Hides*, para. 10.4 (arguing that such administrative measures did not contain substantive customs rules for the enforcement of export laws).

<sup>964</sup> Panel, *United States – Japan Hot-Rolled Steel*, WT/DS184/R, 28 February 2001 (adopted on 23 August 2001), para. 7.268.

<sup>965</sup> Panel, *Argentina – Bovine Hides*, para. 11.84.

<sup>966</sup> Appellate Body, *EC – Bananas*, paras. 200 – 201.

<sup>967</sup> See Cf. UNCTAD REPORT 2006, pp. 12 – 13 at paras. 26 and 32; OECD REPORT, p. 49 at para. 143.

<sup>968</sup> Section 343 (a) (3) (G) Trade Act 2002, expressly requires that CBP in its implementation regulations protect the privacy of any business proprietary and any other confidential cargo information to CBP in accordance with Section 343 (a). However, this does not apply to vessel cargo manifest information which is collected pursuant to Section 431, Tariff Act 1930. Therefore, shipper information contained on the vessel cargo manifests can be disclosed to the public pursuant to 19 USC § 1431 (c).

<sup>969</sup> Panel, *Argentina – Bovine Hides*, para. 11.76. At the same time, the provision should not be interpreted to require all products be treated identically: see para. 11.84 (“There are many variations in products which might require differential treatment”).

treatment of the same kind, in the same manner both over time and in different places and with respect to other persons.”<sup>970</sup> In *U.S. – Stainless Steel*, the Panel held that the requirement of uniform administration of laws and regulations had to be understood to mean uniformity of treatment in respect of persons similarly situated; it could not be understood to require identical results where relevant facts differed.<sup>971</sup>

In *Argentina – Hides and Leather*, the Panel held that “impartiality” required the equality of parties in the customs process. This could be endangered if customs procedures or the administration of laws involved persons with contrary commercial interests.<sup>972</sup> The mere presence of such persons is not decisive: rather, it depends on what they are allowed to do.<sup>973</sup> In such cases, the Panel will consider whether adequate safeguards are in place to ensure impartiality.<sup>974</sup> Concerning the requirement of “reasonableness”, the Panel *Argentina – Hides and Leather* held that a process aimed at assuring the proper classification of products, but which inherently contained the possibility of revealing confidential business information, would constitute an unreasonable manner of administering the laws, regulations and rules identified in Article X:1.<sup>975</sup> As a result, the measure was held to be inconsistent with Article X:3(a). Unless the measure is objectively justified, it is likely to fail the test of reasonableness.<sup>976</sup>

Article X:3(b) goes beyond the actual publication requirements and contributes to the principle of effective legal protection in world trade law<sup>977</sup> insofar as it relates to the maintenance or institution of review procedures of administrative action relating to customs matters.<sup>978</sup> This provision is also very important for transparency because it allows traders to obtain an explanation of the reasons for the decision and provides them with the right of appeal to a

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<sup>970</sup> *Id.* paras. 11.81 – 11.84.

<sup>971</sup> Panel, *US – Korean Steel AD Measures*, paras.6.50 – 6.51.

<sup>972</sup> Panel, *Argentina – Bovine Hides*, para. 11.100.

<sup>973</sup> *Id.*, para. 11.99.

<sup>974</sup> *Id.*, para. 11.101.

<sup>975</sup> *Id.*, para. 11.94.

<sup>976</sup> *Id.*, paras.11.90 – 11.94.

<sup>977</sup> WEIB/HERMANN, p. 195; RKC, General Annex, Chapter 10, Guidelines on Appeals in Customs Matters, para. 1, referring to the general principle that “all persons who deal with Customs must be afforded the opportunity to lodge an appeal on any matter.”

<sup>978</sup> Appeals in customs matters are regulated in Chapter 10 of the RKC. “Appeal” is defined as “the act by which a person who is directly affected by a decision or omission of the Customs and who considers himself to be aggrieved thereby seeks redress before a competent authority.”

competent authority.<sup>979</sup> According to the WCO, the review procedures can also provide a suitable means of ensuring uniform application of laws and regulations.<sup>980</sup> It also ensures protection of the individual against decisions of customs which are *ultra vires* or otherwise non-compliant with the law.<sup>981</sup>

### 5.5.3. Examination

The 24 Hour Rule and CSI represent “trade regulations”: the 24 Hour Rule is regulated by CFR 4.7<sup>982</sup> and the Container Security Initiative was introduced in February 2002 as a non-regulatory measure by the CBP but was recently codified by the SAFE Port Act of 2006. The 24 Hour Rule also satisfies the requirement of general application because CFR 4.7 is a mandatory provision which requires the advance declaration of *all* container cargo destined to the United States, regardless of the country or seaport from which it departs. By contrast, it is questionable whether the CSI can be described as a measure of general application. This is because it refers to specific seaports of a country rather than the country itself. The CSI also applies to an identified number of economic operators because it is limited to economic operators who are shipping goods to the United States.

CBP has therefore satisfied the formal requirements for publishing the 24 Hour Rule by notifying those affected by the rule prior to its entry into force in an official publication. In accordance with 5 U.S.C § 553(b),<sup>983</sup> the U.S. Customs announced the introduction of the 24 Hour Rule by publication in the “Proposed Rules” section of the Federal Register on 31 October 2002<sup>984</sup> and 26 November 2002.<sup>985</sup> The proposed rule-making was published in the Federal Register of 23 July

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<sup>979</sup> WTO Doc. G/C/W/392, p. 6

<sup>980</sup> *Id.*

<sup>981</sup> See RKC, General Annex Guidelines, Chapter 10, p.3.

<sup>982</sup> Implementing Section 343 (a) of the Trade Act 2002 (as amended by the MTSA 2002).

<sup>983</sup> 5 U.S.C §553 (b) (3) requires the notice to include either the terms or substance of the proposed rule or a description of the subjects and issues involved.

<sup>984</sup> Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Port For Transport to the United States, Fed. Reg., Vol. 67, No. 211, 31 October 2002.

<sup>985</sup> Required Advance Electronic Presentation of Cargo Information, Fed. Reg., Vol. 67, No. 228, 26 November 2002.

2002 together with comments from interested parties made during public meetings.<sup>986</sup> The Department for Homeland Security published the final rule for the required advance electronic presentation of cargo information in the Federal Register on 5 December 2003. It entered into force on 5 January 2004<sup>987</sup> but a 60-day non-enforcement period was granted in order to give industry sufficient time to adapt to the rule.<sup>988</sup> This exceeded the 30 day period provided in 5 U.S.C. §553(d). CBP has also published information for industry about the requirements and enforcement of the 24 Hour Rule in the form of a frequently asked questions document.<sup>989</sup>

Assuming that the CSI is found to be of general application, the complainant could argue that CBP has not published this measure correctly because it failed to publish a strategic plan prior to the introduction of the measure detailing the objectives and components of the security measure until August 2006.<sup>990</sup> This is a serious omission because such a plan is essential to the effective implementation of the CSI<sup>991</sup> and was noted by the Government Accountability Office in a report of July 2003.<sup>992</sup> The GAO recommended that customs develop a strategic plan that clearly lay out CSI goals, objectives and detailed implementation strategies.<sup>993</sup> The publication of a strategic plan would provide a basis for communication and mutual understanding between stakeholders and contribute to programme accountability.<sup>994</sup> The importance of such a plan is also recognized in international conventions.<sup>995</sup> On the other hand, CBP could argue that the measure was non-regulatory and that CBP's website provided sufficient information in the form of a fact sheet and

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<sup>986</sup> Comments on the proposed rule-making had to be submitted within a one-month period. During the consultation period 128 entities responded.

<sup>987</sup> Fed. Reg., Vol. 68, No. 234, 5 December 2003, p. 68140.

<sup>988</sup> According to Section 343(j) Trade Act 2002, the Secretary is to determine whether it is appropriate to provide transition periods between promulgation of the regulations and the effective date of the regulations and shall prescribe such transition periods in the regulations, as appropriate.

<sup>989</sup> *Supra n.* 364

<sup>990</sup> In the meantime, the SAFE Port Act 2006 was passed which clarified the substance of the CSI in a number of respects.

<sup>991</sup> See GAO-03-770, p. 33 (“The effective implementation of CSI [...] depends, in part, on rigorous strategic planning. Without strategic plans, Customs may discover that CSI cannot place CSI teams in strategic ports in a timely fashion, or that they place the teams but do not achieve any improvement in security”). The CSI STRATEGIC PLAN was issued in February 2004 in response to a recommendation by the GAO. See GAO-05-557, pp. 26 – 27.

<sup>992</sup> See GAO-03-770, p. 32 (“Without the benefit of strategic planning, customs quickly rolled out CSI in France but failed to involve primary stakeholders in making key decisions”).

<sup>993</sup> *Id.* p. 4.

<sup>994</sup> *Id.* p. 31.

<sup>995</sup> See e.g. the Columbus Ministerial Declaration on Trade Efficiency, Appendix, Section B, para. 1.

bulletins on CSI's components and objectives.<sup>996</sup> These electronic documents were updated regularly and supplemented by the U.S. customs journal and speeches of the U.S. Customs Commissioners which contained detailed information on the goals and aims of the CSI, also publicly available on the CBP website.

The complainant could also argue that the administration of the 24 Hour Rule and CSI is unreasonable. Concerning the 24 Hour Rule, the failure of CBP to provide a definition of what would constitute an "incomplete manifest"<sup>997</sup> results in uncertainty about precisely what information it considers acceptable.<sup>998</sup> This is unreasonable – especially considering the severity of penalties for incorrect information. The fact that CBP imposes information requirements on a party (i.e. the carrier) which does not have direct knowledge of the information contained on the cargo manifest is also unreasonable<sup>999</sup> because that party is unable to verify what is in the container.

The complainant could argue that the administration of CSI is unreasonable because CBP does not pay sufficient regard for its effects on other member states. The urgent need for counter-terrorist measures following 9/11 meant that U.S. Customs launched the CSI quickly during a period of national emergency using a so-called "implement and amend" approach.<sup>1000</sup> The priority was to introduce the programme, solving any problems as they arose. However, as the GAO has pointed out, this approach runs the risk that fundamental weaknesses persist until they are discovered by which time it may prove extremely expensive or even impossible to correct them.<sup>1001</sup> Performance measuring techniques were not adequately incorporated into the CSI from

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<sup>996</sup> For an overview of CBP information on the CSI including standards, member ports and strategic plan see: <[http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/)>

<sup>997</sup> On the other hand, it has issued some guidelines on what information would not be acceptable. A "dummy" description is an accurate description of non-existent cargo and "generic" descriptions include "freight of all kinds" ("FAK"), "said to contain" ("STC") etc. See Fed. Reg. Vol. 67, No. 211, 31 October 2002, p. 66324.

<sup>998</sup> See of the World Shipping Council et al., *Petition for the Reconsideration of the Final Rule before the Department of Homeland Security*, 2 February 2004, pp. 19-20.

<sup>999</sup> Section 343(a) of the Trade Act 2002 requires the information requirements to be imposed on the party most likely to have direct knowledge of the information. Another potential unreasonable aspect was the CBP's interpretation of "shipper", which did not reflect the legal or customary usage of the term as well as its treatment of confidential information. However, following complaints by the World Shipping Council, CBP suspended its interpretation of shipper in June 2004.

<sup>1000</sup> See GAO-03-770, pp. 17 – 18; S. Hrg. p. 8.

<sup>1001</sup> *Id.*; a major example of the weakness in this approach is provided by the 24 Hour Rule, which was only introduced when it became clear that the customs officers needed advance information about cargo shipments see pp.

the outset<sup>1002</sup> and, as late as May 2005, the CBP was still developing three components of its strategic plan as required by the Government Performance and Results Act of 1993.<sup>1003</sup> The GAO has deemed these omissions to be serious because they make it difficult to assess progress in CBP operations over time and to compare CSI operations across ports.<sup>1004</sup> The CBP also implemented the CSI using informal agreements which do not regulate any aspect of the measure in detail. In particular, there is no mention of cost sharing, appeals procedures or oversight by an independent body which indicates a lack of due process,<sup>1005</sup> despite the fact that the U.S. government recognizes the importance of this principle.<sup>1006</sup> The expansion of the CSI also appears illogical: the number of CSI ports varies considerably from country to country and do not appear to reflect the volume of exports to the United States or the geographic size of the country.<sup>1007</sup>

The complainant could argue that Section 205 (j) of the SAFE Port Act fails the uniformity requirement of Article X:3(a). The import regime resembles that in *EC – Bananas III* insofar as the US operates an advantageous regime for CSI cargo and a disadvantageous regime for non-CSI cargo.<sup>1008</sup> However, in that case the Appellate Body held that different import procedures did not infringe WTO law. This was because Article X:3(a) only applies to the administration of laws and regulations and does not concern the substance of the laws themselves.<sup>1009</sup> Therefore, Section 205 (j) of the SAFE Port Act does not come within the scope of Article X:3(b) and should be considered under the anti-discrimination provisions of Article I:1.

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21-22; Appendix II, p. 49, at para. 8. Cf. Robert C. Bonner, *Remarks to the Customs World London Summit 2004 London, England*, 21 September 2004.

<sup>1002</sup> See GAO-03-770, pp. 33 ff.

<sup>1003</sup> See GAO REPORT, *HOMELAND SECURITY: KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED*, 26 May 2005 [hereinafter, GAO-05-466T], p. 22

<sup>1004</sup> See GAO-05-557, p. 5.

<sup>1005</sup> Appellate Body, *U.S. – Shrimp*, para. 182.

<sup>1006</sup> DHS, *THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY*, p. 5.

<sup>1007</sup> Cf. GAO-05-557, p. 12. According to CBP, Italy (5) has more CSI ports than China (4). Although Sweden has 2 CSI ports, Russia has none, which is questionable from a strategic point of view considering that Russia is a suspected locus of nuclear smuggling. According to the: see NATIONAL RESEARCH COUNCIL, *MAKING THE NATION SAFER: THE ROLE OF SCIENCE AND TECHNOLOGY IN COUNTERING TERRORISM*, 2002, p. 40 (“Theft or diversion of excess Russian HEU for terrorist use represents a significant near-term threat to the United States”). See Testimony of David Huizenga in Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations, *Hearing on Nuclear and Radiological Threats*, U.S. Senate, 109th Congress, 2nd Session, 28 March 2006, S. Hrg. 109-548, p. 43.

<sup>1008</sup> See Erskine, p. 446.

<sup>1009</sup> Appellate Body, *EC – Bananas*, para. 200.



The complainant could also argue that the CSI fails to ensure the uniformity of security standards concerning inspections and non-intrusive inspection equipment.<sup>1010</sup> As a result, some CSI seaports do not agree to inspect high-risk containers, an omission which undermines the effectiveness of the entire programme. Although the SAFE Port Act has attempted to address this problem,<sup>1011</sup> it does not make the implementation of international standards mandatory.<sup>1012</sup> CBP's lack of regulatory authority at foreign seaports also means that there are no means of ensuring uniform security standards.<sup>1013</sup>

Concerning Article X:3 (b), the CBP offers procedures for the review and correction of administrative action relating to customs matters. The fact that CSI teams do not have any powers at foreign seaports mean that complaints relating to inspections at CSI ports will be dealt with by the appeals procedures relating to the host customs authorities. Complaints against inspections carried out by CBP at seaports in the United States should be directed to the Office of Trade Relations which was created in January 2002 and deals with complaints against Customs policy and decisions as well as matters relating to enforcement.<sup>1014</sup> According to the CBP, this office resolves problems objectively and independently. In addition, the Court of International Trade (formerly the Customs Court) is a judicial body with jurisdiction to hear appeals and protests against the agency's acts.<sup>1015</sup> The decisions of the court are published by the CBP on its website. Appeal is to the Court of Appeals for the Federal Circuit, and from there to the Supreme Court. The Bureau of Customs and Border Patrol issues CBP Decisions which contain CBP rulings and court decisions.

#### **5.5.4. Result**

It is uncertain whether Article X applies to the CSI because the latter's application is restricted to specific seaports and economic operators exporting to the United States using containers. In the

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<sup>1010</sup> ASSESSMENT OF U.S. EFFORTS, pp. 8 – 9.

<sup>1011</sup> Section 204 (a) (1) and (2) require the establishment of minimum standards and procedures for securing containers in transit to the United States.

<sup>1012</sup> See Section 204 (c), which encourages national bodies to promote international standards with foreign governments and international organizations.

<sup>1013</sup> See S. Hrg. 108–55, p. 20

<sup>1014</sup> Thereby replacing the Office of Trade Ombudsman: see *supra* n. 529.

<sup>1015</sup> 28 USC § 1581.

event that Article X is held to apply, the CSI may not comply with the publication requirement of Article X owing to the failure of CBP to publish the strategic plan prior to its introduction. Certain aspects of the 24 Hour Rule and CSI may also have “impacts on the competitiveness situation” due to unreasonableness or lack of uniformity in the application of the 24 Hour Rule and CSI<sup>1016</sup> The 24 Hour Rule is unreasonable because it imposes information requirements on parties without direct knowledge of the cargo and the security standards at CSI ports are not uniform in contravention of Article X:3. However, on the available evidence, the publication of 24 Hour Rule and CBP’s appeals procedures appear to satisfy the requirements of Article X.

## **5.6. Article V: Freedom of Transit**

### **5.6.1. Introduction**

Articles V and VIII deal with other non-tariff barriers to trade. Article V deals with customs law in relation to transit cargo and aims to balance the sovereign concern of a country to police its borders with the need to facilitate trade.<sup>1017</sup> The provision is particularly important for landlocked countries.<sup>1018</sup> Article V prescribes two main obligations: on the one hand, member states must not hinder traffic in transit by imposing unnecessary delays or restrictions or by imposing unreasonable charges and, on the other, they must accord Most-Favoured-Nation (MFN) treatment to transiting goods of all Members.<sup>1019</sup> Article V must be regarded in conjunction with international agreements relating to customs transit.<sup>1020</sup> Counter-terrorist measures which affect international trade can potentially infringe the freedom of transit.<sup>1021</sup>

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<sup>1016</sup> Panel, *Argentina – Bovine Hides* para.11.77.

<sup>1017</sup> BHALA, p. 470; see Standard 6.1. of the RKC.

<sup>1018</sup> See Kennedy, p. 140.

<sup>1019</sup> See World Trade Organization, WTO Secretariat, Article V of the GATT, Scope and Application (TN/TF/W/2) 12 January 2005, [hereinafter WTO Secretariat (TN/TF/W/2)] p. 4.; see also World Trade Organization, Council for Trade in Goods, Freedom of Transit: Obligations and Implications of Article V of the General Agreement on Tariffs and Trade, Communication from UNCTAD, (G/C/W/427), 15 August 2002, p.1.

<sup>1020</sup> E.g. the RKC, Specific Annex E, Chapter 1, Guidelines on Customs Transit. In particular, Recommended Practice 26 (p. 25 para. 10), encourages Contracting Parties to “give careful consideration to the possibility of acceding to international instruments relating to Customs transit.” E.g. the Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention 1975) aims to facilitate the international carriage of goods by road vehicle.

<sup>1021</sup> Jaemin Lee, *Juggling Counter-Terrorism and Trade, The APEC Way: APEC’S Leadership in Devising Counter-Terrorism Measures in Compliance with International Trade Norms*, 12 U.C. DAVIS J. INT’L. L. & POLICY 257 at pp. 270 – 271.

### 5.6.2. Requirements

Article V has never been applied in dispute settlement proceedings of the GATT or the WTO, although there have been a number of disputes concerning this provision.<sup>1022</sup> As a result, it “tends to be overlooked and thus is not well-known.”<sup>1023</sup> On the other hand, the provisions of Article V are also reflected in international conventions, most notably the Revised Kyoto Convention, which also deals with transit and transshipment in Specific Annex E.<sup>1024</sup> Article V may play an important role in relation to the CSI: according to one commentator it is “[t]he only international legal provision that may represent a significant impediment to the introduction of a new security regime.”<sup>1025</sup>

Article V:1 contains three conditions: first, the provision applies only to goods, vessels and other means of transport.<sup>1026</sup> Second, traffic must be “in transit”, which effectively means that the journey must represent one stage of the transportation process.<sup>1027</sup> Finally, the goods must be in transit across the territory of contracting parties. One question of potential importance is whether transshipment falls within the scope of this provision.

Article V:2 lays down the fundamental principle of the freedom of transit for traffic in transit. It subjects the freedom of transit to a further condition, namely that the route be the most convenient for international traffic. As a result, the freedom of transit does not apply to all routes.<sup>1028</sup> The second sentence of paragraph 2 contains the MFN rule and outlaws discrimination based on wide range of factors, namely the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. Thereby, Article V effectively prohibits all forms of discrimination.

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<sup>1022</sup> See GATT Analytical Index, p. 215.

<sup>1023</sup> See BHALA, p. 470.

<sup>1024</sup> See RKC, Specific Annex E, Chapters 1 and 2.

<sup>1025</sup> See Mellor, p. 394.

<sup>1026</sup> See WTO Secretariat (TN/TF/W/2), para. 13.

<sup>1027</sup> See RKC, Specific Annex E, Chapter 1, Guidelines on Customs Transit, p. 3, which defines “Customs transit” as the Customs procedure under which goods are transported from one Customs office to another. Para. 4.1 defines “International Customs transit” as “transit movements [which] ... are part of a single Customs transit operation during which one or more frontiers are crossed in accordance with a bilateral or multilateral agreement.”

<sup>1028</sup> *Id.*, para. 17.

Paragraphs (3) – (5) regulate the charges and regulations which member states can legitimately impose<sup>1029</sup> and subject them to the requirement of necessity, reasonableness and the most-favoured nation principle. The former provision authorizes customs officials to require traffic in transit to be entered at a customs facility in its territory. However, such a measure must not cause *unnecessary* delays or restrictions, *except* in cases of failure to comply with applicable customs laws and regulations.<sup>1030</sup> Therefore, the provision refers (indirectly) to a test of necessity. The lack of jurisprudence on Article V means that it is uncertain exactly how a Panel would interpret “necessary” within the context of Article V.<sup>1031</sup> However, existing jurisprudence on this term suggests that its *legal* meaning is restrictive and has been interpreted by the Appellate Body as meaning “indispensable.”<sup>1032</sup> However, this interpretation related to Article XX which, as an exception to the GATT, has traditionally been interpreted narrowly. The WTO Secretariat has also stressed that jurisprudence on one provision cannot automatically be transferred to another provision.<sup>1033</sup> It could be argued that the context of Article V:3 suggests a lower standard of proof considering that the provision allows member states a certain amount of discretion in controlling their borders. Clarification is provided by the Revised Kyoto Convention which states that “[c]ustoms control shall be limited to that necessary to ensure compliance with the Customs law”, therefore indicating a rather narrow, objective “necessity” test.<sup>1034</sup> This is supported by the fact

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<sup>1029</sup> *Id.*, para. 30; Article 3 RKC; see also the principle of customs control, General Annex, Chapter 6 Guidelines on Customs Control RKC, p. 9. TIR Convention Article 5 (2).

<sup>1030</sup> See *supra* n. 1027, p. 4 which states that “[t]he basic principle of Customs transit is to permit goods to move from one Customs office to another [...] without applying economic prohibitions or restrictions [...]”. See also Article 5 (1), TIR Convention which states that “goods carried under the TIR procedure [...] shall not as a general rule be subjected to examination at Customs offices *en route*.”

<sup>1031</sup> There have been requests for clarification of these terms: see *supra* 953.

<sup>1032</sup> The meaning of “necessary” has been examined in the context of Article XX (b) and (d). See Report of the Panel, *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990 (DS10/R – 37S/200), para. 74 (holding the term to be synonymous with “unavoidable”). See also Report of the Panel, *United States – Section 337 of the Tariff Act 1930* (L/6439 - 36S/345), 16 January 1989 (adopted by the Panel on 7 November 1989), para. 5.26 (holding that a measure would be considered unnecessary if *an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.*). See also Report of the Appellate Body, *Korea – Measures affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000 (adopted on 10 January 2001), para. 160.

<sup>1033</sup> See WORLD TRADE ORGANIZATION, WORKING PARTY ON DOMESTIC REGULATION, NECESSITY TESTS IN THE WTO: NOTE BY THE SECRETARIAT, (S/WPDR/W/27), 2 DECEMBER 2003, paras. 4, 7.

<sup>1034</sup> Standard 6.2 of the RKC.

that customs administrations often grant transit goods simplified customs procedures in order to make transit more efficient.<sup>1035</sup>

In addition, the measure in question may not subject the traffic in transit to a customs duty or any transit duties or other charges imposed in respect of transit. The only charges which contracting parties may levy are those for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.<sup>1036</sup>

Article V:4 subjects charges and regulations imposed by contracting parties to the requirement of *reasonableness* having regard to the conditions of the traffic. This term derives from the principle of good faith, and is similarly vague: member states have requested clarification on its meaning.<sup>1037</sup> According to one writer, the term “usually refers to both substantive and procedural requirements including concepts such as ‘suitability’, ‘necessity’, ‘proportionality’, ‘transparency’ and ‘participation’.”<sup>1038</sup> The Panel has also considered the meaning of this term in relation to Article X.<sup>1039</sup> Accordingly, there are potentially many ways in which the member states can breach the requirement of reasonableness. For example, in *U.S. – Hot-Rolled Steel*, the Appellate Body suggested that measures which imposed “unreasonable extra burden” or entailed “unreasonable additional cost and trouble” would contravene the principle of good faith.<sup>1040</sup> A test of reasonableness implies an objective standard. For example, in *EC – Hormones* the European Communities argued that WTO panels should adopt a deferential “reasonableness” standard in all highly complex factual situations. However, these arguments were rejected by the Appellate Body which held that Article 11 DSU required an objective assessment of the facts.<sup>1041</sup>

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<sup>1035</sup> See e.g. Recommended Practice, RKC, Specific Annex E, Chapter 1; see also TIR Convention, which reflects the desire amongst the contracting parties to simplify and harmonize administrative formalities in the field of international transport, in particular at frontiers.

<sup>1036</sup> Cf. Standard 3 of the RKC, Specific Annex E, Chapter 1.

<sup>1037</sup> See World Trade Organization, Council for Trade in Goods, *WTO Trade Facilitation – Strengthening WTO Rules on GATT Article V on Freedom of Transit, Communication from the European Communities*, (G/C/W/422), 30 September 2002, p. 6.

<sup>1038</sup> See Frederico Ortino, *From Non-Discrimination to Reasonableness, A Paradigm Shift in International Economic Law?* JEAN MONNET WORKING PAPER NO. 01/05, p. 7.

<sup>1039</sup> *Supra* pp. 179 – 180.

<sup>1040</sup> Appellate Body, *U.S. – Japan Hot-Rolled Steel*, para. 101 (“This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable”).

<sup>1041</sup> Appellate Body, *EC – Hormones*, para. 15 (concerning arguments of the EC); para. 117 (objective assessment of Article 11 DSU)

Therefore, like the necessity test, the outcome of the reasonableness test is a question of evidence. In *United States – Sunset Reviews of Anti-Dumping Measures*, the Appellate Body stated that an allegation of unreasonableness had to be supported by solid evidence and reflect the gravity of the allegations.<sup>1042</sup> When considering the objective of the measure, the Panel has deferred to the explanation given by the member state.<sup>1043</sup> Overall, there are aspects of the CSI which may appear unreasonable, one example being the plans for introducing 100 percent scanning.<sup>1044</sup> On the other hand, CBP maintains that it has not received any complaints of cargo having been delayed due to CSI implementation in any overseas port.<sup>1045</sup>

Article V:6 requires member states to accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. This provision therefore limits the MFN principle to member states of the WTO<sup>1046</sup> which is particularly important with regard to transshipment services offered by seaports, although as stated above, it is uncertain whether transshipment forms part of the transit process. It would certainly be beneficial for member states if the Panel included transshipment services within the definition of “transit”, considering that transshipment hubs play an important role in the maritime transportation of goods.<sup>1047</sup> On the other hand, such an interpretation would be difficult to reconcile with the Revised Kyoto Convention and European law which assign transshipment and transit different customs procedures.<sup>1048</sup> This provision also has an interpretative note, which

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<sup>1042</sup> *Supra n.* 759.

<sup>1043</sup> Panel, *Argentina – Bovine Hides*, para. 11.90, p. 128 (“While a manifestly WTO-inconsistent measure cannot be justified by assertions of good intentions, we consider it reasonable in this instance to accept for purposes of analysis the preferred explanation in light of all the facts of the dispute”); see also Report of the Panel, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, WT/DS135/R, 18 September 2000 (adopted 5 April 2001), p. 439 (“The Panel therefore considers that the evidence before it tends to show that handling chrysotile cement products constitutes a risk to health rather than the opposite”).

<sup>1044</sup> See *infra pp.* 332 – 333.

<sup>1045</sup> TRADE POLICY REVIEW 2004, p. 33, para. 24.

<sup>1046</sup> See Kennedy, p. 140.

<sup>1047</sup> Port operators are investing heavily in this service industry see e.g. *Hutchison Strategy Envisions Panama Ports as Container Transshipment Hubs*, PAC. SHIPPER, 15 September 2005 (WLNR 25308954), reporting that Hutchison Port Holdings plans to invest \$1 billion to quadruple container capacity at two key ports in Panama over the next 10 years in a bid to establish them as key transshipment hubs.

<sup>1048</sup> Under European customs law, transshipment goods are to be placed under the temporary importation procedure and then re-exportation procedure. See Lux, pp. 453 and 458.

states that "[w]ith regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions."<sup>1049</sup>

### 5.6.3. Examination

The CSI applies to transit cargo and therefore falls within the scope of Article V. Such cargo is termed "foreign freight remaining on board cargo" ("FROB") and is defined by the CBP as "cargo that is loaded in a foreign port and is to be unloaded in another foreign port with an intervening vessel stop in one or more ports in the United States."<sup>1050</sup> Therefore, the cargo is not to be removed from the vessel at the US port. FROB cargo is deemed to be a security risk and is accordingly subject to the information and inspection requirements of CSI.<sup>1051</sup>

The Container Security Initiative purports "to enhance cargo security and trade facilitation by strategically identifying the optimal trade lanes and ports for inclusion into CSI."<sup>1052</sup> However, the complainant could argue that the CSI contravenes the most favoured nation principle contained in Article V:2 with regard to freedom of transit because it makes a distinction between cargo containers (including those in transit) based on the port of departure. Thereby, CBP interrupts or otherwise disrupts the most efficient transit route available owing to the competitive distortion that expedited clearance creates between seaports. Shippers may be forced to transit their cargo through CSI ports in order to avoid redlane clearance at U.S. ports of arrival, thereby preventing them from using more efficient routes involving non-CSI (transshipment) seaports.<sup>1053</sup> The CSI therefore constitutes a *de jure* infringement of the second sentence of Article V:2 owing to the fact that it discriminates against transit cargo by inspections depending on its "place of

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<sup>1049</sup> Annex I of the GATT, Ad Article V, para. 5.

<sup>1050</sup> See CBP Frequently Asked Questions – Inbound Vessel Only – Trade Act of 2002 Final Rule [hereinafter CBP, Vessel FAQ], p. 5.

<sup>1051</sup> Customs considers "FROB" cargo a security concern because although the cargo does not have a final destination in the U.S., the cargo is transiting the U.S. See Fed. Reg. Vol. 67, No. 211, 31 October 2002, p. 66328. See also CBP, Vessel FAQ, p. 4. It is also significant that a suspected Al Qaeda terrorist was hiding in a container which had been loaded at Port Said, transhipped at Gioia Tauro transported to Rotterdam and then further transhipped to Canada. See OECD REPORT, July 2003, pp. 8-9, para. 23.

<sup>1052</sup> CSI STRATEGIC PLAN 2006, Objective 2.2.

<sup>1053</sup> See Lee, 151 – 152, who claims that a CSI seaport will replace ports that were previously the best economical choice. This represents a trade barrier because it interferes with the transaction in question and restricts the movement of trade consumers: see PARAMESWARAN p. 45.

departure.” Discriminating against seaports restricts transit routes and thereby denies shippers access to efficient transportation networks.<sup>1054</sup>

Article V:3 provides that traffic in transit shall not be subject to unnecessary delay, except in cases where there is an infringement of applicable customs laws. In the case of transit shipments from non-CSI ports, infringement of 19 CFR 4.7, could cause delay for a number of reasons.<sup>1055</sup> Such delay may not be considered unnecessary to the extent that it results from action taken in response to a breach of the 24 Hour Rule which specifically relates to national security. However, in the absence of a breach of customs infringements, the delay will be subject to a test of necessity.<sup>1056</sup>

Article V reflects the fact that inspections are an important function of customs administrations in enforcing customs laws and securing a nation’s borders. This is also reflected in international conventions which attempt to simplify Customs transit procedures. For example, the Revised Kyoto Convention allows customs officers at the office of departure to identify the consignment and detect any unauthorized interference<sup>1057</sup> and the TIR Convention also recognizes the importance of inspections.<sup>1058</sup> Generally speaking, the enforcement of legislation relating to import of goods in order to protect the territory and citizens against potentially dangerous imports is reflected in the missions of all customs administrations.<sup>1059</sup> Indeed, in the United States, border inspections by the customs authorities are considered so important that they justify exemption from the Fourth Amendment<sup>1060</sup> with the result that U.S. customs officers are permitted to carry out border searches without reasonable cause. This suggests that a certain amount of delay resulting from border control measures (even when carried out in the absence of infringements) may be deemed necessary – especially where the measures in question relate to vital interests

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<sup>1054</sup> PARAMESWARAN, p. 47.

<sup>1055</sup> For example, if the cargo is loaded without being scanned in contravention of the no-load order, CBP may delay the release of the cargo or deny the carrier’s preliminary entry-permit/special license to unlade at the U.S. port. It can also order physical inspections of containers which takes a considerable amount of time. See CUSTOMS BULLETIN AND DECISIONS, VOL. 39, NO. 28, 6 JULY 2005, p. 4. For an overview of the legal and financial penalties owing to non-compliance with the CSI, see Bishop, 324 – 330.

<sup>1056</sup> The elements to consider in a necessity test are examined within the context of the general exceptions to the GATT, *infra* at pp. 279 – 281.

<sup>1057</sup> See Standard 8 of the RKC, p. 11, para. 6.3.

<sup>1058</sup> *Supra n.* 1029.

<sup>1059</sup> See MICHAEL LUX, GUIDE TO COMMUNITY CUSTOMS LEGISLATION, pp. 2 – 3.

<sup>1060</sup> See *infra pp.* 100 - 101 et seq.



such as public health or national security.<sup>1061</sup> A random sampling of cargo, for example, is also used to measure the effectiveness of risk assessment system.<sup>1062</sup> On the other hand, delay is likely to be considered unnecessary if caused by organizational failings such as the poor location of NII equipment,<sup>1063</sup> a high rate of false alarms<sup>1064</sup> or poor cargo handling facilities owing to inadequate infrastructure. Recent newspaper reports show that security at U.S. seaports is still ineffective.<sup>1065</sup>

The complainant could argue that the 24 Hour Rule and Container Security Initiative are unreasonable pursuant to Article V:4 insofar as the inspections of high-risk containers at U.S. seaports cause delays in transit and increased transit costs which are so severe as to compromise market access. This aspect has already been dealt with under Article XI.<sup>1066</sup> However, another potentially<sup>1067</sup> important aspect of the CSI with regard to transit cargo concerns the introduction of security seals in order to improve the traditional means of ensuring the security of goods in transit.<sup>1068</sup> It is particularly important that this element of the CSI be governed by “predictable, transparent and consistent rules” because ineffective rules could result in delay to goods in transit and competitive inequalities.<sup>1069</sup> For example, the RKC recommends the mutual recognition of customs seals thereby “reducing any delays arising from customs intervention.”<sup>1070</sup> In particular, it must take account of the fact that containers are often inspected during transit by customs officers carrying out controls. Any requirements concerning the sealing of containers must also

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<sup>1061</sup> Appellate Body, *EC - Asbestos*, paras. 170 – 172, stating that measures are more readily accepted as “necessary” when they pursue important aims, such as protecting human life or health.

<sup>1062</sup> For example, as part of its Compliance Measurement Programme, CBP randomly selected 30,000 shipments based on entry information submitted by the trade community. See Government Accountability Office, *Statement for the Record to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Cargo Container Inspections, Preliminary Observations on the Status of Efforts to Improve the Automated Targeting System Statement for the Record by Richard M. Stana, Director Homeland Security and Justice Issues*, 30 March 2006, [hereinafter GAO – 06 – 591 T], p. 6.

<sup>1063</sup> See S-Hrg 109 – 186, p. 24 concerning the positioning of radiation portal monitors at U.S. seaports; GAO-04-557T, p. 12.

<sup>1064</sup> Concerning the cost of false alarms see *id.*; S. Hrg. 107 – 224, p. 81.

<sup>1065</sup> See e.g. John Gillie, *Port Security: Ring the Alarm*, MORNING NEWS TRIB. (TACOMA WASH.), 10 March 2006 (2006 WLNR 4066293); Alwyn Scott, *Piercing Port Security Easy as Hitching a Ride*, SEATTLE TIMES, 25 July 2006 (2006 WLNR 12858462).

<sup>1066</sup> *Supra pp.* 170– 174. However, if Article XI:1 does not extend to measures relating to transportation, Article V may be the only provision under which the indirect trade restrictive effects of the CSI can be examined.

<sup>1067</sup> The use of container security seals is not yet a mandatory requirement under the CSI. However, see Section 204 (c) of the SAFE Port Act 2006.

<sup>1068</sup> WSC, *In-Transit Container Security*, p. 8 (“[T]he purpose of a security seal is to provide evidence regarding whether the seal has been interfered with in transit”).

<sup>1069</sup> *Id.*, p. 15.

<sup>1070</sup> *Id.*, pp. 17 – 18; Recommended Practice 17 of the RKC, Specific Annex E, Chapter 1. However, this does not prevent Customs from affixing their own customs seal if the foreign seals are found to be insufficient.

be agreed multilaterally within the framework of the Containers Convention 1972, to which the United States is a party. Currently, under the terms of this Convention, the United States must admit a container which is found to be compliant under the terms of that Convention.<sup>1071</sup>

Finally, the CBP may breach the most favoured nation principle in V:6 if it increases the inspections of shipments which have passed through certain countries *en route* to its final destination.<sup>1072</sup> This provision is particularly relevant for transshipment hubs that form an important part of seaport services.<sup>1073</sup> The ability of seaports to compete in this important service industry could be prejudiced if shippers avoid using non-CSI transshipment ports owing to the risk of delays at US ports<sup>1074</sup> – as the following statement suggests:

*“Moreover, U.S. bound cargo originating in foreign ports not blessed as CSI compliant likely will be more heavily scrutinized on this side of the pond. That means potential delays upon arrival, which should be a disincentive to shippers running their freight through ports not teamed up with us.”*<sup>1075</sup>

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<sup>1071</sup> See Departmental Advisory Committee on Commercial Operations of Customs & Border Protection (COAC), Maritime Transportation Security Act Subcommittee Recommendations to COAC and the U.S. Department of Homeland Security, p. 5

<sup>1072</sup> Although the destination of traffic which transits *through* the United States territory is concentrated on the Pacific Coast, Hawaii and Alaska, which are not normally considered a terrorist threat. For information on the waterborne cargo of the United States see generally Institute for Water Resources, Waterborne Commerce of the United States Calendar Year 2005, Part 4.

<sup>1073</sup> See RKC, Specific Annex E, Chapter 2, Guidelines on Transshipment, para. 2 (defining “transshipment” as “the Customs procedure under which goods are transferred under Customs control from the importing means of transport to the exporting means of transport [...]”). Transshipment hubs are considered at risk to terrorist activities and this has led to the creation of the Transshipment Country Export Control Initiative (TECI), which aims to prevent the proliferation of WMD through global transshipment hubs. See also DHS, INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, APPENDIX B. p. 2.

<sup>1074</sup> Small ports or ports not located near main shipping lanes (e.g. St. Petersburg, Russia) are unable to ship directly to or from the United States. See Philip Damas, *Transship or Direct? A Real Choice*, AMERICAN SHIPPER, JOURNAL OF INTERNATIONAL LOGISTICS 2001, VOL. 43, NO. 6 (page unavailable online). In addition, transshipment cargo services is a potentially lucrative market with ports in Egypt and the Caribbean handling significant volumes of transshipment cargo: see Peter T. Leach *New Caribbean Tune: Transshipment, No Problem!* Florida Shipper (WLNR 22874432, 2006), 11 September 2006 (page unavailable online). Of the big four transshipment hubs in the Caribbean only the Port of Freeport is currently a member of the CSI and this could give it an unfair advantage in a highly competitive market. Concerning the investment in hub ports see UNCTAD REPORT 2006, pp. 81 – 82. World Bank, *Egypt – Port Sector Development* Project Information Document, 6 April 2006 (AB1461), p. 2.

<sup>1075</sup> Steven Block, *The Container Security Initiative: Pushing out the Front Lines in the War on Terrorism*, MONDAQ BUS. BRIEFING, 6 April 2004 (WLNR 12285330).

If the complainant can prove that CBP targets containers which have passed through or are destined for countries where there is a high terrorist threat, the CSI may violate Article V:6.<sup>1076</sup> According to the following statement there is evidence that discrimination against non-CSI transshipment ports is having repercussions on market access for certain countries:

*“At present, Indian cargo is first moved to Colombo, Dubai and Singapore for further transshipment to the United States or other CSI compliant ports. This results in delays as also raises transportation costs which impacts on both traders and India also loses revenue.”*<sup>1077</sup>

On the other hand, such an argument will fail if the Panel takes the view that transshipment services are not regarded as forming part of the transit process. It would also limit the remedies open to complainants: for example, if the Panel holds that Article XI does not extend to measures affecting transportation and interprets the term “transit” in accordance with the RKC and EU Customs Code, the complainant would be left with no remedies under the GATT with regard to reduced market access caused by the effect of the CSI on transshipment services.

#### **5.6.4. Result**

The complainant could argue that the Container Security Initiative infringes the freedom of transit of Article V:2 owing to the fact that it expressly discriminates against all container cargo from non-CSI seaports. By granting container shipments from CSI ports a competitive benefit, it also disrupts the most efficient route for transit cargo by pressuring producers to use CSI seaports in order to reduce the risk of delay from increased inspections. Delay caused by risk assessment or random inspections at US ports of call may not be regarded as “necessary” if caused by

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<sup>1076</sup> CBP has attempted to obtain as much information as possible about the history of the container and its final destination. For example, among the information that CBP requires is the foreign port of lading (19 CFR 4.7a(c)(2)(ii)(B); 19 CFR 4.7a(c)(4)(xi)); the first foreign port where the carrier takes possession of the goods destined for the United States (19 CFR 4.7a(c)(4)(vi)); and the name and address of the consignee (19 CFR 4.7a(c)(4)(ix)). However, this information is too limited for security purposes. See World Shipping Council, *Testimony of Christopher Koch Regarding Maritime Transportation Security Act Oversight Before the Senate Committee on Commerce, Science, and Transportation*, 17 May 2005, p. 5. The recent “10 +2” data elements recently proposed by CBP go further than the EU’s AEO and the WCO’s Framework of Standards in requiring data about the importer.

<sup>1077</sup> Dr Vijay Sakhuja, *Container Security Initiative: Is India Serious About Its Maritime Trade?* World News Connection (Newswire), 6 January 2005.

unreliable inspection equipment or poor port layout. Finally, the CSI could contravene Article V: 6 if it increases inspections of transit cargo which has passed through certain countries.

## 5.7. Article VIII

### 5.7.1. Introduction

Article VIII also deals with aspects of customs law namely fees and charges at border crossings, the simplification of border formalities and sanctions for infringements imposed by member states. The provision works “hand-in-glove” with Article II:2 (c).<sup>1078</sup>

### 5.7.2. Requirements

Article VIII:1(a) complements Article III:1(b) and applies to a residual category of fees and charges imposed by *a governmental authority* which must be connected to trade.<sup>1079</sup> The provision submits charges to three conditions: the charge must be limited in amount to the approximate cost of services rendered; it must not represent an indirect protection to domestic products or a taxation of imports for fiscal purposes.

In order to fall within Article VIII:1(a), the body levying the charges must be a governmental or quasi-governmental entity. In *Japan – Semi-Conductors*, the Panel held that government involvement could take the form of informal government measures, applied “in a manner to directly influence the behaviour of private companies.”<sup>1080</sup> In *Japan - Measures Affecting Consumer Photographic Film and Paper*, it held that the fact that a measure has been taken by a private party did not necessarily mean that it could not be linked to the government.<sup>1081</sup> However,

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<sup>1078</sup> See Kennedy, p. 143.

<sup>1079</sup> See World Trade Organization, Council for Trade in Goods, *Article VIII of the GATT, Scope and Application, Note by the Secretariat*, T/N/TF/W3, 12 January 2005 (updating document G/C/W/391, 9 July 2002), p. 4 para. 9.

<sup>1080</sup> Panel, *Japan – Semi-Conductors*, para. 117.

<sup>1081</sup> Report of the Panel, *Japan - Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R, 31 March 1998, (adopted on 22 April 1998), para. 10.52 (“[P]rivate actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions”).

the Panel stated that there were no general guidelines in this regard and that the question had to be determined on an *ad hoc* basis.<sup>1082</sup>

Concerning the meaning of “services”, the Panel in *U.S. – Customs Services Fee* held that the term referred to activities *closely enough connected to the processes of customs entry* that they might, with no more than the customary artistic license accorded to taxing authorities, be called “services” to the importer in question.<sup>1083</sup> The Panel held that investigations of customs fraud and counterfeit goods were activities that formed part of general customs “services” applicable to all commercial importers because they directly affected the manner in which all entries were processed and were sufficiently general in character.<sup>1084</sup> Accordingly, their cost could be allocated among all commercial importers and did not have to be charged solely to the specific importers who happened to be beneficiaries of their “services” at the time in question.<sup>1085</sup>

The government entity may only charge for the approximate cost of services rendered. Although the terms “commensurate with” and “approximate” grant a certain degree of flexibility, the charge must be sufficiently linked to the services rendered to prevent a member state disguising a charge which serves to protect domestic producers.<sup>1086</sup> This rule is also reflected in the Revised Kyoto Convention, which also limits expenses chargeable by customs to “the approximate cost of the services rendered.”<sup>1087</sup> In *U.S. – Customs Services Fees*, the Panel held that the ordinary meaning of the term “cost of services rendered” would be the cost of those services rendered to the individual importer or exporter in question.<sup>1088</sup> The Panel held that this requirement excluded levying fees on an *ad valorem* basis to the extent that it caused fees to be levied in excess of such

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<sup>1082</sup> *Id.*, para. 10.56.

<sup>1083</sup> See Panel, *U.S. – Customs Services Fee*, para. 77.

<sup>1084</sup> *Id.*, para. 102.

<sup>1085</sup> *Id.* para. 104. The same applied to the “clearance of carriers” item, which was an activity involving “the examination of manifests which was the first step in discharging commercial cargo, and thus was clearly a part of the normal process of customs clearance.” On the other hand, “international affairs” was not accepted as forming part of general customs “services” because it concerned activities of Customs officers stationed in other countries and only some appeared to be related to the process of customs clearance.

<sup>1086</sup> Report of the Panel, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, 25 November 1997 (adopted on 22 April 1998), [hereinafter, Panel, *Argentina – Footwear*], paras. 6.77 – 6.80 (holding that the link that was too loose). Panel, *United States – Customs User Fee*, para. 86 (holding that the fee was above the cost of services rendered by the United States Customs Service).

<sup>1087</sup> Standard 3.2 of the RKC.

<sup>1088</sup> Panel, *United States – Customs User Fee*, para. 86.

costs.<sup>1089</sup> On the other hand, consular fees, customs fees and statistical fees have been held permissible for services rendered. The Panel in *Argentina – Textiles and Apparel* also rejected an *ad valorem* “statistic tax” on the basis that such a tax, according to its very nature, was not limited to the approximate costs of the service rendered.<sup>1090</sup>

In *United States – Import Measures on Certain Products from the EC*, the Panel held that Article VIII:1(a) was a dual requirement because the charge in question had to involve a “service rendered” and then the level of the charge could not exceed the approximate cost of that service. The government imposing the fee should have the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation had been given, it would be upon the complainant to present further information calling into question the adequacy of that explanation.<sup>1091</sup>

Article VIII:1(c) contains only hortatory language and is therefore not legally binding on member states.<sup>1092</sup> However, member states have implemented this provision through other instruments such as the Agreement on Import Licensing Procedures, Agreement on Preshipment Inspection and Agreement on Technical Barriers to Trade as well as instruments outside the WTO such as the Revised Kyoto Convention and TIR Convention.<sup>1093</sup> Therefore, if a state infringes Article VIII:1(c) it is likely to infringe these agreements as well.<sup>1094</sup> According to the Panel in *EC – Bananas*, the Panel noted that Article VIII:1(c) referred to import formalities and documentation requirements, not to the trade regulations which such formalities or requirements enforce.

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<sup>1089</sup> Panel, *Argentina – Textiles and Apparel*, para. 86. Therefore, the Panel held that a charge calculated on an *ad valorem* basis would infringe Article VIII:1(a) because minor value transactions would pay less than major value transactions. See also MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY*, OXFORD UNIVERSITY PRESS, 2005, pp. 102 ff.

<sup>1090</sup> Panel, *Argentina – Textiles and Apparel*, para. 6.80.

<sup>1091</sup> See Report of the Panel, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000 (adopted 10 January 2001), para. 98. See also VAN DEN BOSSCHE, p. 440

<sup>1092</sup> Article VIII:1 (c) simply states that members “recognize the need” to simplify import requirements. The provision was dealt with in Report of the Panel, *EEC – Import Regime for Bananas*, DS38/R, 11 February 1994, (unadopted), at para. 151. See also VAN DEN BOSSCHE, p. 475.

<sup>1093</sup> See World Trade Organization, Council for Trade in Goods, *Article VIII of the GATT, Scope and Application*, Note by the Secretariat, T/N/TF/W3, 12 January 2005 (updating document G/C/W/391, 9 July 2002).

<sup>1094</sup> E.g., Article 2, Appendix I of the RKC obliges each contracting party “to promote the simplification and harmonization of Customs procedures [...]”

Article VIII:3 subjects the imposition of customs penalties to the principle of proportionality. Penalties are an important aspect of unilateral security measures because they ensure compliance by traders.<sup>1095</sup> The provision prohibits “substantial penalties” being imposed for “minor breaches” of customs regulations or procedural requirements. It focuses on omission or mistakes in customs documentation which are “easily rectifiable and obviously made without fraudulent intent or gross negligence.” The use of the word “and” suggests that both requirements must be satisfied. Accordingly, it would be permissible to punish a minor breach which is easily rectifiable but which was made with fraudulent intent. Similarly, innocent mistakes which are not easily rectifiable may also give rise to substantial penalties. Provided that both requirements are satisfied, however, the penalty must only serve as a warning. This provision is also reflected in the Revised Kyoto Convention, which stipulates that customs must not impose substantial penalties for inadvertent errors. Penalties may be applied to discourage repetitions of errors but must be “no greater than is necessary for this purpose.”<sup>1096</sup>

### 5.7.3. Examination

Cost-sharing is one of the most controversial aspects of the CSI. As a rule, the U.S. government expects CSI participants to bear the costs of participation including outlays for inspection equipment, inspections and disposal of WMD materials.<sup>1097</sup> As stated above, it reflects the *quid pro quo* approach adopted by seaports in attracting private sector investment in port infrastructure (e.g. concession contracts).<sup>1098</sup> The argument is that the private stakeholders in the maritime domain including seaport authorities, carriers and shippers profit from increased security and should therefore contribute towards the costs of security measures.<sup>1099</sup> It has been reported that the shipping industry as well as seaports in the United States and other countries are passing costs for security measures on to port users<sup>1100</sup> in the form of container surcharges, scanning fees or

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<sup>1095</sup> Mikuriya, p. 53.

<sup>1096</sup> Standard 3.39 of the RKC.

<sup>1097</sup> *Supra n.* 859

<sup>1098</sup> *Supra n.* 557.

<sup>1099</sup> See CRS REPORT FOR CONGRESS, 3 January 2007, pp. 11 – 12.

<sup>1100</sup> In the United States, security surcharges have been imposed the South Carolina State Ports Authority, Virginia Port Authority and the North Carolina Ports Authority. In Mexico, a security fee for each full export or import container took effect on February 1, 2005. On 8 June 2005, the Florida Ports Conference adopted specific security fee criteria and rates which will take effect on or prior to 1 January 2006. On 25 October, the Gulf Seaports Marine

port duties.<sup>1101</sup> Considering that new user fees have been opposed by the shipping and trade interests as well as constitutional obstacles<sup>1102</sup> the question arises whether recovering costs specifically relating to the CSI from port users *generally* in the form of a security fee contravenes Article VIII. This section is unique in this investigation insofar as a complaint would not be directed against the United States itself but against its partners in the Container Security Initiative. This implies that the complainant will not be a member of the CSI itself, at least as far as Article VIII:1(a) is concerned.<sup>1103</sup>

The costs of “pushing out the borders” are borne by the United States as well as private and public-sector stakeholders.<sup>1104</sup> The U.S. government finances the CSI teams at the seaports and provides limited financial assistance for the implementation of security standards, depending on the country involved.<sup>1105</sup> According to CBP, the private sector pays for all the costs associated with the non-intrusive inspections (NII) as well as the physical inspections<sup>1106</sup> required by the CSI, which can be substantial.<sup>1107</sup> According to CBP, “[t]he existence of CSI has shifted examination costs from the U.S. importer to the foreign shipper (exporter).”<sup>1108</sup> One commentator

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Terminal Conference announced its intention to impose a security fee for vessels and cargo utilizing U.S. Gulf of Mexico ports. See American Association of Port Authorities website: <<http://www.aapa-ports.org/industry/content.cfm?ItemNumber=1064>>; see also *Frustration Mounts at Costs of Port Security*, 29 May 2004 (WLNR 7081132).

<sup>1101</sup> See OECD REPORT 2003, p.52, para. 151. See also UNCTAD REPORT 2003 at p. 18, para. 45, (concerning additional charges levied by carriers); at p. 35 para. 91 (reporting that seaports are considering levying security fees of GBP 10.50 or EURO 10 per box).

<sup>1102</sup> See Walters, 30 TUL. MAR. L.J. 311, pp. 326 – 328.

<sup>1103</sup> As stated above, it may be the case that some WTO member states which are members of the CSI will complain against certain aspects of the measure that they object to, such as 100 per cent scanning.

<sup>1104</sup> Papavizas and Kiern, pp. 452 – 454; Lee, p. 136; for an overview of the stakeholders who must bear the costs of the CSI see Allen, pp. 441 – 443.

<sup>1105</sup> Florestal, p. 403.

<sup>1106</sup> CSI STRATEGIC PLAN, p. 9.

<sup>1107</sup> E.g. UNITED STATES TRADE POLICY REVIEW 2004, p. 35, para. 22 (“The CBP pays for personnel overseas to implement the CSI (e.g., travel, offices, and computers equipment), but ports that do not have the NII equipment must purchase it before CBP deploys to the port. Although most large ports already have this equipment it for their own import and compliance processes, many commercial ports world-wide do not”). The potential costs are wide-ranging and include the additional administrative burden in implementing the 24 Hour Rule, the acquisition, operation and maintenance of inspection equipment, the carrying out of inspections, disposal of WMD and the compensation of exporters for any loss caused by the inspections.

<sup>1108</sup> CSI STRATEGIC PLAN, p. 9. In order to cover administrative costs associated with the additional reporting requirements under the 24-Hour Rule, most ocean carriers have begun to charge between US\$ 25 and US\$ 35 per bill of lading. See UNCTAD REPORT 2003, p. 18, para. 45.



states that “[t]here are fears by prospective CSI ports that they may be left in a situation where they take over all the burdens of U.S. controls *in situ* at their ports.”<sup>1109</sup>

Security fees connected with the Container Security Initiative appear to fall within the scope of Article VIII:4(f) and (g) because they refer to costs connected with documents, documentation and certification as well as analysis and inspection.<sup>1110</sup> Concerning the second requirement, the entity levying port fees is likely to be the seaport authority and so the question arises as to the degree of government involvement in the running of seaports. Although many seaports today are primarily owned by the private sector, there is also a significant degree of government control in certain areas.<sup>1111</sup> There are numerous restrictions to free trade in maritime transportation services imposed by government legislation, including access to port facilities.<sup>1112</sup> For example, in the United States the government controls access to and use of port facilities and is responsible for port safety, security and customs duties. In particular, it applies port access restrictions based on national security restrictions.<sup>1113</sup> With regard to the CSI, the complainant could argue that the implementation of the CSI displays a degree of government involvement which justifies classifying the seaport as a quasi-governmental entity: the details of implementation, procedures for targeting and inspecting high-risk containers as well as the standards of security are agreed between the host government and the CBP. The role of the seaport authority is simply to facilitate the security standards agreed between the host government and the United States.<sup>1114</sup> Accordingly, it accommodates the CSI teams, provides inspection equipment, facilitates inspections and disposes of the WMD in co-operation with the national customs authority and CBP. The seaport authority recovers the costs arising from the implementation of the Declarations of Principles from port users.

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<sup>1109</sup> Jau, p. 19 – 20 who states that Singapore spent \$ 8.8 million on acquiring inspection equipment alone. See also WSC, Comments of 30 July 2007 (concerning 100 percent inspections).

<sup>1110</sup> See *U.S. – Customs User Fee*, para. 76.

<sup>1111</sup> See Trujillo and Nombela, pp. 16 – 18, concerning the participation of the private sector in seaports.

<sup>1112</sup> See PARAMESWARAN, pp. 50 – 55; pp. 64 – 65.

<sup>1113</sup> Jeffrey Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and its Pre-emption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, pp. 89 – 90. See also PARAMESWARAN, pp.64 - 68 describing the government restrictions on maritime transportation services which exist in most states.

<sup>1114</sup> The MTSA 2001 places the responsibility for security largely on private parties: see Papavizas and Kiern, p. 453.

If the Panel accepts that the seaport is acting as a quasi-governmental entity with regard to the implementation of the CSI, it would then have to consider whether the security fees represent “services rendered” to an importer or exporter. Although this term is not defined, Article VIII:4 provides an illustrative list of relevant services. The complainant could argue that port user fees imposed in connection with the CSI fall within the scope of Article VIII:1,<sup>1115</sup> being fees or charges relating to documentation and inspection. As a result, such services would appear to be “closely enough related to the processes of customs entry.”<sup>1116</sup> Assuming that fees for participation in CSI fall within the scope of Article VIII:1(a), the complainant would then have to prove that the charge (i) does not involve a service rendered to all port users *and* that (ii) it indirectly protects a domestic producer or is a non-tariff device for raising revenue.

Concerning the first requirement, the complainant could argue that the CSI inspection requirements only apply to container cargo for the United States. Therefore, the costs of scanning or physical inspections requested by CSI teams cannot be covered by a security fee levied on all port users because they do not represent a general service provided to all port users.<sup>1117</sup> Unlike the inspections at issue in *U.S. – Customs User Fees*, CSI inspections do not represent an autonomous decision of the host customs authority either: the risk assessment of a container is carried out by CBP which can request the host customs administration to perform an inspection.<sup>1118</sup> In other words, CSI inspections are exclusively designed to protect U.S. borders and do not benefit the containers of any other exporters: CSI inspections would not detect a bomb in a container destined for the United Kingdom, for example, because the 24 Hour Rule only carries out risk assessment to cargo containers destined for the United States. On the other hand, the host country could argue that the inspection equipment itself is there to benefit all port users: in particular, the security facilities at CSI ports serve to satisfy the requirements of the Framework of Standards, which is a multilateral agreement designed to discover illicit activities

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<sup>1115</sup> Report of the Panel, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, BISD 41S/I/131, 12 August 1994 (adopted 4 October 1994), para. 77.

<sup>1116</sup> *Supra n.* 1083. However, the service provided by CSI harbours appears to contain some economic aspects. On the one hand, they improve security arrangements so that commerce can continue in the event of a terrorist attack. On the other hand, they confer expedited clearance on cargo containers. According to the OECD, CSI seaports “are simply investing in greater security, a premium which the United States is willing to “pay” for through expedited cargo processing.” See OECD REPORT 2003, p. 54, para. 157.

<sup>1117</sup> *Supra n.* 1083.

<sup>1118</sup> GAO-05-557, p. 15, fig. 3.

at seaports generally.<sup>1119</sup> For example, it has been reported that customs authorities at the Port of Le Havre use inspection equipment acquired within the framework of the CSI to detect smuggled cigarettes.<sup>1120</sup> Relevant points to consider would be whether the inspection equipment is positioned in such a way to inspect all containers or only U.S. containers. The complainant could also submit statistical information, comparing the number of inspections carried out containers destined for the U.S. and those destined for other countries.

The second requirement (viz., whether the fees charged do not reflect the approximate cost of the service rendered and amount to a non-tariff device for raising revenue)<sup>1121</sup> requires an examination of the method of calculating and levying the fee. This aspect is unlikely to give rise to evidential problems: at least one study has precisely quantified the costs of security measures at seaports.<sup>1122</sup> At the same time, it is not possible to make any general statements in relation to this requirement because the costs of participation are likely to vary between ports. According to one report, “[port] design is strongly conditioned by the physical characteristics of the coast where the port is located.”<sup>1123</sup> The costs of installation may therefore be considerably higher in some seaports than in others.

Both the 24 Hour Rule and administration of non-intrusive inspections involve complex documentation requirements and may be inconsistent with the principle contained in Article VIII:1(c). In particular, there is evidence that the extended information requirements contained in

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<sup>1119</sup> *Id.*, p. 23 (referrals by CBP for inspections have been refused by some administrations on the grounds that the illicit activities do not relate to terrorism). But see CSI STRATEGIC PLAN 2006, p. 13 (pointing out that equipment used for CSI may be used to uncover other illegal activities).

<sup>1120</sup> ASSESSMENT OF U.S. EFFORTS, p. 19.

<sup>1121</sup> Owing to the fact that security standards at CSI ports will be periodically reviewed under Section 204 (b) of the SAFE Port 2006 and that future updates or acquisitions are likely to be made on a regular basis, it is likely that security fees will be ongoing.

<sup>1122</sup> See CSI STRATEGIC PLAN 2006, p. 34, which states that the estimated average cost per CSI port to achieve operational status is \$395,000. However, these costs do not include the acquisition of X-Ray equipment to qualify for participation in the CSI. See Bjorkholm and Boeh, p. 147, who precisely quantify the costs of security equipment. See also WLNR 7081132 (*supra* 1100), South Carolina officials stated their intention to “press ahead unilaterally with a levy of \$1 per foot for every vessel calling at the ports”; *Port Klang*, LLOYD’S LIST, 2 April 2004 (WLNR 7189605) reporting that Port Klang’s two container terminals had started charging “anywhere between M\$130 (US\$34) per TEU to M\$620 per FEU for boxes selected for scanning under the Container Security Initiative”. The charge “will be billed as ‘extra movement charges’ under the existing port tariff.

<sup>1123</sup> The costs of installation of detection equipment and the inspection of containers depend on factors such as port size and layout, local labour rates and container yard technology. See UNCTAD REPORT, p. 52, para. 152; Trujillo and Nombela, p. 6.

CFR 4.7 have complicated import formalities for FROB cargo and interfered with contractual relationships.<sup>1124</sup> In this respect, the complainant could argue that the pending “10 + 2” set of data elements required by CBP is far more onerous than that required by the WCO’s Framework of Standards and the European Union’s Authorized Economic Operator programme.<sup>1125</sup> However, as the Panel in *EEC – Bananas*, stated, it is for the complainant to submit evidence that the import formalities and documents are more complex than necessary in order to implement the US security policy.<sup>1126</sup> The United States could argue that the requirements are necessary because risk assessment is recognized by the Revised Kyoto Convention and the Framework of Standards as the most effective basis for carrying out inspections.<sup>1127</sup> It is also justified in increasing the information requirements because it has been proved that existing data requirements are inadequate in identifying high-risk containers.<sup>1128</sup> the more information it receives, allows the more precisely the NTC can carry out risk assessment.<sup>1129</sup> In addition, the “10 + 2” data elements have been expressly supported by the World Shipping Council.<sup>1130</sup>

Article VIII:3 applies to monetary and non-monetary penalties and prohibits member states from imposing substantial penalties for minor breaches of customs regulations or procedural requirements. This is an important dimension of the CSI because it is the means by which it ensures enforcement with its security requirements.<sup>1131</sup> The Customs and Border Protection Bureau has inherited the traditional powers of U.S. Customs and can assess penalties and liquidated damages, seize merchandise, remit forfeitures, mitigate penalties, decide petitions and cancel claims.<sup>1132</sup> It imposes penalties for breaches of the 24 Hour Rule as well as failure to comply with screening and scanning requirements at foreign seaports. Examples of infringements punished by CFR 4.7 include presenting the cargo information 10 hours before the cargo is laden aboard the vessel at the foreign port, or filing incomplete information.<sup>1133</sup> Also, any master of a

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<sup>1124</sup> See e.g. WSC, Statement of 22 August 2003, p. 11.

<sup>1125</sup> *Supra n.* 284.

<sup>1126</sup> Panel, *EEC – Import Regime for Bananas*, para 151.

<sup>1127</sup> See RKC, Chapter 6, Customs Controls; Framework of Standards, Standard 4.2 ; see also Mikuriya, p. 55.

<sup>1128</sup> See ASSESSMENT OF U.S. EFFORTS, pp. 26 – 27.

<sup>1129</sup> WSC, Comments of 17 May 2005.

<sup>1130</sup> World Shipping Council, Remarks of Christopher Koch Before the Maritime Security Expo 2006, New York City, 19 September 2006, pp. 4 – 5.

<sup>1131</sup> See DHS, MARITIME SECURITY RECOMMENDATIONS, p. 8.

<sup>1132</sup> See Bishop, pp. 324 – 325.

<sup>1133</sup> This violates 19 CFR 4.7(b)(2) and may result in the delay or the denial of the permit to unlade.

vessel can be punished for failing to provide a ‘precise narrative description’ of cargo container contents.<sup>1134</sup> Certain factors can mitigate the penalties<sup>1135</sup> and their imposition is also staggered.<sup>1136</sup> Nevertheless, the pecuniary and non-pecuniary penalties are substantial and can be economically damaging to the parties affected.<sup>1137</sup>

The complainant could argue that imposing penalties for errors in the cargo manifest is disproportionate because such errors are “easily” rectifiable and are likely to be made without fraudulent intent or gross negligence. It is generally accepted that the cargo manifest is a document which serves commercial rather than security purposes and that it is subject to errors and inaccurate information.<sup>1138</sup> It is well-known that corrections often need to be made to the cargo manifest after the cargo has been loaded.<sup>1139</sup> Despite these weaknesses, CBP has chosen to base the ATS almost exclusively on the cargo manifest information.<sup>1140</sup> CBP requires a “precise narrative description of the cargo” and has made the importer responsible for obtaining this information.<sup>1141</sup> However, a carrier does not have direct knowledge of the cargo and is unable to verify the information contained on the cargo manifest without carrying out a physical inspection of the container. Although CBP permits the carrier to submit information from third parties which it reasonably believes to be true, it nevertheless stresses that the party which provides the cargo

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<sup>1134</sup> See CBP, Trade Act FAQ, pp. 15 – 16. See Bureau of Customs and Border Protection, CBP Decisions (CBP Dec. 05–23), CUSTOMS BULLETIN AND DECISIONS, VOL. 39, NO. 28, 6 July 2005, pp. 2 – 4.

<sup>1135</sup> According to Section 343 (a) (3) (B) of the Trade Act, the CBP must require information from the party most likely to have direct knowledge. Therefore, where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present such information on the basis of what the party reasonably believes to be true. Mitigating factors also include inexperience in transmitting electronic information, a general good performance and low error rate in the handling of cargo, C-TPAT membership and demonstrated remedial action has been taken to prevent future violations.

<sup>1136</sup> For a first violation, the CBP will mitigate the penalty imposed on a master of a vessel or the assessment of liquidated damages to an amount between \$1,000 and \$3,500, if CBP determines that law enforcement goals were not compromised by the violation. Subsequent infringements incur a penalty payment of \$3,500 – \$5,000.

<sup>1137</sup> According to 19 USC 1436(b), port directors are authorized to levy civil penalties of \$5,000 against the master of the vessel and a \$10,000 penalty against the same master for any subsequent violation. Port Directors may assess, in addition to any other applicable statutory penalty, a claim for liquidated damages in the amount of \$5,000 under 19 CFR 113.64(c) or 19 CFR 113.62(j)(2), against any NVOCC, slot charterer or other authorized electronic transmitter. A claim for liquidated damages in the amount of \$5,000 may be assessed for any subsequent violation. These penalties apply in addition to penalties applicable under other provisions of law. In addition, an infringement may result in the delay of the release of the cargo or the denial of the carrier’s preliminary entry-permit/special license to unlade.

<sup>1138</sup> See WSC, Comments 9 September 2002, p. 4; ASSESSMENT OF U.S. EFFORTS, p. 27.

<sup>1139</sup> *Id.*, p. 17.

<sup>1140</sup> See ASSESSMENT OF U.S. EFFORTS, p. 27.

<sup>1141</sup> For example, CBP has stated that “electronics” would not constitute a precise description, but that “CD players” or “computer monitors” would. See CBP, Trade Act FAQ, p. 16 at para. 18.

declaration information to CBP is responsible for ensuring that the information is accurate.<sup>1142</sup> Considering that it is likely that carriers acting in good faith will nevertheless fail to provide sufficiently precise information the penalties imposed for infringements may be considered disproportionate. They impose a blanket penalty for errors *per se* and do not distinguish between errors made as a result of fraudulent handling or obvious negligence and errors made by entities acting in good faith. Clearly, the latter sort of error demands a lesser penalty than the former. For example, according to the Recommendation on Standard Practices for Consular Formalities of 1952, no charge, other than the regular charge for replacement of a document, should be imposed for mistakes made in good faith. Moreover, corrections to the original documents should be allowed “within reasonable limits.” In this respect, evidential problems may arise because US authorities have stated that the number of fines assessed for violations of Section 343 of the Trade Act of 2002 is not public information.<sup>1143</sup>

#### **5.7.4. Result**

Seaports cannot pass the costs for participation in CSI onto all port users in the form of general port user fees because the CSI is a security measure which only applies to cargo shipments bound for the United States. The concept of “pushing out the U.S. borders” means that CSI inspections do not form part of the normal activities of the host customs administration. Host customs officials simply facilitate these inspections which are initiated at the request of CBP and reflect U.S. security standards. In this respect, seaports are acting as quasi-governmental entities in implementing the Declarations of Principles. The proposed “10 + 2” information requirements may not contravene Article VIII:3 because they are considered necessary by the United States and the World Shipping Council to assess risk accurately. On the other hand, the penalties imposed by CBP are disproportionate considering that errors in the cargo manifest are often made innocently and easily rectifiable.

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<sup>1142</sup> *Id.*, p. 15.

<sup>1143</sup> See US TRADE REVIEW 2006, p. 27 at para. 22.

## 6. TBT Agreement 1994

### 6.1 Introduction

The progressive reduction in tariff barriers to trade achieved by the GATT and WTO has been accompanied by an increase in non-tariff barriers. So-called “non-tariff measures” (NTMs) take a variety of forms and circumvent the prohibitions on trade restrictions in the GATT.<sup>1144</sup> For example, despite the fact that they clearly restrict trade, many NTMs are difficult to challenge because they are disguised as or form part of legitimate measures. Technical barriers to trade are the major example of this form of disguised restriction.

Technical barriers to trade refer to the technical regulations or standards which a modern society needs to protect the public interest such as health or the environment.<sup>1145</sup> They often serve a dual purpose: on the one hand, they seek to protect legitimate interests and are imposed by the government as a result of pressure by powerful lobbyists and under the pretext that the market alone cannot guarantee the necessary standards. On the other hand, the measures operate to restrict trade either directly or indirectly, for example, by ensuring that the technical standards in question can only be complied with by certain producers or group of producers. This has the effect of forcing other economic participants from the market and excluding competition from developing countries, which may lack the technical capacity to comply with the regulations or standards.<sup>1146</sup> A complainant may not be able to prove the underlying protectionist motive because the technical regulations at issue may not be expressly discriminatory. It can also be difficult to establish a *prima facie* case of *de facto* discrimination if the regulation pursues a legitimate non-trade purpose.

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<sup>1144</sup> Arts. III, XI, XX GATT.

<sup>1145</sup> SENTI, RICHARD, *DIE NEUE WELTHANDELSORDNUNG NACH DER URUGUAY RUNDE*, 2001 (3<sup>rd</sup> Edition), p. 72, paras. 4.5 *et seq.*

<sup>1146</sup> GALLAGHER, PETER: *GUIDE TO THE WTO AND DEVELOPING COUNTRIES*, KLUWER LAW INTERNATIONAL (2000), pp. 152 *et seq.*

During the Tokyo Round it had become clear that many member states were employing technical measures for protectionist purposes<sup>1147</sup> and that the GATT was ill-suited to deal with NTBs in the form of technical measures.<sup>1148</sup> For example, owing to the fact that many technical measures serve the public interest, it is not possible to order their elimination pursuant to Article XI GATT. The Agreement on Technical Barriers to Trade was signed during the Uruguay Round and combats the most prevalent non-tariff measures. The Appellate Body has described its obligations as “different and additional” to those in the GATT.<sup>1149</sup> This agreement has been dealt with (as a whole) by two disputes: *EC – Asbestos* and *EC-Sardines* with only the latter report being adopted. Therefore, there is little guidance on its interpretation.

The TBT Agreement regulates trade related measures introduced to protect non-trade concerns such as human, animal or plant life or health, to protect the environment and to ensure the quality of goods. It applies in relation to goods and not services. The preamble to the agreement recognises the right of member states to introduce measures necessary to protect non-trade related concerns. However, they are only permissible to the extent that they are “necessary.” In this way, the TBT Agreement attempts to strike a balance between the need for technical provisions and standards and the need for trade facilitation. It also reflects the principles of GATT insofar as it subjects technical measures to the principles of most-favoured nation and national treatment. In a separate paragraph, the preamble recognizes that no country should be prevented from taking measures necessary for the protection of its essential security interest.

## 6.2 Requirements

In order to fall within the scope of the TBT Agreement, the CSI must constitute either a technical regulation or technical standard pursuant to Annex 1. In the *EC-Asbestos* case, the Appellate Body required a technical regulation or standard to be contained in a “document” laying down the

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<sup>1147</sup> See DANIEL FISCHER, *DIE BEHANDLUNG TECHNISCHER HANDELSHEMNISSE IM WELTHANDELSRECHT*, HEIDELBERG 2004, pp.120ff. on how such measures can constitute trade restrictions.

<sup>1148</sup> Tietje in PRIESS/BERRISCH, *WTO HANDBUCH*, Section B.I.5, paras. 3 – 4.

<sup>1149</sup> See Appellate Body, *EC – Asbestos*, at p. 31 para. 80



necessary requirements.<sup>1150</sup> In *EC – Sardines* the Appellate Body, referring back to its *Report in EC – Asbestos*, formulated a three-part test for determining if a measure is a technical regulation:

- the document must apply to an identifiable product or group of products;
- the document must lay down one or more product characteristics; and
- compliance with these characteristics must be mandatory.<sup>1151</sup>

The scope of the TBT Agreement is contained in Annex 1 which defines “technical regulations” and “standards.”

A “standard” takes the form of a document approved by a recognized body that provides, for common and repeated use, rules, guidelines and characteristics for products or related processes or production methods, with which compliance is not mandatory. Standards may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements, as they apply to a product, process or production method. Although a standard is not strictly binding, it may nevertheless develop *de facto* binding effect as the standard becomes commonly used in trade.

The term “technical regulations” was the subject of *EC-Asbestos* and *EC-Sardines*. In the former case, the Appellate Body held that “[t]he heart of the definition of a ‘technical regulation’ is that a ‘document’ must ‘lay down’ – that is, set forth, stipulate or provide – ‘product characteristics’.”<sup>1152</sup> This statement suggests that the technical regulation must manifest itself in the actual product. This is supported by the AB’s definition of characteristics, which it held “might relate, *inter alia*, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.”<sup>1153</sup> However, the examples provided

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<sup>1150</sup> *Id.*

<sup>1151</sup> Report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002 (adopted 23 October 2002), p. 44 at para. 176.

<sup>1152</sup> Appellate Body, *EC - Asbestos*, paras. 67 – 69.

<sup>1153</sup> *Id.* para. 67.

in the TBT Agreement suggest that its scope might be wider than this ruling suggests.<sup>1154</sup> The Panel held that these examples “indicate that ‘product characteristics’ include, not only features and qualities intrinsic to the product itself, but also *related* ‘characteristics’, such as the means of identification, the presentation and the appearance of a product.”<sup>1155</sup> The Appellate Body also pointed out that, according to the definition in Annex 1.1 of the TBT Agreement, “a ‘technical regulation’ may set forth the ‘applicable administrative provisions’ for products which have certain ‘characteristics’.”<sup>1156</sup> Concerning the requirement of “mandatory”, the Appellate Body held that, “with respect to products, a ‘technical regulation’ has the effect of *prescribing* or *imposing* one or more ‘characteristics’ – ‘features’, ‘qualities’, ‘attributes’, or other ‘distinguishing mark’.”<sup>1157</sup>

The question whether the regulation must be detectable in the final product is a controversial topic owing to the fact that Annex 1 of the TBT Agreement defining technical regulations and standards refers not only to “product characteristics” but also “related processes and production methods” (PPMs). This term refers to the way in which products are manufactured/produced or to the processes used in producing the product. In literature, a distinction is made between PPMs which are detectable in the final product (“product-related PPM” (PR-PPMs)) and PPMs which are not detectable in the final product (“non-product related PPM” (NPR-PPMs)). The reference to “related” PPMs in Annex 1 clearly indicates that the scope of the TBT Agreement does not extend to non-product-related PPMs.<sup>1158</sup>

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<sup>1154</sup> TBT Agreement, Annex I, defining a technical regulation as “a document which lays down product characteristics *or their related processes and production methods*, including the applicable administrative provisions, with which compliance is mandatory” (emphasis added).

<sup>1155</sup> Appellate Body, *EC – Asbestos*, para. 67.

<sup>1156</sup> *Id.*

<sup>1157</sup> *Id.* para. 68.

<sup>1158</sup> See REPORT (1996) OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT, WT/CTE/1, 12 November 1996, para. 70 (“The negotiating history of the TBT Agreement indicates clearly that there was no intention of legitimizing the use of measures based on non-product-related PPMs under the TBT Agreement, and that voluntary standards based on such PPMs are inconsistent with the provisions of the Agreement as well as other provisions of the GATT”).

### **6.3. Examination**

Both the 24 Hour Rule and the CSI are contained in “documents” because they are regulated by statute and lay down regulations for the advance submission of cargo information and inspections at foreign seaports. In addition, both measures apply to an identifiable product group: i.e., products transported by containers to US seaports for sale in the United States.<sup>1159</sup>

The second stage of the test laid down in *EC – Sardines* requires the regulation to be detectable in the final product – either positively or negatively. The jurisprudence clearly states that the terms “*related* processes and production methods” refer to the manufacture of the product itself. For this reason, the 24 Hour Rule and CSI do not fall within the scope of the agreement because their requirements relate solely to the transportation of cargo. Requirements such as the advance submission of the cargo information and inspection of high-risk containers do not contribute to the creation of the product characteristics, as required by the Appellate Body. By the same token, they are unlikely to constitute technical standards which also require a connection to a product or related process or production methods.

### **6.4. Result**

The 24 Hour Rule and CSI relate solely to the security standards at different nodes of the supply chain in terms of advance information requirements and inspections of containers. These measures do not fall within the scope of the TBT Agreement because they do not determine the intrinsic or related physical characteristics of a product.

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<sup>1159</sup> See *supra* pp. 161 – 162.

## **7. WTO Agreement on Pre-Shipment Inspections**

### **7.1. Introduction**

Pre-shipment inspection was introduced in 1965 and refers to a service provided to developing countries by private companies or quasi-governmental bodies (so-called “PSI entities”) to verify the information provided by the exporter relating to the goods. Many developing countries have opted for PSI because they lack the resources to effectively inspect imports at a rate which facilitates trade. There are 37 countries which use PSI services, 34 of which are WTO members.

An increase in the use of PSI during the 1980s increased the profile of the system internationally and led to complaints by exporting nations that PSI represented a trade barrier owing to flaws in its design.<sup>1160</sup> Industry, governments and international organizations issued studies critical of PSI and the WTO included the PSI issue on its GATT negotiating agenda in 1995. The WTO Pre-shipment Inspection Agreement addresses the complaints of exporters in developed countries.

### **7.2. Requirements**

The preamble to the PSI Agreement states that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment. In addition, it recognizes that it is desirable to provide transparency of the operation of pre-shipment inspection entities and of laws and regulations relating to pre-shipment inspection. Last but not least, the Contracting Parties wish dispute to be resolved quickly, effectively and equitably. The most important provision is Article 2, which regulates the obligations of user members. The paragraphs of this article relate to prohibition of non-discrimination, use of international standards, guarantee of transparency, protection of confidential information, avoidance of delays and the provision of an appeals procedure.

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<sup>1160</sup> They complained that PSI lacked transparency, caused delay and threatened the confidentiality of business information. Moreover, it did not offer any effective appeals procedure against the decisions of PSI entities. See MATSUSHITA, pp. 122-123.

Article 1:1 applies to all pre-shipment activities which are carried out on the territory of members, whether contracted or mandated by the government or any government body of a member. Paragraph 2 defines a user member as a country whose government contracts for or mandates the use of pre-shipment inspection activities. Paragraph 3 defines the term PSI as including all activities relating to the verification of product-related factors such as quality, the quantity and price. It then provides a list of activities which relate to purely commercial considerations.

### **7.3. Examination**

The 24 Hour Rule and Container Security Initiative display considerable differences to pre-shipment inspections. Unlike the PSI, the CSI is administered by U.S. Customs and Border Protection in co-operation with the host customs authority and is limited to selected foreign seaports of departure. In addition, the examination is limited to ascertaining that the cargo in the container actually corresponds to its description on the cargo manifest. By contrast, PSI inspections take place in the country of origin at the site of the production or storage of the goods and do not involve in the customs authorities of the states in question. Moreover, it is not limited by a framework agreement with customs administrations which limits it to particular seaports. Finally, the information required relates to the inherent characteristics of products, namely the value, quantity and quality.

The scope of the agreement on pre-shipment inspection as laid down in Article 1 of the PSI Agreement refers to activities relating to the commercial characteristics of the goods. Therefore the ordinary wording of Article 1:3 does not extend to security matters. This is supported by the history of pre-shipment inspection which started in 1965 and was a service offered by private contractors to developing countries whose customs authorities did not have the resources to inspect goods at the border themselves. The GATT/WTO Pre-Shipment Inspection Agreement was a response to the concerns of member states that such inspections could constitute barriers to trade and not global security concerns.

#### **7.4. Result**

The Container Security Initiative does not fall within the scope of the GATT/WTO Agreement on Pre-shipment Inspection as defined by Article 1 of that agreement. The underlying purpose of the agreement is to prevent fraud in the form of capital flight (through the overvaluing of goods) and tax evasion (through the undervaluing of goods) and not terrorist activities.

#### **8. Conclusion**

As the investigation has demonstrated, a dispute involving the CSI concerns such a range of weighty issues with regard to the interpretation of the GATT, that it may well be seen as representing a litmus test of the DSU's approach to treaty interpretation as a whole in the new century. The following summarizes the major findings of the investigation.

##### **1. Container Security could be used as a disguised restriction on trade**

Since its appearance in 2002 container security has become an increasingly important non-trade related issue. For this reason, it is important that security-related measures comply with the WTO agreements as far as possible. While security measures like the Container Security Initiative may have a legitimate aim (i.e. to protect its citizens and critical infrastructure against a terrorist attack), they can also operate to restrict trade, either intentionally – by operating as a disguised protectionist measure – or unintentionally – by failing to strike the necessary balance between trade and security. Section 1701 of the IRCA 2007 and the Dubai Ports World controversy show that political pressure can lead to measures which are not only ill-suited to improve security but actively distort the competitive environment to the detriment of foreign economic participants with regard to trade in seaport services and goods.<sup>1161</sup>

##### **2. The Container Security Initiative can only be challenged under the General Agreement on Tariffs and Trade**

The Container Security Initiative can only be challenged under the General Agreement on Tariffs and Trade. Despite its clear effects on maritime trade, the provisions of the General Agreement

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<sup>1161</sup> C.f. FLYNN, pp. 91 and 87 (on the impossibility of 100 per cent *inspections*).

on Trade in Services does not apply to maritime transportation services. The effects of the Container Security Initiative clearly place it outside the scope of the Agreement on Pre-Shipment Inspection as well as the Agreement on Technical Barrier to Trade.

### **3 GATT does not expressly allow the Panel to examine the existence of protectionist measures**

Seen against the political importance of maritime security in the United States these caveats may lead one to conclude that the concept of supply chain security is secretly being used by policy-makers in the United States to protect domestic the seaport services and manufacturing industries. That said, the GATT provisions do not appear to offer any possibility to take into account the political motivations of the United States in enacting security measures such as Section 1701 of the IRCA. Although Article VIII offers a textual basis for investigating “indirect protection to domestic products,” this provision does not refer to the substance of the CSI *per se* but to its implementation in foreign states. The prescriptions and proscriptions contained in the other provisions (Articles V, X and XI) do not allow an examination of protectionist motivation for adopting the CSI either. There may be an opportunity for the Panel to examine this theme of disguised protectionism within the context of Article XXI. Although this provision does not offer any textual basis for such an investigation, it may be possible to justify such an enquiry by introducing a test of good faith – similar to the one contained in the chapeau to Article XX. This would allow the Panel to examine whether the CSI constitutes arbitrary discrimination or a disguised restriction on trade.

### **4. The Container Security Initiative is likely to infringe Articles I, XI, V, X and VIII.**

The foregoing investigation has suggested that the CSI could infringe all relevant articles of the GATT. However, much depends on how the Panel will interpret the scope of these provisions. In particular, it is significant that the CSI primarily affects the transportation of goods rather than the goods themselves.

In this respect, the complainant will be confronted with two tasks: first, to convince the Panel that the CSI falls within the scope of the GATT provisions and second, to prove the causal connection between the CSI and trade restriction. Concerning the first task, the complainant is likely to

advocate a broad interpretation of the provisions in the sense of Article 3.3 DSU,<sup>1162</sup> in order to prevent member states circumventing the principles of non-discrimination and market access. In this respect, the growing literature on the importance of transport for market access will enhance the complainant's arguments. On the other hand, the broad interpretation of Articles V and XI is likely to lead to new accusations of judicial activism – in particular, of using the GATT as a means of regulating access to maritime transportation services indirectly. Concerning the complainant's burden of evidence, there appears to be conflicting evidence on the effects of the CSI and so the complainant will not only have to present detailed evidence proving that the CSI gives rise to unlawful effects but must also be prepared to counter any evidence presented by the United States in response, indicating that the CSI actually supports trade facilitation. In this respect, it is important to note that, when interpreting Articles V, VIII and X, the Panel is likely to be guided by the important international agreements on trade facilitation, most notably the Revised Kyoto Convention, TIR Convention as well as the Framework of Standards issued by the WCO.<sup>1163</sup> All of these agreements recognize the importance of supply chain security.

The evidential burden on the complainant will be considerable owing to the fact that the agreement most applicable to the CSI – the GATS – does not apply (owing to the lack of agreement on subjecting maritime transportation services to the disciplines of this agreement). The same is true of the TBT Agreement (because the CSI affects transportation of products and not their production) as well as the Agreement on Pre-Shipment Inspection (which was clearly not conceived to ensure container security). The GATT may apply to the CSI mainly because it also extends to *de facto* measures. The complainant's case therefore depends on adducing sufficient evidence to prove a causal connection between the operation of the CSI and the effects prohibited by the relevant provisions of the GATT, as required by the Panel in *Argentina – Bovine Hides*.

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<sup>1162</sup> Article 3.3. DSU refers to “the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”

<sup>1163</sup> Mikuriya, p. 52.



### **5. Article XI is likely to be most successful in a complaint against the CSI**

The major provision in a violation complaint is likely to be Article XI of the GATT. However, as stated above, this provision cannot be considered automatically applicable to a measure which concerns a means of transportation rather than products. Although the case law demonstrates that the provision applies to *de facto* restrictions and prohibitions, the measures at issue in those cases were clearly akin to quantitative restrictions. Concerning the other provisions, it is unlikely that the Panel would hold Article V to apply to transshipment hubs owing to the fact that customs practice views transshipment and transit as considered two separate procedures – as demonstrated by the RKC and EU Customs Code. Moreover, it is unlikely that the United States will be the subject of complaints under Article VIII:1 (a) concerning the levying of charges or under Article X concerning the customs appeals procedures because these aspects are under the control of the participating seaports. Article VIII:1 (c) concerning the simplification of customs formalities is potentially of great significance but in its present form it is hortatory and legally non-binding. As far as Article I:1 is concerned, states do not generally make a complaint on the basis of this provision alone: it is questionable whether it is worth pursuing a complaint against a discriminatory measure which does not violate any other provision of the GATT.

### **6. The United States is likely to justify the CSI on grounds of Article XXI directly**

There is a real likelihood that the United States will choose not to defend itself against a violation complaint but instead immediately seek to justify the measure on the basis of Article XXI, an approach it adopted in *US – Shrimp*.<sup>1164</sup> However, considering the controversy caused by Article XXI as well as the potential weaknesses in the complainant's case, the United States may well choose to defend the claim (especially if the complaint relates to 100 percent scanning).

In contrast to the broad arguments of the European Communities, the United States is likely to concentrate on the wording and scope of the general obligations. Owing to the opposition of the United States to the liberalization of seaport services (especially in the wake of the Dubai Ports World controversy), it is likely to vehemently oppose the extension of Article XI to cover measures relating to maritime transportation. It could support this argument by referring to Article 3.2 which provides that the dispute settlement system “serves to preserve the rights and

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<sup>1164</sup> Panel, *US – Shrimp*, para. 7.13.

obligations of Members under the covered agreements” and, in particular, that the “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

## D. The National Security Exception

### 1. Introduction

The term “national security” refers to interests that are vital to a state’s survival and security<sup>1165</sup> and under international law, it is the right and obligation of states to protect these interests.<sup>1166</sup> For example, the right of states to defend themselves against armed attack is recognized by Article 51 of the United Nations’ Charter<sup>1167</sup> and Resolution 1373 of the U.N. Security Council obliges states to take steps to prevent acts of terrorism.<sup>1168</sup> In common with other international treaties,<sup>1169</sup> the GATT provides an exception to its obligations when a member state considers its national security interests are being threatened.<sup>1170</sup> In the United States, national security interests include critical infrastructure such as seaports, which are crucial for transportation of goods.

Article XXI of the GATT is known as the “national security exception” and consists of three paragraphs which each address different aspects of national security. Paragraph (a) protects the secrecy of classified information which is of crucial importance to national security. Accordingly, a member may refuse to provide information if disclosure contradicts its essential security interests. Paragraph (b) is divided into three sub-paragraphs which permit security measures to be taken in relation to “fissionable materials”, “traffic in arms” etc., as well as action “taken in time of war or other emergency in international relations.” Finally, paragraph (c) allows WTO

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<sup>1165</sup> See Winston P. Nagan and Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, p. 382.

<sup>1166</sup> See Hahn, pp. 565 – 569. The 1949 GATT Council discussions included a statement that “every country must be the judge in the last resort on questions relating to its own security.” See, however, Ryan Goodman, *Norms And National Security: The WTO As A Catalyst For Inquiry*, 1 Chi. J. Int’l. L., 101 (2001), who argues that the United States’ position relating to the Helms-Burton dispute involves a wholly legitimate definition of “security interests” and that the US stance, rather than representing a retreat from international legal norms, reflects and contributes to them. Moreover, “consistency with and furtherance of robust international norms of security – should be taken into account in rendering any broad assessment of the relationship between the US actions and international norms.”

<sup>1167</sup> On the other hand, Article 51 does not define the contents of this right. In fact, the right of self-defence forms part of international customary law and is “particularly contentious and difficult to analyse.” See Michael Byers, *Terrorism, The Use of Force and International Law After 11 September*, INT’L & COMP. L. Q. 401, p. 405.

<sup>1168</sup> See S/RES/1373, para. 2 (b). Concerning potential state liability for failure to take these necessary steps, see *supra*, pp. 43 – 45. See also Akande and Williams, p. 366 at fn. 2.

<sup>1169</sup> Akande and Williams, p. 367

<sup>1170</sup> See Article XXI of the GATT, which is practically repeated *ad verbatim* in Article 73 of the TRIPS Agreement and Article XIV *bis* of the GATS.

members to perform obligations arising under the Charter of the United Nations in order to protect international peace and security.<sup>1171</sup> Neither the Panel nor the Appellate Body have given a ruling on the interpretation of Article XXI.

The following sections examine first of all, whether the Panel has the necessary jurisdiction to review an invocation of Article XXI and whether the terms used in the provision are in fact justiciable.<sup>1172</sup> It then proposes an interpretative framework for Article XXI partly based on the jurisprudence of Article XX (the general exception) considering that they perform a similar function (i.e. providing an exception to the GATT obligations) and protect similar interests. Accordingly, the following will also examine how the Panel and Appellate Body have interpreted the general exception and applies these principles to Article XXI to the extent permitted by the latter's wording.<sup>1173</sup> Considering that national security has proved a highly controversial issue in the GATT and WTO this section also examines arguments against bringing a violation complaint before the DSB and provides an overview of Article XXI in literature.

The investigation takes the text of Articles XX and XXI as its starting point and interprets the relevant terms in accordance with the customary rules of interpretation laid down in Articles 31 and 32 VCLT. Therefore, the interpretation of the Article XXI is primarily based on the ordinary meaning of the words in light of their context and the aims of the agreement.

### **1.1. Relationship between Article XX and Article XXI**

Article XXI is one of two provisions in the GATT which grants an absolute exemption to the obligations contained therein. The other provision is Article XX, entitled the "general exception." At least one writer has argued that the two provisions should be interpreted according to similar

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<sup>1171</sup> This paragraph reflects Article 103 of the UN Charter which declares the priority of the Charter and the obligations arising therefrom in relation to all other international agreements. For this reason, the exception of international security also applies in relation to all other agreements of world trade law and not only in relation to GATT. Accordingly, Article XIV bis (c) GATS and Article 73 TRIPS contain a rule corresponding to Article XXI (c) GATT.

<sup>1172</sup> Schloemann and Ohlhoff, p. 426.

<sup>1173</sup> Admittedly, the drafting history of the provisions suggests fundamental differences in the provisions: see Note by the Secretariat, Article XXI MTN.GNG/NG7/W/16, para. 2. However, the statements by the drafters in the historical materials are not clear or unambiguous.

principles.<sup>1174</sup> This common approach to the two exceptions is also supported by the statement of the Appellate Body in *Korea – Dairy*, that “a treaty should be interpreted as a whole and, in particular, its sections and parts should be read as a whole.”<sup>1175</sup> In addition, Article 31 of the VCLT allows interpreters to adopt a contextual approach when interpreting international treaties. Using this approach it would be possible for the Panel to refer to decisions on Article XX as guidance in structuring an investigation of Article XXI and establishing the proper interpretation of objective elements.

A comparison of the two provisions suggests that they are sufficiently related to be considered in tandem,<sup>1176</sup> although it is crucial to acknowledge and respect the differences in wording. The preparatory work to Article XXI shows that the original drafts of the ITO combined what are now Article XX and XXI into a single provision with a chapeau which had the same wording as that of Article XX GATT.<sup>1177</sup> Both provisions protect similar interests insofar as natural resources and the supply chain represent vulnerable, commonly held resources:

*“Our commons, our systems of production and government, the means of economic exchange, and our social organizations and institutions, while not a single physical asset, are nonetheless commonly held and valuable property without a proprietor, with the potential to be ruined by terrorist actions.”*<sup>1178</sup>

In addition, supply chain security and maritime wildlife inhabit the same environment, namely the maritime domain. Measures to secure these interests are therefore confronted by the same legal considerations and technical challenges. The United States government has also pointed out

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<sup>1174</sup> See Rene E. Browne *Revisiting National Security in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 Geo. L.J. 405.

<sup>1175</sup> Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 (adopted on 12 January 2000), paras. 74 and 81.

<sup>1176</sup> Concerning the drafting history of the provision, see Negotiating Group on GATT Articles, *Article XXI*, Note by the Secretariat, MTN.GNG/NG7/W/16, 18 August 1987 [hereinafter MTN.GNG/NG7/W/16], para. 2.

<sup>1177</sup> However, this was eventually divided into two provisions which dealt with Commercial Policy and General Exceptions Article 43 General Exceptions to Chapter IV (Commercial Policy) and Article 94 General Exceptions. See *id.* Cf. the TBT Agreement, which classifies measures relating to national security and environmental protection together.

<sup>1178</sup> Stephen Gale and Lawrence Husick, *From MAD (Mutually Assured Destruction) to MUD (Multilateral Unconstrained Destruction): Dealing with the New Terrorism*, February 2003, Vol. I, No. 1.

that oceans are vulnerable to intentional critical damage from terrorists<sup>1179</sup> and an MSI is likely to cause catastrophic pollution to the maritime environment and lead to equally catastrophic law suits against stakeholders in the supply chain by survivors or relatives of those killed in such an incident.<sup>1180</sup> Legislative provisions in the United States impose strict liability in the case of environmental pollution, which could lead to devastating civil liability.<sup>1181</sup> The two provisions also lead to the same legal result, namely an absolute exception to GATT obligations. Exactly how far one can base the interpretation of Article XXI on the jurisprudence to Article XX is a matter of debate. However, the following argues that Article XX can provide assistance in interpreting Article XXI with regard to the **structure of examination** and the **definition of certain terms**.

### 1.1. Does the Panel have Jurisdiction over Article XXI?

Some member states, particularly the United States,<sup>1182</sup> argue that the Panel cannot subject national security measures to review. The WTO lacks the necessary jurisdiction to do so because it is a trade body and therefore not qualified to examine national security issues,<sup>1183</sup> In addition, the wording of the provision suggests that it is “self-justifying”, i.e. that the mere invocation of Art. XXI by a state excludes a review of its grounds for doing so because only member states are competent to make decisions relating to their national security interests.<sup>1184</sup> These arguments have given rise to great controversy.<sup>1185</sup>

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<sup>1179</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 12.

<sup>1180</sup> See *infra* pp. 313 – 314.

<sup>1181</sup> In particular, the Oil Pollution Act 1990 imposes strict liability on any person owning, operating or demise chartering the vessel for environmental damage caused by oil spillage. Liability for the damage caused by the release of hazardous substances is governed by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Act imposes strict liability on owners and operators of facilities at which hazardous substances are released. See also Carey, pp. 306 ff.

<sup>1182</sup> The United States has been involved in three disputes involving Article XXI. In each case, its arguments were that the Panel did not have jurisdiction to examine national security matters and that the provision was entirely subjective. For an overview of these cases see Hahn, pp. 569 – 577. The creation of the WTO has not altered the U.S. position as shown by its reaction to the EU complaint concerning the Helms-Burton Act. The U.S. invoked Article XXI and declared its intention to boycott the Panel proceedings.

<sup>1183</sup> See the statement of Stuart Eizenstat, United States Undersecretary of Commerce and Special Envoy for the Promotion of Democracy in Cuba. Cited in Finegan, p.15.

<sup>1184</sup> See *U.S. Will Boycott WTO Proceeding on Helms-Burton*, 8 WORLD ARB. & MEDIATION REP. 7.

<sup>1185</sup> See Piczak, at p. 309 (“[T]he general approach to interpreting Article XXI has been to defer almost completely to the judgment of the party invoking the exception.”); see also Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 Duke L.J. 1277, pp. 1285 – 1286. *Contra* Spanogle, who argues that there are

According to the rules of interpretation under customary international law, there is nothing in the ordinary wording or context of Article XXI or Article XXIII:2 (that provides for the competence of the contracting parties to investigate complaints of nullification of impairment of any benefits granted by the GATT) to suggest that the security exception should not be subjected to Panel review. This is also supported by the historical comments made in Geneva 1947 which show that the national security exception was never intended to grant an exception to the application of Article XXIII:2.<sup>1186</sup> On the contrary, one could argue that the Panel must be able to review the invocation of Article XXI in order to ensure that it is not being abused. The jurisdiction of the Panel over the security exception appeared to be confirmed by a decision issued on Article XXI GATT of 30 November 1982, which stated that the dispute resolution organs were competent to decide on the lawfulness of measures made in reliance on Article XXI.<sup>1187</sup>

The competence of the Panel to review the invocation of Article XXI is also supported by reference to the Dispute Settlement Understanding, which, being the constitution of the Dispute Settlement Body (DSB), reflects a rules-based approach to dispute settlement. According to Article 3.2 DSU, Members States recognize that the DSB serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation. In addition, recommendations and rulings of the DSB cannot (add to or) diminish the rights and obligations provided in the covered agreements. The disputes involving Article XXI clearly show that measures taken to protect essential security interests have the potential to impair benefits accruing to another member directly or indirectly under the covered agreements pursuant to Article 3.3.<sup>1188</sup>

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few precedents supporting the U.S. position, see pp. 1329 – 1330. For an analysis of GATT and WTO practice see Hahn, *supra n.* 1182; Akande and Williams, *supra* note 43 at 373 – 378, especially p. 374: “[T]here is no subsequent practice on the issue which establishes the agreement of the parties within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.”

<sup>1186</sup> See WORLD TRADE ORGANIZATION: ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE VOL. I, GENEVA 1995, p. 606 “[T]here is no exception from the application of Article 35 [Article XXIII] to this or any other Article” (ECPT/A/PV/33, p. 26-27); see also Hahn, pp. 567 – 568.

<sup>1187</sup> Decision Concerning Article XXI of the General Agreement (BISD 29S/23), adopted on 30 November 1982. The decision was issued owing to a dispute between the EC and Argentina concerning the lawfulness of a two-month embargo on Argentinian imports owing to the Falklands war.

<sup>1188</sup> Hahn *supra n.* 1182.

The DSU also contains a number of provisions which oblige the Panel to fully investigate disputes. Article 7.1 provides for standard terms of reference that require a Panel to examine a matter referred to it by parties to a dispute. Art. 7.2 DSU imposes a positive duty on Panels to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” In addition, Article 17.12 DSU requires the Appellate Body to “address each of the issues raised on appeal.”<sup>1189</sup> According to these provisions therefore, the Panel is clearly competent to review an invocation of Article XXI(b).

There are some rulings by the dispute settlement organs which also support jurisdiction, although none can be said to be truly conclusive. The only dispute where Article XXI was directly examined was in *United States – Czechoslovakia* decided by the CONTRACTING PARTIES in 1949.<sup>1190</sup> In this case, the United States imposed a ban on the export of certain products to Czechoslovakia and sought to justify it on the basis of Article XXI. Although the contracting parties decided the dispute in favour of the United States, they nevertheless subjected its invocation of the provision to review.<sup>1191</sup>

The two disputes between the United States and Nicaragua which arose during the 1980s also offer evidence that, technically, the Panel is legally competent to review the invocation of Article XXI. In *United States – Nicaragua I*, Nicaragua complained about the United States’ reduction in the share of sugar imports it was allocated and requested the establishment of a Panel.<sup>1192</sup> Although the United States did not oppose this request, it did not believe that the review and resolution of that broader dispute was within the scope of the GATT.<sup>1193</sup> In order to prevent the Panel considering Article XXI it therefore stated that it would not invoke any exceptions nor

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<sup>1189</sup> See Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 ICLQ 861, at p. 876 (quoting James Bacchus).

<sup>1190</sup> CONTRACTING PARTIES TO THE GATT, Third Session; GATT/CP.3/33 (30 May 1949); GATT/CP.3/38 (2 June 1949); GATT/CP.3/39 (8 June 1949).

<sup>1191</sup> Schloemann and Ohlhoff, pp. 432 – 433.

<sup>1192</sup> Report of the Panel, *United States - Imports of Sugar from Nicaragua*, 2 March 1984 (adopted 13 March 1984), L/5607 – 31S/67, para. 3.11. See also Piczak, p. 292 (asserting that since the 1930s, the United States had used sugar quotas to integrate the export-dependent Cuban economy into the U.S. system and foster economic dependence on the United States).

<sup>1193</sup> Panel, *id.*, para. 3.11.



defend its actions.<sup>1194</sup> In *United States – Nicaragua II*, Nicaragua complained about a complete import and export embargo which the United States had imposed on grounds of national security and again requested the establishment of a Panel.<sup>1195</sup> Although the United States eventually agreed to this request, it required the terms of reference to exclude Article XXI. Accordingly, the terms of reference announced by the Chairman of the GATT Council stated that the Panel “cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii).”<sup>1196</sup> However, the Panel did make some significant comments on Article XXI in the form of the following rhetorical question:

*“If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?”*<sup>1197</sup>

In other words, the very fact that the drafters qualified the scope of Article XXI (i.e. by using terms such as “necessary”, “essential” as well as reference to specific conditions under which the provision could be invoked) suggests that the Panel must be able to interpret the provision; otherwise it would not be able to ascertain whether the measure has exceeded these qualifications.<sup>1198</sup> It is significant in the Nicaragua cases that the United States only succeeded in

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<sup>1194</sup> *Id.*, para. 3.10. Under the GATT system of dispute settlement, decisions concerning the convening of a panel, its proceedings and the acceptance of a report had to be made by consensus in the GATT Council. Therefore, the establishment of a panel also required the agreement of the state against which a complaint had been made. As a result, Contracting Parties were able to prevent the establishment of Panels, dictate the terms of review and block the adoption of Report of the Panels.

<sup>1195</sup> Report of the Panel, *United States – Trade Measures affecting Nicaragua*, (adopted on 13 October 1986), [hereinafter, Panel, *US – Nicaragua II*], L/6514 - 36S/331, at para. 3.1. See also Exec. Order issued by the President of the United States on 1 May 1985 (“I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat”).

<sup>1196</sup> Panel, *id.*, at para. 1.4.

<sup>1197</sup> *Id.*, at para. 5.17

<sup>1198</sup> The existence of limitations to the Article is also supported by writers, notably Hahn, p. 579; Schloemann and Ohlhoff, pp. 442 – 447 and Akande and Williams, pp. 381 – 384.

preventing the review of Article XXI by the Panel by virtue of the consensus requirement. However, since the creation of the DSU, this procedure has been replaced by the so-called negative consensus requirement<sup>1199</sup> with the result that the establishment of a Panel is now automatic. According to the standard terms of review provided by Article 7.1 DSU, the Panels and the Appellate Body are obliged to review Art. XXI if it is relevant for the resolution of the complaint.<sup>1200</sup>

The embargoes against Nicaragua were also the subject of litigation before the International Court of Justice. The United States declined to participate in main hearing, likewise claiming that the court did not have any jurisdiction to hear the case. The court made the following statement:

*“Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction.”*<sup>1201</sup>

This statement appears equally applicable to the dispute settlement proceedings of *Nicaragua II*, where the United States participated in proceedings in order to prevent the Panel examining Article XXI.

In literature, the most substantial investigations of Article XXI also tend to reject the argument that the Panel is not competent to review a state’s invocation of Article XXI. On the other hand, they have questioned whether an action would be fruitful in accordance with Article 3.7 DSU,<sup>1202</sup> a point which is examined in more detail below.

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<sup>1199</sup> The Ministerial Declaration of 20 September 1986 contained an express mandate to improve the dispute resolution procedure. See: WTO/GATT Ministerial Declaration on the Uruguay Round (Declaration of 20 September 1986), Section D., “Subjects for Negotiation.” The right to veto the establishment of a panel was abolished in 1989.

<sup>1200</sup> See Schloemann and Ohlhoff, pp. 424 et seq.; Akande and Williams, at pp. 379 – 380.

<sup>1201</sup> See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 1986 ICJ Rep. Judgement of the ICJ, para. 27. The reasons why the United States believed the court to lack jurisdiction are dealt with in para. 32.

<sup>1202</sup> There may be good reasons for the Panel deciding not to exercise its jurisdiction, see Piczak, at pp. 320 – 327, who argues that there is merit in the arguments against jurisdiction submitted by the United States. Lindsay, at pp. 1310 – 1313, who argues that informal methods of addressing Article XXI are more effective than formal dispute resolution.

## 1.2. Is Article XXI Justiciable?

The answer to this question depends on whether the terms used in the provision, according to their ordinary meaning, are capable of being reviewed by the Panel. This question gives rise to debate owing to the *scope* of the subjective wording of Article XXI (b): does the subjective wording contained in this provision (i.e. “it considers”) also relate to the terms “necessary” or “essential security interests”, and, if so, to what extent do these terms limit the discretion of the state in question to introduce security measures?<sup>1203</sup> Does the absence of a chapeau equivalent to Article XX mean that the Panel cannot examine whether the application of the measure amounts to arbitrary and unjustifiable discrimination? In this context, it is also important to consider that evidential problems are likely to arise during proceedings because Article XXI (a) grants states the right to withhold information which would compromise their national security.<sup>1204</sup> This is an important aspect in relation to seaports, which are classed as critical infrastructure owing to their military and social significance.

Despite the subjective wording in Article XXI (b), commentators have argued that the terms “necessary” and “essential” should be interpreted as setting standards which the state seeking to rely on Article XXI must attain.<sup>1205</sup> As explained below, the legal meaning of “necessary” is potentially very restrictive and imposes a high standard of proof. The reference to “essential security interests” (as opposed to simply “security interests”) indicates that the drafters intended to limit the scope of the provision to the most vital interests relating to national security. Commentators also argue that the scope of Article XXI is limited by the specific circumstances under which the provision can be invoked: each of the situations listed in sub-paragraphs (i) – (iii) refer to specific, concrete situations and must therefore be judged objectively.<sup>1206</sup> In disputes

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<sup>1203</sup> This is particularly clear in paragraph (a) where the paragraph only makes sense if the member state defines its essential security interests. See Akande and Williams, p. 398.

<sup>1204</sup> See *infra* pp. 251 – 252.

<sup>1205</sup> See Schloemann and Ohloff, pp. 445 – 446.

<sup>1206</sup> Finegan, p. 13 describing the provision as “broadly worded, unilateral and entirely subjective” and proposes a reasonableness test; Olivia Q. Swaak – Goldman, *Who Defines Members’ Security Interest in the WTO?* LEIDEN J. INTL L. 9: 361 – 371, 1996, p. 370, describing Article XXI (b) as “one of the most ambiguous, and seemingly unlimited, exceptions to the rules governing international trade”; Schloemann and Ohloff, p. 443 argue that even the term “it considers” is subject to objective restrictions and Akande and Williams, p. 399 who argue that the sub-paragraphs (i) – (iii) are unconnected with the subjective wording of Article XXI (a) and (b) and are to be judged objectively.

involving Article XXI complainants have also based their arguments on the objective limitations to Article XXI. For example, in *U.S. – Czechoslovakia*, the complainant argued that the United States was unjustified in invoking the national security exception and presented detailed arguments relating to the interpretation of the provision.<sup>1207</sup> In *Nicaragua II*, the complainant argued that the provision did not present a blanket exception but could only be invoked if the measure in question was necessary for the protection of essential security interests and taken in a time of war or other emergency in international relations.<sup>1208</sup>

A contextual interpretation of the provision also suggests that it is justiciable. The introductory paragraph to Article XX states that the measures in question must not be used as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. This introductory chapeau of Article XX raises the question whether it is possible to subject measures under Article XXI to a similar test. Despite the fact that this latter provision does not contain such an introduction, the use of restrictive terms in Article XXI clearly suggests that there is a risk that the security exception could be abused.<sup>1209</sup> For example, if states were permitted to define “essential security interests” without control, the provision could be used to justify security interests that are not “essential.”<sup>1210</sup> Reference to the wider context of the WTO treaties also suggests that member states must exercise their discretion to introduce measures relating to national security within the framework of the WTO Agreement. For example, in *Japan – Taxes on Alcoholic Beverages*, the Appellate Body stated that:

*“The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive*

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<sup>1207</sup> See generally, CONTRACTING PARTIES TO THE GATT, Third Session; GATT/CP.3/33 (30 May 1949), esp. p. 8.

<sup>1208</sup> Panel, *US – Nicaragua II*, para. 4.5.

<sup>1209</sup> This is generally recognized by most commentators. See, in particular, JACKSON, p. 741 “Articles XX and XXI contain a series of exceptions that may be the most troublesome and most subject to abuse of all the GATT exceptions.”

<sup>1210</sup> See Contracting Parties to the GATT, Third Session, Summary Record of the Twenty-Second Meeting, GATT CP.3/S.R. 22, (8 June 1949), [hereinafter *United States – Czechoslovakia*], p. 4 (where the Czechoslovakian representative argued that such an approach would lead to “autarky”).

*as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.*<sup>1211</sup>

If member states were granted unfettered discretion to determine measures necessary to protect their essential security interests, the temptation to abuse the provision would be overwhelming. The *Swedish footwear* dispute of 1975 provides an example of how easy it is to abuse Article XXI for reasons which have little or nothing to do with “essential security interests.” Sweden sought to justify its import quota on footwear by claiming that the decrease in domestic shoe production “had become a threat to the planning of its economic defence in situations of emergency and as an integral part of its security policy.”<sup>1212</sup> On this basis, the Swedish government sought to justify its quota under Article XXI. The other Contracting Parties “expressed doubts as to the justification of these measures” and reserved their rights under the General Agreement. Developing countries also objected to the fact that Sweden had not taken their needs into account pursuant to Part IV of the GATT.<sup>1213</sup> Despite being described as a temporary measure it was two years before the Swedish government lifted the restriction. This example shows that the only means of preventing abuse is for the Panel to examine whether the measure falls within the (limited) scope of Article XXI (b). This argument is supported by the *travaux préparatoires* to Article XXI. According to one drafter:

*“We recognized that there was a great danger of having too wide an exception [...] Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance [...] It is really a question of balance.”*<sup>1214</sup>

During discussions of the complaint brought by Czechoslovakia in 1949, it was stated that “[e]very country must be the judge in the last resort on questions relating to its own security”. On the other hand, it was also stated that “every Contracting Party should be cautious not to take any

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<sup>1211</sup> Appellate Body, *Japan – Alcoholic Beverages*, p. 15.

<sup>1212</sup> Minutes of Council Meeting, 31 October 1975 (C/M/109) p. 8. See also, GATT ANALYTICAL INDEX, p. 603.

<sup>1213</sup> C/M/109, *id.*

<sup>1214</sup> GATT ANALYTICAL INDEX, p. 600.

step which might have the effect of undermining the general agreement.”<sup>1215</sup> The subjective wording of Article XXI (b) notwithstanding, the Swedish footwear dispute suggests that it may be unrealistic to expect member states to strike this balance between the interests protected by the exceptions and the obligations arising under the general agreement (i.e. the proportionality of the measures) themselves. For example, the jurisprudence to Article XX shows that this balance can only be achieved by “weighing and balancing a series of factors” within the framework of a necessity test, which is a complex task. It is unlikely that a member state would be able to observe the inherently objective limitations of Article XXI, some of which are crucial to achieving this balance, considering the overriding importance they habitually attach to their essential security interests. The question therefore arises whether there are any devices that a Panel could use (i.e. in the sense of interpretative techniques or legal principles) in order to minimize the risk that member states abuse Article XXI. The following considers the doctrine of the general rule – exception as well as the standard of review that a Panel should adopt when examining Article XXI.

### **1.3. The General Rule – Exception Principle**

One means of preventing the abuse of Article XXI may be offered by the general – rule exception doctrine. During the GATT regime, jurisprudence shows that the Panels made a distinction between general obligations and exceptions by categorizing provisions in the main body of the agreement as “positive obligations” and the exceptions to these provisions as “affirmative defences.” Exceptions did not form part of the main scheme of the agreement but only established an exception to a rule.<sup>1216</sup> Neither the Panel nor the Appellate Body have provided a detailed explanation for this distinction, often describing it as a “well-established” rule or practice,<sup>1217</sup> justifying it “by implication”<sup>1218</sup> or on the basis of reasonableness. Arguably, this distinction simply reflects the inherent tension which results from “the right of a Member to

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<sup>1215</sup> *Id.*, pp. 603 – 604.

<sup>1216</sup> See Michelle T. Grando, *Allocating the Burden of Proof in WTO Disputes: A Critical Analysis*, 9 J. INT’L ECON. L. 615, p. 633. See also Report of the Panel, *Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim*, BISD/319, adopted 13 May 1992, para. 4.5 (where the Panel refers to “deviating from basic rules”).

<sup>1217</sup> Panel, *Turkey – Textiles*, para. 9.57; Panel, *US – Shrimp*, para. 7.30

<sup>1218</sup> Panel, *EC – Hormones*, para. 8.86.

invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.”<sup>1219</sup>

The “general rule – exception” principle was realized by two techniques: on the one hand, the Panels placed the burden of proof on the party seeking to rely on the exception and, on the other, required the exception in question to be interpreted narrowly thereby imposing a higher standard of proof than that required in relation to general rules.<sup>1220</sup> This approach proved controversial and was criticized as contradicting the ordinary meaning of the text contrary to the customary rules of interpretation contained in Articles 31 and 32 VCLT<sup>1221</sup> as well as the doctrine of *effet utile*.<sup>1222</sup> The following examines the two instruments which were used to achieve the general rule – exception doctrine, namely the burden of proof and the “narrow” interpretation.

### 1.3.1. Burden of Proof

In *US – Wool Shirts and Blouses* the Appellate Body held that the burden of proof was to be borne by the party “who asserts the affirmative of a particular claim *or defence*.”<sup>1223</sup> In the case of the latter, it stated:

*“Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.”*<sup>1224</sup>

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<sup>1219</sup> Appellate Body, *US – Shrimp*, para. 156.

<sup>1220</sup> PALMETER AND MAVROIDIS, pp. 83 – 84. In other words, the reversal of the burden of proof in relation to affirmative defences and their narrow interpretation form part and parcel of the same policy. See statement of the Panel in Report of the Panel, *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, adopted 19 June 1992, para. 5.41 (“The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use”).

<sup>1221</sup> See Neuling, *The Shrimp – Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, p.18.

<sup>1222</sup> *Infra* p. 237.

<sup>1223</sup> Appellate Body, *U.S. Wool Shirts and Blouses*, p. 14.

<sup>1224</sup> *Id.*, p. 15.

The Appellate Body explained that this allocation of the burden reflected “a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions” and this view is also found in literature.<sup>1225</sup> The Panel in *Argentina – Footwear* suggested that an additional reason for attributing the burden of proof to the party relying on the exceptions is the risk that the party will abuse the provision<sup>1226</sup> thereby implying that the presumption that member states act in good faith in relation to their general obligations does not extend to exceptions.<sup>1227</sup>

### 1.3.2. The Narrow Interpretation

The distinction between general obligations and exceptions was also reflected in the deliberately “narrow” interpretation adopted by the GATT Panels in relation to Article XX. The term “narrow” appears to refer to restrictively defining the scope of Article XX thereby ensuring that it can be invoked only under very limited circumstances. For example, in *Canada – Herring* the Panel stated:

*“[T]he purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.”*<sup>1228</sup>

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<sup>1225</sup> See Zeidler p. 725 (“The presumption does not imply in all cases that the complainant has the full and complete burden of proof. A defending party invoking, for example, the exception of Article XX GATT would still have to establish a prima facie case of justification, but not more, before the burden of proof shifts to the complainant”). For criticism of the allocation of burden of proof in relation to exceptions see generally Grando (*supra n.* 1216) and WAINCYMER, pp. 553 et seq.

<sup>1226</sup> See Panel, *Argentina – Footwear*, para. 6.37 (“When, however, Argentina is claiming a specific affirmative defence, such that its national challenge procedure can be used to correct any alleged violation of GATT rules, it is for Argentina to raise first a presumption that such system operates in a way that there is, in effect, no infringement of GATT/WTO rules”). See also Whitt, p. 605, who describes Article XXI as a “broad GATT exception which threatens to undercut the overall stability and goodwill inherent in the GATT system.”

<sup>1227</sup> However, this would arguably contradict the ruling of the Appellate Body that the fact that a member has violated a substantive treaty provision does not mean that it has not acted in good faith: see Report of the Appellate Body, *United States – Continued Subsidy and Dumping Offset Act of 2000*, WT/DS217/DS234/AB/R, 16 January 2003 (adopted 27 January 2003), para. 298 (“In our view, it would be necessary to prove more than mere violation to support such a conclusion”). See also Report of the Appellate Body, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Article 21.5 Recourse)*, WT/DS132/AB/RW, 22 October 2001 (adopted on 21 November 2001), para. 74.

<sup>1228</sup> Report of the Panel, *Canada - Measures Affecting the Exports of Unprocessed Herring and Salmon*, (adopted 22 March 1988), 35S/98, 114, para. 4.6



This also reflected the tendency in international law to interpret exceptions narrowly.<sup>1229</sup> However, the approach led the Panel to interpret provisions in a way which did not reflect the ordinary meaning of the words. For example, in this dispute, the Panel interpreted the crucial term “relating to” in Article XX(g) in a restrictive way. This cannot be said to reflect the ordinary meaning of “relating to” because, unlike terms such as “necessary” and “essential”, this term does not indicate a restrictive scope.<sup>1230</sup> In later disputes Panels went further and subjected the exercise of Article XX to conditions unsupported by the text of the provision. The Panel Reports in the *US - Tuna/Dolphin* disputes are good illustrations of this particular approach to interpretation.

In the *Tuna/Dolphin I* dispute, the Panel expressly recognized the general rule – exception doctrine, stating that “it had been the practice of panels to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.”<sup>1231</sup> The Panel in *Tuna/Dolphin II* appeared to go further than the Panel in *Canada – Herring* in relation to the interpretation of Article XX, referring to “the long-standing practice of Panels to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement.”<sup>1232</sup> Therefore, even if Article XX did apply, it was not to be interpreted as providing a complete exception to the General Agreement. Critics of the panel’s decision claimed that the “narrow interpretation” therefore had the effect of *restricting* (as opposed to narrowly defining) the scope of Article XX.<sup>1233</sup> Restricting the scope of Article XX in this way arguably contravened the principle of *effet utile* and diminished the rights of members in contravention of Article 3.2 DSU.<sup>1234</sup> Critics objected that, by prohibiting unilateral trade measures the Panel was restricting state sovereignty in contravention of international law.<sup>1235</sup> Moreover, the Panel’s interpretation of Article XXI was unsupported by the text and therefore contravened Article 31 VCLT as well as Article 3.2 of the DSU.<sup>1236</sup> In the event, neither report was adopted.

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<sup>1229</sup> See Hahn, p. 579.

<sup>1230</sup> See *infra* p. 268.

<sup>1231</sup> Panel, *US – Tuna I*, para. 5.22

<sup>1232</sup> Panel, *US – Tuna II*, para. 5.26.

<sup>1233</sup> Neuling, pp. 19 – 20.

<sup>1234</sup> Concerning *effet utile* and Article 3.2. DSU, see *infra* p. 237 and pp. 247 – 248 respectively.

<sup>1235</sup> See Howse, p. 16, who refers to the *Lotus* case as authority for the assertion that state sovereignty is “plenary.”

<sup>1236</sup> *Id.*

### 1.3.3. The Evolutionary Interpretation

With the creation of the WTO as a rules-based organization, the “narrow” interpretation of exceptions was *expressly* abandoned in favour of a text-based interpretation in accordance with the customary rules of interpretation in Articles 31 and 32 VCLT.<sup>1237</sup> In the *EC – Hormones* dispute, the Appellate Body declared that “merely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by [...] applying the normal rules of treaty interpretation.”<sup>1238</sup> At the same time, the rule that the party invoking the exception bears the burden of proof still applies.

The principle of “evolutionary interpretation” can be seen as the antithesis of the narrow interpretation. This doctrine of interpretation was established by the Appellate Body in *U.S. – Shrimp/Turtle* which concerned the interpretation of “exhaustible natural resources” in Article XX(g).<sup>1239</sup> The United States sought to justify its environmental measure which sought to reduce the mortality rate of turtles owing to fishing nets by arguing that turtles could be considered “exhaustible natural resources.”<sup>1240</sup> The Panel rejected the United States’ argument on the basis that it constituted unjustifiable discrimination, contrary to the chapeau of Article XX.<sup>1241</sup> However, the Appellate Body overturned this ruling and approached the question using a novel and hitherto unprecedented interpretation in WTO law:

*“The words of Article XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”*<sup>1242</sup>

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<sup>1237</sup> This tendency is so pronounced, that it has led to the criticism that the Appellate follows the wording of the text to the exclusion of everything else: see Ragosta et al, p. 707, who illustrate this by the example of the Appellate Body’s reading Article XX in an “evolutionary” manner. The writers support the view that panels have completely disregarded such consensus of Members’ views on what was interpreted to reach their own conclusions.

<sup>1238</sup> Report of the Appellate Body, *EC – Hormones*, para. 104.

<sup>1239</sup> Appellate Body, *US – Shrimp*, paras. 129 – 130.

<sup>1240</sup> *Id.*, para. 125.

<sup>1241</sup> However, the Panel started its examination with the chapeau and therefore did not examine whether the measure fell within the scope of Article XX (b) or (g): see Panel, *US – Shrimp*, para. 7.63.

<sup>1242</sup> Appellate Body, *US – Shrimp*, para. 129.

Using this approach, the Appellate Body interpreted the provision by referring to its use in international conventions and declarations. The importance of interpreting the WTO agreements in light of contemporary concerns was also recognized by the Appellate Body in *Japan – Alcoholic Beverages II*:

*“[WTO rules are]... reliable, comprehensible and enforceable.... [and that they] are not so rigid or so inflexible as not to leave room from reasoned judgments in confronting the endless and ever changing ebb and flow of real facts in real cases in the real world. They will served the multilateral trading system best if they are interpreted with that in mind.”*<sup>1243</sup>

Considering that supply chain security is a comparatively recent phenomenon the evolutionary interpretation could therefore be of great importance to the interpretation of Article XXI which, as one of the original provisions of the GATT 1947, was conceived under circumstances very different from today.<sup>1244</sup> The terms in Article XXI, such as “fissionable materials”, “war” and “other emergency in international relations,” are often defined in contemporary international instruments and could therefore be decisive in the interpretation of Article XXI.

At the same time, it is important to note that the decision of the Appellate Body in *US – Shrimp* also subjected Article XX to a requirement which is not mentioned in the text, namely that unilateral measures should be linked to efforts to achieve multilateral agreement.<sup>1245</sup> However, the Appellate Body linked this requirement to the chapeau, namely, that failure to have recourse to diplomacy could result in unjustifiable and arbitrary discrimination.<sup>1246</sup> It would be difficult to introduce such non-text based requirements into Article XXI, which does not contain such a chapeau.

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<sup>1243</sup> Appellate Body. *Japan – Alcoholic Beverages*, p. 31.

<sup>1244</sup> See Schloemann and Ohlhoff, pp. 432 ff.

<sup>1245</sup> Appellate Body, *US – Shrimp*, paras. 166 – 168.

<sup>1246</sup> *Id.*, para. 166.

#### 1.3.4. The *Effet Utile* Doctrine

The evolutionary interpretation also corresponds to the doctrine of *effet utile*, which has been described by the Panel in *Japan Alcoholic-Beverages* as being a fundamental tenet of treaty interpretation which flows from the general rule of interpretation set out in Article 31 of the Vienna Convention (*ut res magis valeat quam pereat*). This doctrine does not relate specifically to the exceptions as such but it is of particular importance in incorporating the exceptions within the framework of the treaty.

According to the Panel, “all provisions of a treaty must be, to the fullest extent possible, given their full meaning so that parties to a treaty can enforce their rights and obligations effectively [...]” (so-called *effet utile* doctrine).<sup>1247</sup> In *US-Gasoline*, the Appellate Body held that one of the corollaries of the general rule of interpretation in the Vienna Convention was that the interpretation had to give meaning and effect to all the terms in a treaty. An interpreter could not adopt a reading that reduced whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>1248</sup> In *Korea – Dairy*, the Appellate Body stated that interpreters are under a duty to read all applicable provisions of a treaty in a way that gives meaning to all of them harmoniously. As a result, the treaty was to be interpreted as a whole and, in particular, sections and parts were to be read as a whole.<sup>1249</sup>

#### 1.3.5. Does the General-Rule Exception Still Apply?

With the creation of the WTO, the general rule – exception principle was partly discarded. Although the allocation of the burden of proof remains unchanged, the intentionally narrow interpretation (based on policy reasons) was – as a general rule – discarded in favour of a textual interpretation according to Article 31 VCLT. However, the interpretation by the Panel must still take into account the character of an exception. According to *Schloemann and Ohlhoff*, for example:

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<sup>1247</sup> *Id.*, pp. 11 – 12.

<sup>1248</sup> Report of the Appellate Body, *supra* note 650 at p. 19; see Article 3.2 of the DSU, which states that “the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

<sup>1249</sup> See Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, 14 December 1999 (WT/DS98/AB/R), p. 24 para. 81; see also Panel, *Korea – Beef*, para. 814 at fn. 423.

“[I]f a provision clearly constitutes an exception – as do Articles XX and XXI – the Appellate Body still believes that the purpose of the treaty would be jeopardized if that exception were interpreted and applied without taking into account the necessary balance between the GATT’s exceptions and substantive rights. The Appellate Body requires only that panels thoroughly examine the relationships among the various provisions they apply to a particular dispute.”<sup>1250</sup>

One could draw two conclusions from this: first, it is not possible to adopt a “narrow” interpretation of Article XXI *to the extent that it does not reflect the ordinary meaning of the words* and, second, that a security measure must be proportionate if it is to be justified under Article XXI. Although the evolutionary interpretation also gives the Panel a significant degree of discretion in interpreting the GATT provisions, the lack of a chapeau may prevent it from introducing additional requirements (e.g. need to achieve multilateral agreement) to prevent abuse. This point is examined in more detail below.<sup>1251</sup>

#### **1.4. Standard of Review in Relation to Article XXI**

According to one writer, the standard of review expresses “a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it”<sup>1252</sup> and thereby reflects the conflict between state sovereignty and the competence of multilateral organizations.<sup>1253</sup> This conflict is particularly pronounced in Article XXI whose subjective but qualified wording attempts to balance the sensitivity of national security with the need to protect the rights of other member states. In other words, the standard of review in Article XXI must reflect the balance “between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”<sup>1254</sup>

The importance of a provision’s wording in establishing the standard of proof is shown by the Appellate Body’s decision in *EC – Hormones*. It stated that the wording of the SPS Agreement

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<sup>1250</sup> See Schloemann and Ohlhoff, p. 439 at n. 84.

<sup>1251</sup> See *infra*, pp. 275 – 284.

<sup>1252</sup> Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INTL ECON. L. 635, p. 636.

<sup>1253</sup> See Steven P. Croley and John H. Jackson, *WTO Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, p. 194.

<sup>1254</sup> Appellate Body, *EC – Hormones*, para. 115.

could not be interpreted to impose “the more onerous as opposed to the less burdensome” standards, adding that to do so would require “treaty language far more specific and compelling” than that found in the relevant provision.<sup>1255</sup>

The standard of review should therefore reflect the mixture of subjective and objective elements in Article XXI. Accordingly, the Panel would be justified in adopting an objective standard of review in relation to Article XXI (b) (i) – (iii) whose terms can only be defined by reference to international law. On the other hand, the subjective wording (“it considers”) in the introductory paragraph of Article XXI(b) suggests that the Panel should defer to the decision of the member state to some extent. The significance that the dispute settlement bodies attribute to “self-regulating” elements in the provisions of the WTO Agreements can also be seen from Appellate Body’s interpretation of Article 3.7 of the DSU in *Mexico – HFCS*:

*Given the “largely self-regulating” nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith [...]. Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement. Therefore, the Panel was not obliged to consider this issue on its own motion.*<sup>1256</sup>

It is submitted that the Panel cannot grant this degree of deference to Article XXI. Fundamentally, the right to take measures to protect national security interests is different in nature to the right to request the establishment of a Panel. The latter right serves to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” By contrast, the right to exercise Article XXI will necessarily deprive other states of their rights under the agreement.

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<sup>1255</sup> *Id.*, para 165

<sup>1256</sup> Appellate Body, *Mexico – HFCS*, para. 110.

Another reason why the wording does not justify total deference is because the subjective elements in Article XXI (a) and (b) have been qualified using strikingly restrictive language, (i.e. “essential security interests” (paragraphs (a) and (b)) and “necessary to protect” (paragraph (b))). Total deference would offer the complainant no guarantee that the Defendant was applying the high standard of proof inherent in these terms. It would prevent the Panel from challenging any abuse of Article XXI and thereby leave the rights of other Members unprotected, thereby contravening the purpose of establishing a Panel in Article 3.2 DSU.

The Panel should therefore interpret Article XXI (b) (i) – (iii) on the basis of an objective assessment of the facts in accordance with Article 11 DSU and an incursive and inquisitorial approach. It should then review the subjective elements of Article XXI (a) and (b) (i.e. “necessary to protect” and “its essential security interests”) by assessing the review conducted by the government authority using objective criteria<sup>1257</sup> but deferring to the member state in cases of doubt. In this respect, the Panel could apply the principle of *in dubio mitius* which was recognized by the Appellate Body in *EC – Hormones*.<sup>1258</sup> This principle states that if a term is ambiguous, that meaning should be preferred which is less onerous to the party assuming an obligation or which interferes less with the territorial and personal supremacy or involves less general restrictions upon the parties.<sup>1259</sup> This standard of review would protect the rights of other member states against abuse whilst respecting the subjective wording together with its limitations.

### **1.5. Arguments against a Violation Complaint**

The DSU requires member states to weigh up the pros and cons of initiating a violation complaint. As mentioned above, launching a violation complaint is essentially a political decision which could have serious ramifications for the future relationship between the two states concerned. This is particularly acute in relation to Article XXI owing to the sensitivity of national security. Previous complaints relating to the national security exception have generated intense

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<sup>1257</sup> Panel, *US – Cotton Underwear*, para. 7.12.

<sup>1258</sup> Appellate Body, *EC – Hormones*, para. 154.

<sup>1259</sup> Although the principle is controversial because it arguably conflicts with the Vienna Convention, see WAINCYMER, p. 476.

controversy and could have been damaging to the system of world trade. Generally speaking, there are three major arguments against a violation complaint: 1) that the measure would not be fruitful according to Article 3.7 DSU; 2) the political question doctrine and 3) the risk of judicial activism.

### 1.5.1 Dispute Would Not Be “Fruitful” Pursuant to Article 3.7 DSU

Both the wording of Article XXIII of the GATT 1994 and that of Article 3.7 of the DSU, require member states to decide whether it would be appropriate to bring a case against another Member.<sup>1260</sup> In particular, Article 3.7 states that the aim of “the dispute settlement mechanism is to secure a positive solution to a dispute” and requires members to consider whether “action under these procedures would be fruitful.”<sup>1261</sup> This provision reflects the fact that the effectiveness of dispute resolution largely depends on the willingness of member states to reach a solution. This is recognized in Article 3:10, which obliges all member states to participate in the dispute resolution procedure “in good faith in an effort to resolve the dispute.”

Disputes between member states often relate to national security, environmental protection and anti-dumping which can be highly controversial owing to their political nature. As a result, litigation does not always lead to a positive solution as required by Article 3.7 DSU. It is an adversarial system which can engender resentment, encourage non-compliance and the adoption of retaliatory measures.<sup>1262</sup> The question therefore arises whether a complaint involving a measure introduced on the basis of national security is likely to lead to a positive outcome. The answer to this question will depend on the motivations of the complainant in bringing the dispute and the defendant’s interpretation of Article XXI.

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<sup>1260</sup> Appellate Body, *EC – Bananas*, paras. 135 ff.

<sup>1261</sup> This aspect is particularly important with regard to Article XXI, as shown by the dispute between the European Community and the United States concerning the Helms-Burton Act 1996. See *supra* p. 140.

<sup>1262</sup> Seen in this light, the increase of litigation under the WTO does not necessarily not represent a positive development, see William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L., p. 32



Member states could use the dispute settlement procedure as a sword rather than a shield, by initiating a complaint in order to force a state to justify politically contentious trade measures.<sup>1263</sup> This risk is recognized in Article 3.10, which states that “[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts.” According to one commentator, the EU’s request for a Panel to examine its complaint about the Helms-Burton Act is one example of a politically-motivated complaint.<sup>1264</sup> On the other hand, it will be difficult to prevent such complaints because, following consultations, the dispute settlement runs automatically.<sup>1265</sup> During proceedings the parties cannot prevent the Panel considering sensitive issues because the standard terms of reference under Article 7.2 allow the judicial bodies to examine any provision they deem is relevant to the dispute.

As far as the defendant is concerned, states tend to equate the issue of national security with their sovereignty<sup>1266</sup> and insist that the Panel should accord them total deference in matters of national security. For example, in *US – Czechoslovakia* it was argued that a country had the right to invoke Article XXI on the basis that national security was ultimately the sovereign right of the country concerned.<sup>1267</sup> In *U.S. – Nicaragua*, the U.S. argued that Article XXI left the validity of the security justification to the exclusive judgment of the contracting party taking the action. As a result, it therefore could not be found to act in violation of Article XXI.<sup>1268</sup> In the dispute which arose between the United States and the European Union concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, the United States declared its intention not to participate in the dispute settlement proceedings. This dispute was discussed at a sub-committee during the 105<sup>th</sup> Congress and the following comment illustrates the position taken by the United States towards issues of national security.

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<sup>1263</sup> Spanogle, *supra* n. 79.

<sup>1264</sup> *Id.*

<sup>1265</sup> Other examples are the *EEC – Trade Measures Taken for Non-Economic Reasons, Recourse to Article XXIII:2 by Yugoslavia*, DS27/2, 18 February 1992; GATT Council, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, Minutes of Meeting*, C/M/157, 7 May 1982 (circulated on 22 June 1982), p.2.

<sup>1266</sup> Schloemann and Ohlhoff, p. 426; Hahn, p. 560 (describing the security exception as states’ “sovereignty safeguard provision”).

<sup>1267</sup> *US – Czechoslovakia*, GATT/CP.3/SR.22, p. 4 (“It was [...] a principle well recognized internationally, that it was for each country to judge for itself of its own national security interests”).

<sup>1268</sup> Panel, *US – Nicaragua II*, para. 4.6.

“With regard to the first issue, to involve the WTO in a dispute over foreign policy is merely a thinly veiled attempt to interfere and dictate the agenda of the United States. I am confident that I speak for most, if not all, of us here today when I say that no U.S. Government leader would, in good conscience, allow the WTO or any other outside entity to determine what the United States can or cannot do to protect our own interest. [...]. International law has long recognized that each State has the sovereign right to dictate its foreign relations and to protect its citizens. Therefore, the U.S. Government's right to make decisions about our own foreign policy and our national security is absolute and cannot be abrogated or interfered with by any foreign entity.”<sup>1269</sup>

These approaches to dispute resolution contravene the aforementioned principles of dispute settlement in the DSU. On the one hand, member states are obliged to participate in dispute settlement proceedings in good faith, with the aim of achieving a positive resolution to the dispute. On the other hand, the interpretation of the agreements is not the task of the member states themselves but the dispute settlement organs. Initiating disputes to pursue political complaints and insisting on a unilateral interpretation of the agreements contradicts the status of the WTO as a rules-based institution. On the other hand, *Realpolitik* may dictate that the sheer belligerence of a member state in pursuing its unilateral security measures may persuade a member state that launching a violation complaint would be a fruitless exercise, especially if that state is an important trading partner.

### **1.5.2. Political Question Doctrine (*Non Lique*)**

As a general rule in civil and common law legal systems, the court must decide questions of law. If it is unclear on the law, the court “cannot sit still and let the party making the claim lose.”<sup>1270</sup> An exception to this rule is the political question doctrine which forbids the courts from ruling on an issue which lies outside their competence. In this case the court should leave the question open

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<sup>1269</sup> at *Hearing Before the Sub-Committee on International Economic Policy and Trade of the Committee on International Relations “Interfering with U.S. National Security Interests: The World Trade Organization and European Union Challenge to the Helms-Burton Law”*, House of Representatives, One-hundred-and-fifth Congress, 1<sup>st</sup> Session, 19 March 1997 [hereinafter *Sub-Committee Hearing 19 March 1997*], (1998 48-877 CC), (Statement of Hon. Ileana Ros-Lehtinen).

<sup>1270</sup> See Pauwelyn, p. 230.

and refer it to the appropriate state organs.<sup>1271</sup> According to one commentator, the reason for this doctrine is that “the resolution of a dispute in judicial proceedings would render useless the exercise of the powers of the political organs.”<sup>1272</sup> Although the political question doctrine is a concept found in national legal systems some commentators have used it in relation to the WTO, in recognition of the fact that it has a quasi-legal dispute settlement body.<sup>1273</sup>

The invocation of Article XXI has political dimensions. For example, in *US – Nicaragua*, the United States stated that were the Panel to examine the question of whether nullification or impairment could be caused through measures under Article XXI, it would be “drawn into a consideration of the political situation motivating the United States to invoke Article XXI.”<sup>1274</sup> Therefore, the security situation “fell outside the competence of the GATT in general and the Panel in particular.”<sup>1275</sup> The United States also justified its refusal to participate in dispute resolution proceedings by arguing that the disputed Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 was of a political nature and therefore fell outside the jurisdiction of the WTO.<sup>1276</sup> This argument of the United States is supported by statements made during the *travaux préparatoires* of the GATT, which make clear that Article XXI was not intended to deal with political questions. According to one representative:

*“[T]he Charter ought to make provision for economic measures which are closely linked with political questions [...] in the sense of excluding them, because he believed that an economic*

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<sup>1271</sup> A related doctrine is “non liquet”, according to which the court does not rule on a question because the law is incomplete. However, this doctrine appears to be contradicted by the aim of the DSB to secure a positive resolution to a dispute under Article 3.7 as well as the requirement under Article 7.2 DSU to address the relevant provisions in any covered agreement(s) cited by the parties. Moreover, the wording of WTO agreements is necessarily ambiguous and the adoption of non liquet could undermine the authority of the texts. For further information see Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 ICLQ 861, pp. 875 – 877 who argues (p. 877), that “where the law is indeterminate, panels and the Appellate Body will be discharging their duties to ‘address’ the relevant provisions of the covered agreements, and the relevant legal issues, by making a statement to this effect.” Concerning the position of non liquet in international law, see Alfredo Mordechai Rabello, *Non Liquet: from Roman Law to Modern Law*, 10 Ann. Surv. Int’l & Comp. L. 1, pp. 10 – 11; Steinberg, pp. 258 – 259.

<sup>1272</sup> Bartels, p. 880.

<sup>1273</sup> Piczak, pp. 320 – 321 (U.S. arguments in *Nicaragua II* were based upon the political question doctrine from U.S. constitutional jurisprudence).

<sup>1274</sup> Panel, *US – Nicaragua II*, para. 4.9.

<sup>1275</sup> *Id.*, para. 4.6.

<sup>1276</sup> Sub-Committee Hearing, 19 March 1997, “*Unfortunately, the EU countries have been unable or, better yet, unwilling to understand two essential points. First, the LIBERTAD Act is one of a political nature. It is a foreign policy instrument of the United States and thus falls beyond the purview and the jurisdiction of the WTO.*”

*measure taken for political reasons was not properly speaking an economic measure but a political measure and as such was not within the competence of the Organization.*"<sup>1277</sup>

However, there are also persuasive arguments against adopting such a doctrine. First of all, the political question doctrine depends on the existence of a developed constitution which the WTO does not yet have.<sup>1278</sup> In *India – Quantitative Restrictions*, India argued that the panel had only limited competence to examine trade measures for balance of payment purposes. It argued that jurisdiction over this matter has been explicitly assigned to the Balance of Payments Committee and the General Council.<sup>1279</sup> However, the Appellate Body rejected this argument and did not express a principle along the lines of a separation of powers or a constitutional relationship between the political and judicial organs.<sup>1280</sup> Also, the political organs of the WTO often find it difficult to reach consensus owing to the conflicting interests of its diverse membership as illustrated by the Seattle and Cancun Ministerial Conferences.<sup>1281</sup> Members can request the General Council to provide an authoritative interpretation of a covered agreement under Article 3.9 DSU but this procedure can be ineffective if there is a lack of consensus owing to the highly political nature of the subject. For example, a Decision Concerning Article XXI of the General Agreement which was issued by the General Council in 1982 did not provide any practical assistance in the interpretation of Art. XXI.<sup>1282</sup> Finally, the WTO has a “*quasi – judicial*” dispute resolution system which does not compare in authority with courts in common law or civilian jurisdictions.

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<sup>1277</sup> See SUMMARY RECORD OF THE SIXTH COMMITTEE on 10 March 1948, (C.6/SR.37, page 3).

<sup>1278</sup> See Jeffrey L. Dunhoff, *Constitutional Concepts: The WTO'S 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647.

<sup>1279</sup> Report of the Appellate Body, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, 23 Aug. 1999 (adopted 22 September 1999), para. 98 (“In order to preserve a proper institutional balance between the judicial and the political organs of the WTO with regard to matters relating to balance-of payments restrictions, review of the justification of such measures must be left to the relevant political organs”).

<sup>1280</sup> See *id.*, paras. 100 – 105; see also para. 108 concerning judicial restraint. For an examination of this case see Dunhoff, pp. 657 – 658.

<sup>1281</sup> Concerning the difference in priorities between developed and developing countries concerning the Seattle agenda see James L. Kenworthy, *The Unraveling of the Seattle Conference and the Future of the WTO*, 5 GEO. PUB. POL'Y REV. 103, pp. 109 – 110.

<sup>1282</sup> See Schloemann and Ohlhoff, pp. 437 – 438, referring to the Decision concerning Article XXI of the General Agreement, (GATT Doc. L/5426 (1982)).

The political question doctrine also contradicts Article XXIII which grants member states the right to request the establishment of a Panel. Excluding areas from litigation would effectively deny member states the opportunity to protect their rights contrary to Article 3.2 DSU. In addition, Article 7.2 DSU requires Panels to address the relevant provisions in any covered agreement. In this context, it is also relevant to consider the comments of the Panel in *US – Section 301 Trade Act* in which the Panel stated that “providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the preamble.”<sup>1283</sup> Refusing to answer legal questions on the grounds that the question is political or the law is incomplete would undermine this objective.<sup>1284</sup>

The political question doctrine may represent an important principle in national constitutional law but it cannot be automatically transferred to the WTO which does not have a constitution comparable to those of member states. This doctrine can only function properly if the political decision-making organs are effective and this is not the case with the WTO. Even if the dispute settlement organs do make a decision, there is little prospect of a corresponding legislative response.<sup>1285</sup> Application of this doctrine is also likely to violate provisions of the GATT and DSU which do not make the initiation of dispute settlement dependent on the political nature of the case.

### 1.5.3. Judicial Activism

Like the political question doctrine, the concept of judicial activism derives from national legal discourse. The term was coined in the 1950s to describe two types of judges: “judicial activists” and “champions of self-restraint.”<sup>1286</sup> The former group of judges regarded the court as an instrument to achieve desired social change whereas the latter preferred to leave political

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<sup>1283</sup> Report of the Panel, WT/DS152/R of 22 December 1999.

<sup>1284</sup> See also Appellate Body, *U.S. – Gasoline*, p. 23 (“One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”).

<sup>1285</sup> See WAINCYMER, p. 103.

<sup>1286</sup> Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 2004 1441, pp. 1445-1447.

decisions to the elected legislature.<sup>1287</sup> The term soon came to be used pejoratively to describe judges who were protagonists for change without regard for the unwritten rules regulating the exercise of judicial power.<sup>1288</sup> Examples of judicial activism include usurping the role of parliament by legislating from the bench, failing to observe *stare decisis* or failing to use the tools of interpretation correctly.<sup>1289</sup>

Article 3.2 DSU requires the dispute settlement organs to refer to customary rules of interpretation of international law.<sup>1290</sup> The Panels have therefore based their interpretation on Articles 31 and 32 VCLT, which require courts to adopt a textual interpretation using the ordinary meaning of words.<sup>1291</sup> Article 32 VCLT only permits reference to the drafting history in exceptional circumstances in order to ascertain what the contracting parties actually intended.<sup>1292</sup> Critics argue that these rules of interpretation in the VCLT reflect *legal practice* and are therefore ill-suited to the WTO texts, which were formulated by non-lawyers and reflect political compromise. Considering the ambiguity of the WTO agreements, a textual interpretation tends to encourage gap-filling and law-making.<sup>1293</sup> This, in turn, contravenes the requirement – contained in Article 3.2 itself – that opinions should not add to or diminish the rights or obligations of member states.<sup>1294</sup> For example, the “evolutionary” interpretation adopted by the Appellate Body in *Shrimp-Turtle* concerning the term “exhaustible natural resources” in Article XX(g) GATT has been denounced as a “remarkable” example of judicial activism on the grounds that it could lead to the terms of the agreements evolving into something that none of the original parties to the agreement ever imagined.<sup>1295</sup> It has also been argued that that, by effectively allowing the

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<sup>1287</sup> *Id.*

<sup>1288</sup> *Id.* 1457-1458.

<sup>1289</sup> *Id.* 1463 et seq..

<sup>1290</sup> Appellate Body, *United States – Wool Shirts and Blouses*, p. 45.

<sup>1291</sup> Appellate Body, *U.S. – Gasoline*, p. 17.

<sup>1292</sup> According to art. 32 of the VCLT, recourse may only be had to supplementary means of interpretation when the interpretation according to art. 31 “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

<sup>1293</sup> See Ragosta et al, p. 700: this ambiguity gives the Panels two choices: either to dismiss the case as beyond the purview of WTO norms or to create some obligation where none existed before. See also Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, p. 261, (arguing that “failure to give weight to non-textual factors could lead to interpretations that contradict what the negotiators manifestly intended”).

<sup>1294</sup> Ragosta et al, pp. 706 – 707.

<sup>1295</sup> Ragosta et al, p. 707. See also Patrick Kelly, *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance*, 38 CORNELL INT’L L.J. 459, p. 460.

unilateral regulation of production processes and methods, the Appellate Body has contravened Article 3.2 DSU by diminishing the right of other member states to claim free access to markets.<sup>1296</sup>

On the other hand, there is no evidence that reference to extrinsic aids such as *travaux préparatoires* would preserve the negotiators' intention or lead to any more acceptable results.<sup>1297</sup>

Such an approach would grant historical negotiations equal standing to the final statement of the member states' intention in the WTO Agreements. There would also be evidential problems in ascertaining the Member's intention from the background material.<sup>1298</sup> The argument for judicial restraint also appears too restrictive: criticism of the "evolutionary interpretation" ignores the need to interpret terms of the GATT to reflect contemporary circumstances.<sup>1299</sup> After all, global terrorism and global warming are two pressing concerns nowadays which were not contemplated by the drafters of the GATT in 1947. In any case, the need for restraint has been expressly recognized by the Appellate Body in *U.S. – Wool Shirts*, which noted that Panels must only address those questions that are necessary to resolve the claim and to the extent necessary for the reasoned consideration of the claims disputed.<sup>1300</sup>

## 1.6. Literature on Article XXI

The security exception tends to attract little attention from writers in general, at least in comparison with other provisions of the GATT. In available literature, only few writers concentrate on Article XXI as the sole subject of investigation.<sup>1301</sup> Coverage of the provision in

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<sup>1296</sup> E.g. Kelly, *id.*, pp. 469 – 471.

<sup>1297</sup> E.g. the Panel in *US – Tuna I*, which adopted a "narrow" interpretation of Article XX (d), has been accused of interpreting the provisions of Article XX GATT and the *travaux préparatoires* in a way which did not reflect their ordinary meaning. See Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 p. 16.

<sup>1298</sup> No official records are kept of GATT/WTO negotiations and the *travaux préparatoire* of the GATT refers to the Havana Charter, which is technically a different charter: see WAINCYMER, p. 402. Moreover, the wealth of background material cited by Steinberg, (at p. 261) could lead to arguments about which documents are to be given priority.

<sup>1299</sup> See Bernard H. Oxman and Louise de la Fayette, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, 96 AM. J. INT'L L. 685, p. 692 ("[T]here is no doubt that WTO jurisprudence has taken a decisive turn in the right direction.").

<sup>1300</sup> See Report of the Appellate Body, *U.S. Wool Shirts and Blouses*, p. 45.

<sup>1301</sup> Hahn, Schloemann and Ohlhoff, Akande and Williams. Cf. however, Appellate Body, *US – Shrimp*, para 151 which linked this description of the provisions to the chapeau of Article XX ("[...] that is to say, the ultimate

text books varies.<sup>1302</sup> The provision is usually examined within the context of a particular dispute, one notable example being the *Helms-Burton* dispute. There is only one article which deals with the security exception in relation to the introduction of the Container Security Initiative.<sup>1303</sup> Nevertheless, the available literature presents many detailed and divergent views relating to the interpretation of the national security exception and suggests that Article XXI of GATT is in fact far more significant than the lack of jurisprudence and literature would suggest. The following examines the general view of literature on the justiciability of the provision, its wording, as well as the interpretation of subjective (Article XXI(b)) and objective elements (Article XXI(b)(i) – (iii)).

Writers generally agree that Article XXI represents a conditional and limited exception to the GATT<sup>1304</sup> and is therefore justiciable. The Panel has jurisdiction to examine the provision because Article XXI does not affect Article XXIII or the provisions of the DSU.<sup>1305</sup> In addition, its wording not only contains objective elements but is obviously restrictive as shown by the reference to “essential security interests” and “necessary.” At the same time, there is agreement that the subjective wording cannot be overlooked owing to the application of Article 31 VCLT.<sup>1306</sup> On the other hand, *Lindsay* argues that Article 31 VCLT is “of minimal help in connection with GATT Article XXI”<sup>1307</sup> owing to the ambiguous wording of the provision. There does not appear to be any “subsequent agreement between the parties” or “subsequent practice” in relation to Article XXI either.<sup>1308</sup>

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availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau”). Since Article XXI does not have a chapeau, the question arises whether it can be called a conditional and limited exception at all.

<sup>1302</sup> Extensive coverage in BHALA, pp. 556 ff.; VAN DEN BOSSCHE, pp. 628 – 32; Alexandroff and Sharma, pp. 1572 – 1578.

<sup>1303</sup> Florestal (*supra n. 28*).

<sup>1304</sup> See Hahn, p. 568; Akande and Williams at p. 399 (“[I]t provides for specific exceptions to cover specific instances.”).

<sup>1305</sup> Schloemann and Ohlhoff, p. 440; Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L.J., 577 pp. 1281 et seq.

<sup>1306</sup> Hahn, p. 589.

<sup>1307</sup> Lindsay, p. 1282.

<sup>1308</sup> Akande and Williams, p. 374 who do not perceive subsequent practice pursuant to Article 31 (3) (b) of the VCLT; Browne, p. 422. However, some writers perceive evidence of interpretative practice: cf. Hahn, pp. 594 et seq. who asserts that state practice “supports the notion that the security exception in article XXI(b)(iii) is subject to specific and objective limitations [...]”; Schloemann and Ohlhoff, p. 431 and at fn. 38, who start their interpretative analysis by referring to the “pertinent case law” and “past Panel practice regarding Article XXI of GATT 1947”; cf. Piczak, pp. 309 and 320, referring to “past GATT practice in interpreting the security exception”; see also Gaugh, p.



Leading opinion regards Article XXI as a weakly worded provision which can be easily abused by states to pursue political aims. *Gaugh*, for example, argues that states have invoked Article XXI “without reference to trade or economic rationale; rather, a subjective, political determination is made that trade in the particular good threatens national security.”<sup>1309</sup> It is argued that Article XXI offers a unacceptably broad exception to the General Agreement and it has been described as a unilateral provision:<sup>1310</sup> “a virtually unlimited escape clause”;<sup>1311</sup> “an all-embracing exception”; as containing “vague terms”;<sup>1312</sup> “ambiguous language”<sup>1313</sup> and “broadly tailored exceptions.”<sup>1314</sup> A more pragmatic view is taken by *Schloemann and Ohlhoff*, who argue that Article XXI “contains various open legal terms.”<sup>1315</sup> Writers have also attacked the exception owing to its subjective wording. As a result, Article XXI has invited invectives such as “bogeyman” defence<sup>1316</sup> or “a dangerous loophole.”<sup>1317</sup> Its use has been described as “disturbing” and the questions its use raises as “troubling.”<sup>1318</sup> *Bhala* describes the provision as “a weak restraint on the behaviour of members with regard to the enactment of national security sanctions.”<sup>1319</sup> *Jackson* regards the language as being “so nebulous as to make exact definitions impossible.”<sup>1320</sup> *Whitt* even suggests that the provision should be redrafted.<sup>1321</sup> However, not all writers view the wording of Article XXI negatively. *Lindsay* argues that the ambiguity was intentional and has proved constructive.<sup>1322</sup> The wording offers a flexibility without which the GATT could not operate. The following investigation adopts the view of the wording taken by

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69, who asserts that “actions taken under Article XXI have always been subject to a certain level of review under GATT’s dispute resolution mechanism”. The only explicit Panel enquiry into the meaning of Article XXI is *obiter* in Panel, *Nicaragua – United States II* case (*supra n.* 1195).

<sup>1309</sup> Michael Gaugh, *GATT Article XXI and US Export Controls: The Invalidity of Non-Essential Non-Proliferation Controls*, 8 N.Y. INT’L REV. 51, p. 68

<sup>1310</sup> Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW AND POL’Y INT’L BUS. 603, p. 616.

<sup>1311</sup> David T. Shapiro, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT’L L. & ECON. 97, p. 98.

<sup>1312</sup> *Id.*; see also Piczak, p. 320, who considers the term “emergency in international relations” could be regarded as “so vague that it defies judicial determination.”

<sup>1313</sup> Whitt, p. 605.

<sup>1314</sup> Hahn, p. 559.

<sup>1315</sup> Schloemann and Ohlhoff, p. 427.

<sup>1316</sup> See Spanogle, p. 1316.

<sup>1317</sup> See JACKSON, p. 748.

<sup>1318</sup> Whitt, pp. 604, 619.

<sup>1319</sup> Bhala, (*supra n.* 44), p. 265

<sup>1320</sup> JACKSON, p. 744.

<sup>1321</sup> Whitt, pp. 630 – 631.

<sup>1322</sup> See Lindsay, p. 1312.

*Schloemann and Ohlhoff* (i.e. as “open legal terms”) and attempts to interpret Article XXI with reference to the jurisprudence on Article XX whilst taking differences between the two provisions into account.

The way that writers assess the wording of the national security exception is of crucial importance for their investigation. Holding that the wording is ambiguous allows writers to break free from the confines of the text and refer to supplementary materials in support of their own interpretations.<sup>1323</sup> In fact, the reference to supplementary materials is so frequent, that the question arises as to what extent the preparatory materials should be allowed to influence the interpretation of Article XXI, especially as they are relegated to secondary status in Article 32 VCLT.<sup>1324</sup> As commentators have pointed out, reference to such materials is highly controversial owing to the fact that they are simply records of negotiations and do not represent the final consensus.<sup>1325</sup> It is also noticeable that writers tend to rely on the excerpts published in the GATT Analytical Index. Whereas these are informative, the context within which these comments were made is missing and, as isolated comments, do not form a coherent commentary to the drafting process.<sup>1326</sup> Moreover, writers draw contradictory inferences from these preparatory materials.<sup>1327</sup>

Concerning the subjective elements of the wording, most writers agree that member states have the right to decide whether a measure is necessary but that it does not have unlimited discretion within the decision-making process.<sup>1328</sup> Some commentators regard the term “necessary” as

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<sup>1323</sup> See Browne, p. 423 (“[A]s the meaning of the terms is still arguably ambiguous, it would be appropriate to examine the preparatory works of the treaty”).

<sup>1324</sup> Modern WTO law clearly places emphasis on the ordinary textual meaning of the provision. See Steinberg, p. 261. Appellate Body, *U.S. – Shrimp*, para. 114 (establishing a hierarchy of interpretation emphatically placing the ordinary meaning first, followed by object and purpose); *contra* Hahn, p. 564 (“[A]n analysis of a treaty provision may begin with an overview of the pertinent preparatory work and the history of its application.”); see also Browne, at p. 410, who starts analysis by referring to a statement by a drafter of the original charter.

<sup>1325</sup> *Id.*; cf. *supra* n.1293.

<sup>1326</sup> See e.g. Browne, p. 411, who links the comments made by a drafter with those made by the Chairman of the Committee by describing the latter as “the best solution.”

<sup>1327</sup> E.g., Hahn pp. 568 – 569 who regards the preparatory works as evidence that Article XXI was to be a limited exception. On the other hand, Browne at pp. 412 – 413, sees the statements from the GATT’s preparatory works and negotiating history as suggesting that the security exception “should preclude review altogether.” See also Schloemann and Ohlhoff, p. 442.

<sup>1328</sup> See Schloemann and Ohlhoff, p. 442 (on the meaning of “considering”); Browne, p. 426 (concerning security measures with extraterritorial effect); Akande and Williams, p. 398 (pointing out that Article XXI (a) allows a party to define its essential security interests free of review).

setting a standard which the member state must meet.<sup>1329</sup> For that reason, the measure must be subject to examination in order to ensure that the exception is not abused. The term “essential security interests” potentially embraces a wide range of interests<sup>1330</sup> but writers tend to limit its scope excluding, in particular, economic measures.<sup>1331</sup> Some writers advocate an objective review of whether the measure amounts to an “essential security interest”<sup>1332</sup> and, even, whether the measure is necessary.<sup>1333</sup> They see different ways of achieving this, including the borrowing of interpretative methodology from Article XX panel decisions<sup>1334</sup> or the adoption of a good faith test.<sup>1335</sup> One example which is often cited as an abuse of the provision for protectionist purposes is the *Swedish Footwear* case.<sup>1336</sup> This aspect is significant for the CSI which was primarily introduced to prevent the economic devastation that a terrorist attack at a seaport would cause.<sup>1337</sup>

Many writers suggest adopting a test of reasonableness in order to prevent cases of abuse. *Bhala* suggests introducing a “reasonable state standard” which would assess the existence of a credible threat according to the situation of a state in a similar position.<sup>1338</sup> *Schloemann and Ohlhoff* also suggest that the measure should be subject to a test of good faith but do not provide an accompanying conceptual framework.<sup>1339</sup> Both suggestions are rejected by *Akande and Williams* who argue that neither approach is supported by the text of the provision and, in any case, such a test is unnecessary considering the objective threshold requirements of Article XX(b)(i) – (iii). However, they agree that there should be a limited review of good faith.<sup>1340</sup> Incidentally, their

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<sup>1329</sup> Schloemann and Ohlhoff, p. 445.

<sup>1330</sup> Cf. Hahn at p. 580 (“The ‘essential security interests’ covered by Article XXI, however, [...] address the immediate political-military conditions that a state deems important for its position in the world which are *outside the regular scope of GATT*”). See also Piczak, p. 324, arguing that threats to a nation’s “essential security interests” can come in forms other than an armed conflict.

<sup>1331</sup> Cf. Schloemann and Ohlhoff, p. 444 (Article XXI does not include economic interest); Hahn, p. 580 (distinguishing between economic security and “essential security interests”); Whitt, p. 616.

<sup>1332</sup> See Hahn, p. 582 (objective review of context in which the measure was taken); but see ASSESSMENT OF THE BRITISH GOVERNMENT (*supra n.* 85); Schloemann and Ohlhoff, p. 444 (objective review of whether the measure is an economic security measure); Akande and Williams, p. 398 – 399 (objective review of Article XXI (b) (i) – (iii)).

<sup>1333</sup> Schloemann and Ohlhoff, p. 443; Browne, pp. 421 et seq.; *contra* Akande and Williams, p. 386.

<sup>1334</sup> Browne, p. 432; Schloemann and Ohlhoff, pp. 438 – 439.

<sup>1335</sup> Schloemann and Ohlhoff, p. 448; *contra* Akande and Williams, p. 392.

<sup>1336</sup> E.g. Hahn, pp. 580 – 581.

<sup>1337</sup> *Introduction, CSI STRATEGIC PLAN* (“Begun in January 2002, CSI is a multinational programme protecting the primary system of global trade—containerized shipping—from being exploited or disrupted by international terrorists”).

<sup>1338</sup> *Bhala (supra n.* 44), p. 273.

<sup>1339</sup> Schloemann and Ohlhoff, p. 448.

<sup>1340</sup> Akande and Williams, p. 386.

view tends to overlook the fact that “fissionable materials” and “emergency in international relations” are potentially broad enough to be abused by member states (i.e., a trade-restrictive measure which is capable of preventing the proliferation of WMD).<sup>1341</sup> *Hahn* rejects subjecting this provision to any test of necessity, arguing that the provision is subjectively worded which makes the necessity of a measure a question for the member state alone.<sup>1342</sup> The following investigation adopts the same approach as *Browne* and *Bhala*, i.e. that the “necessary” should be based on the test of necessity established in relation to Article XX. It is based on the presumption that a balance between the subjective and limiting elements of Article XXI(b) GATT is best achieved by adopting an essentially objective standard of review which defers to the judgement of the member state with regard to a measure’s necessity in cases of doubt.

Concerning the objective wording of the provision, writers tend to concentrate on Article XXI (b) (iii) regarding it as the most controversial provision. There is widespread agreement that Article XXI (b) (iii) should be narrowly interpreted according to objective criteria. For example, *Shapiro* argues that a situation of war or other emergency must exist before the state can rely on this provision.<sup>1343</sup> This is expressly rejected by *Bhala*, who states that there is nothing in Article XXI that requires the danger or threat to have manifested itself,<sup>1344</sup> (although the reference to “in time of” appears to contradict this statement). *Schloemann and Ohlhoff*, *Akande and Williams* and *Hahn* all argue that the term “war” cannot be interpreted unilaterally by the state concerned.<sup>1345</sup> *Schloemann and Ohlhoff* stress that the term “war” is potentially ambiguous and this argument appears supported by literature on this term since 9/11.<sup>1346</sup> In particular, the “war against terrorism” arguably requires a reconsideration of the meaning of the term “war.”<sup>1347</sup> There is general agreement that the term “other emergency” is susceptible to abuse owing to its ambiguity

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<sup>1341</sup> See *infra pp.* 296 – 297.

<sup>1342</sup> *Id.*; *Hahn*, p. 559.

<sup>1343</sup> *Shapiro*, p. 113.

<sup>1344</sup> *BHALA* p. 562; see also *Ghana – Ban on Imports of Portuguese Goods* (1961) L/1764, referred to in MTN.GNG/NG7/W/16, pp. 5 – 6.

<sup>1345</sup> *Schloemann and Ohlhoff*, p. 445 (“[T]his determination is based on a long-established concept of international law and hence is prima facie a justiciable issue”); *Akande and Williams*, p. 400 (“If it is up to WTO members to unilaterally determine whether there is a war or other international emergency, then the scope for abuse of Article XXI is great indeed.”); *Hahn*, p. 586 (although cf. p. 587 “the definition of war must have recourse to the intentions of the parties involved”).

<sup>1346</sup> See e.g. *Louis Henkin, War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, p. 824.

<sup>1347</sup> *Infra pp.* 298 – 300.

and writers advocate an objective interpretation of the provision.<sup>1348</sup> *Hahn* argues that “other emergency in international relations” is not used “as a stand-alone term but as an annex to the term ‘war’.”<sup>1349</sup> This would provide a means of reigning in the scope of this apparently broad and ambiguous term. On the other hand, *Akande and Williams* observe that other international tribunals have tended to accept the determination of the state with regard to the definition of this term.<sup>1350</sup>

Significantly (for the purposes of the following investigation) *Alexander* points out that “national security is strongest not under Article XXI (b) (iii) but under Article XXI (b) (i) and (ii).<sup>1351</sup> These two articles receive relatively little attention from other writers, although *Akande and Williams* show that it can play an important role in the determination of the case as a whole and, more specifically, in the interpretation of Article XXI (b).<sup>1352</sup> As argued below, the term “relating to fissionable materials” is potentially broad enough to justify CBP’s border-related counter-terrorist measures, such as the PSI, CSI, MPI and SFI<sup>1353</sup> and imposes a lower standard of proof than Article XXI (b) (iii).

Another important piece of literature of relevance to the CSI is Stephen E. Flynn’s “America the Vulnerable.” This book provides an overview of the vulnerabilities in America’s national defences as it attempts to combat terrorism and has influenced the development of the CSI. In addition, considering that the subjective wording of Article XXI requires the Panel to consider national security from the point of view of the state invoking the measure, the various national security strategies of the United States will also be required reading for the Panel. The general opinion in available literature specifically relating to Article XXI GATT is that there is a need to control the invocation of Article XXI owing to the risk of abuse. Although the wording of the provision is widely regarded as unsatisfactory, it does offer the means to review the member

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<sup>1348</sup> Schloemann and Ohlhoff, pp. 445 – 446 who assert that “This part of the provision has been used, and abused, in most actual Article XXI cases.”

<sup>1349</sup> *Hahn*, p. 587 – 588.

<sup>1350</sup> *Akande and Williams*, p. 40, referring to the practice of the European Commission and the European Court of Human Rights.

<sup>1351</sup> See Klinton W. Alexander, *The Helms-Burton Act and the WTO Challenge: Making a Case for the United States under the National Security Exception*, 11 FLA. J. INT’L L. 559.

<sup>1352</sup> *Akande and Williams*, p.394 and 398.

<sup>1353</sup> See *supra* pp. 28 – 34.

state's decision to adopt security measures. Views expressed in literature support the approach taken in this investigation, i.e. an objective-deferential review of Article XXI (b), an objective review of Article XXI (b) (i) – (iii) and a test of reasonableness. The following sections argue that the framework for implementing this approach can be constructed on the basis of the jurisprudence on Article XX as a basis.

## **1.7. Intermediate Result**

The results of the investigation are:

### **1. The Panel has jurisdiction to review Article XXI**

There is nothing in the GATT that suggests that the Panel does not have jurisdiction to investigate Article XXI. In addition, jurisdiction is supported by XXIII:1 and 2 of the GATT, a number of provisions in the DSU, a decision by the GATT Secretariat as well as GATT jurisprudence (pp. 224 – 227).

According to the remarks of the Panel in the *Nicaragua II* case, Panels must have jurisdiction to review an invocation of Article XXI in order to balance the interests between the Complainant and Defendant that this provision protects (p. 226).

Only the DSB has jurisdiction to interpret Article XXI (p. 224). Once dispute settlement proceedings have been initiated, the standard terms of review under Article 7.1 DSU means that member states cannot prevent the Panel from considering Article XXI by manipulating the terms of reference (pp. 225, 227) If the WTO is to exist as a rules-based organization, member states cannot be allowed to determine the limits of WTO jurisdiction or the interpretation of provisions unilaterally.

### **2. Article XXI is justiciable**

The statement “nothing in this agreement shall prevent a member state...” does not mean that the provision is self-justifying. This is because Article XXI contains clear qualifications to the subjective wording in Article XXI (a) and (b) as well as wholly objective criteria in subparagraphs i) – iii). As a result, the Panel's description of Article XX, as representing a “limited

and conditional exception to the general obligations”<sup>1354</sup> equally applies to the security exception (pp- 228 – 229).

Justiciability also appears to be supported by the historical materials (p. 230) and GATT jurisprudence (particularly in relation to the terms “necessary” and “essential” that lay down a high standard that states must attain) (p. 230). Considering that the terms “necessary” and “essential” have been included to protect the rights of other members against gratuitous use of the national security exception, the Panel must be able to verify the adequacy of the evidence submitted.

A self-justifying provision would grant member states too much discretion and could lead to larger states using their economic power to deprive other members of their rights (p.231).

**3. The Complainant bears the burden of proof but a deliberately narrow interpretation of provisions (i.e. regardless of the ordinary meaning of the text) is no longer tenable**

The requirement that the complainant bears the burden of proof is expressly supported by jurisprudence of the Panel and Appellate Body (pp. 232 – 233).

This is also supported by the rules of interpretation contained in the VCLT and rulings of the Appellate Body that support a textual interpretation of treaty provisions (p. 234 - 235). Moreover, the ruling of the Appellate Body in *US – Shrimp* advocates an evolutionary interpretation that directly contradicts a “narrow” interpretation of provisions (p. 235). A narrow interpretation is also opposed by the *effet utile* doctrine (p. 237)

**4. The standard of review should balance the subjective and objective elements of Article XXI whilst deferring to the member state invoking Article XXI in cases of doubt**

Like the general obligations of the GATT already examined,<sup>1355</sup> Article XXI attempts to strike a balance between member states’ national interests and their obligations arising under the general agreement.<sup>1356</sup> It does this by using a mixture of subjective and objective wording.<sup>1357</sup>

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<sup>1354</sup> Panel, *U.S. Tuna I*, para 5.22.

<sup>1355</sup> Most notably, the customs-related provisions of Articles V, VIII and X.

In order to achieve this balance between subjective and objective elements, the Panel should interpret Article XXI (b) (i) – (iii) objectively in accordance with Article 11 DSU but defer to the judgement of the member states in relation to the subjectively worded necessity of measures and essentiality of security interests in Article XXI (b), *provided that* the member state in question submits sufficient scientific evidence substantiating its claims. A basis for such an approach is provided by the principle *in dubio mitius* that is recognized by WTO law (p.240).

### **5. The Panel cannot be prevented from considering a complaint about national security**

Following consultations, the dispute settlement procedure runs automatically. Although members are admonished by the DSU to ensure that a dispute results in a positive solution and to consider whether actions would be fruitful, there is nothing that can prevent a member bringing a complaint concerning the national security measures of another state (p.242).

The Helms-Burton dispute suggests that the sensitivity of national security could convince the United States to refuse to either participate in proceedings or comply with any adverse ruling from the Panel (p. 242). However, this is only relevant to the extent that it may persuade a member state not to initiate proceedings in the first place because such a complaint would not be fruitful (p.243).

In this respect, the political question doctrine<sup>1358</sup> and judicial activism<sup>1359</sup> cannot be regarded as plausible arguments against the jurisdiction of Panels or the Appellate Body to ensure member states' compliance with treaty obligations or interpret texts in light of new circumstances.<sup>1360</sup> On the one hand, they reflect national constitutional structures (p. 246) and, more particularly, the characteristics of the common law legal system (p. 247).

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<sup>1356</sup> See BHALA, p. 561, para. 20-009.

<sup>1357</sup> See *supra pp.* 228 - 231.

<sup>1358</sup> Concerning the application of this principle in relation to Article XXI see Piczak, pp. 318 – 319.

<sup>1359</sup> See generally Ragosta et al.

<sup>1360</sup> Although cf. Ragosta et al at p. 707, who correctly draw attention to the potential pitfall of the AB's "evolutionary interpretation": ("By this reading, the terms of the negotiated agreements could "evolve" into something that none of the original parties to the agreements ever anticipated"). However, this pitfall is not only due to "judicial activism" but also the ambiguous wording of the WTO Agreements.



## **6. Informal dispute settlement may play an important role in deciding sensitive issues**

In view of the controversy of Article XXI, informal dispute settlement could also play an important role in avoiding a potentially damaging trade dispute<sup>1361</sup> and should be encouraged.<sup>1362</sup>

The Helms-Burton dispute between the EU and US showed that even sensitive issues like national security can be decided through informal settlement. It also shows that member states may also sense when an action may not be fruitful – not only with regard to their own interests but also with regard to the interests of the WTO, from whose membership they ultimately profit.<sup>1363</sup> On the other hand, it is questionable whether informal dispute settlement would be effective when the member states in dispute have unequal trade power.

### **2. The Requirements of Article XXI**

This section examines the requirements contained in Article XXI (a) and (b) which relate to information and the conditions under which measures relating to national security can be taken. The investigation does not include Article XXI (c) because the CSI is a unilateral measure which aims to protect the seaports of the United States rather than international peace and security. This is made clear by the underlying strategy of the CBP, which is to “push the borders outwards.”

The investigation interprets the national security exception according to the rules contained in Articles 31 and 32 VCLT. In particular, it uses the contextual interpretation as a basis for referring to decisions of the Panel and Appellate Body on Article XX in order to create a framework for the interpretation of Article XXI. The structure of the investigation reflects that

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<sup>1361</sup> An example of the problems this cause was the dispute between the European Union and the United States concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. The escalation of this essentially political dispute could have had serious consequences for the then fledgling dispute settlement system. Although the EU initiated Panel proceedings, the parties eventually decided on an informal settlement. On the one hand, this example shows the strength of the new system in that both parties were prepared to use the DSU to its fullest extent. See JAMES CAMERON AND KAREN CAMPBELL, *DISPUTE RESOLUTION IN THE WTO* (1998), p. 34.

<sup>1362</sup> The need for member states to seek a negotiated settlement rather than automatically resorting to the WTO dispute settlement process was underlined by a joint statement of former directors-general of the GATT/WTO in 2001: see WTO News Item: Joint Statement of Dunkel, Sutherland and Ruggiero, 2001. The authors state “Litigation in trade matters is not, and must not become, an automatic alternative to negotiation.”

<sup>1363</sup> Lindsay, pp. 1299 – 1300.

developed by the Panel and Appellate Body in relation to Article XX (b).<sup>1364</sup> The scope of Article XXI (a) is examined as a preliminary step to the main investigation because the right to withhold confidential information can be invoked by the defendant state during any stage of the proceedings. The first stage then examines whether the measure falls within the situations listed in Article XXI (b) (i) – (iii).<sup>1365</sup> The second stage examines whether the interests protected by the provision can be considered “essential security interests” and is followed by a necessity test similar to that applied in Article XX. In this respect it is argued that the Panel should adopt an objective standard of review whilst respecting the subjective wording by means of the *in dubio mitius* principle. The final stage of investigation applies the *abus des droit* doctrine similar to that found in the chapeau to Article XX, which ensures that the application of the measure does not constitute an abuse of the national security exception. Such an examination is not supported by the express wording of the provision,<sup>1366</sup> but the doctrine represents customary international law and its application within the context of Article XXI is supported by the context, aims and objectives of the provision as well as its drafting history.<sup>1367</sup>

## 2.1. Article XXI(a)

Article XXI (a) permits member states to maintain the confidentiality of information whose disclosure would threaten national security. Seaports are classified as critical infrastructure and information relating to maritime security is protected by statute.<sup>1368</sup> In this connection, experience has shown that the special procedures that the Panel can offer for dealing with confidential information may not prove sufficient for the state to disclose such information.<sup>1369</sup>

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<sup>1364</sup> Most notably, Schloemann and Ohlhoff, pp. 449 – 450; Akande and Williams, pp. 399 ff.

<sup>1365</sup> Appellate Body, *U.S. – Gasoline*, pp. 30 – 31.

<sup>1366</sup> Appellate Body, *U.S. – Shrimp*, para. 116 (“The purpose and object of the introductory clauses of Article XX is generally the prevention of ‘*abuse of the exceptions of [Article XX]*’.”).

<sup>1367</sup> See generally MTN.GNG/NG7/W/16.

<sup>1368</sup> Section 214 of the Homeland Security Act 2002, protects the secrecy of information in relation to critical infrastructure which also includes seaports. 46 U.S.C. 70103(d) (as implemented by 49 CFR Part 1520) requires that maritime security information, especially security assessments and plans, be protected from unauthorized access or disclosure. On the protection of infrastructure information see TRANSPORTATION SYSTEMS SECTOR SPECIFIC PLAN, p. 38.

<sup>1369</sup> Appellate Body, *US – Wheat Gluten* paras. 8.7 – 8.12 (where the Panel’s extensive “Procedures Governing Private Confidential Information” did not convince the United States to submit the confidential information); see also MAVROIDIS (*supra* n. 1089 ), p. 173

The effect of Article XXI (a) in proceedings should not be underestimated: it could limit the Panel's review of Article XXI by allowing the member state to withhold information crucial to resolving the dispute<sup>1370</sup> and can also influence the interpretation of Article XXI (b).<sup>1371</sup> One commentator claims that generally there has been an over-reliance on secrecy by bureaucrats in the United States, a tendency which has increased since 9/11:

*“Historically, secrecy has continued well beyond identifiable crises, becoming entrenched in even routine matters. The fact that government officials believe the country has subsisted in a constantly threatened state for much of the last 50 years due to the Cold War and terrorism [...] suggests that executive officials will continue to invoke the national security rationale to justify even greater withholding of government information.”*<sup>1372</sup>

The decision to invoke Article XXI (a) is not wholly determined by the executive: as stated earlier, information relating to national security is highly classified and governments make related decisions on the advice of their intelligence services.<sup>1373</sup>

Concerning the interpretation of Article XXI (a), a wholly subjective interpretation of the provision must be rejected for two reasons: first, if member state could invoke Article XXI (a) without justification, it could effectively choke the Panel's review of Article XXI without suffering any prejudice to its case.<sup>1374</sup> Second, the qualifications in the provision require the member state to prove to the Panel, on the one hand, that there is a sufficient connection between the information and its essential security interests and, on the other, that disclosure would prejudice those interests.<sup>1375</sup> In this respect, the review of Article XXI (a) may require a consideration of U.S. legislation governing secrecy (i.e. the Freedom of Information Act 1966 (as amended)). As pointed out above, the Panel has authority to interpret domestic legislation during

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<sup>1370</sup> See *United States – Czechoslovakia*, GATT/CP.3/38, p. 9.

<sup>1371</sup> See Akande and Williams, p. 398 (with regard to the question of whether a state's “essential security interests” are at issue).

<sup>1372</sup> See Christina E. Wells, “*National Security Information*” and the Freedom of Information Act, 56 ADMIN. L. REV., 1195, p. 1197.

<sup>1373</sup> See FLYNN, p. 160.

<sup>1374</sup> See Akande and Williams, p. 394.

<sup>1375</sup> For example, the United States would probably be justified in withholding the information about the rules used by the NTC to assess the risk of containers. On the other hand, it is unlikely that the Panel would accept it withholding information on the penalties assessed for infringements of the 24 Hour Rule.

the course of its review. However, such a review would have to consider the definition of “national security” according to national legislation and jurisprudence, the various classes of information (i.e. sensitive but not classified information), memoranda issued by the executive, the subjects which the classified information relates to, as well as the way the courts have interpreted the provision in the United States.

Another observation to be made about Article XXI (a) is that it does not apply to the DSU.<sup>1376</sup> Accordingly, Article XXI (a) does not exempt member states from their obligation to co-operate with a complainant in order to uncover the truth by placing material evidence before the tribunal, as required by Article 3.10 DSU and elaborated by the Panel in *Argentina – Footwear*.<sup>1377</sup> Article 23 also requires members to “have recourse to and abide by, the rules and procedures of the DSU” when seeking redress for a violation complaint.

Considering the fact-finding function of the Panel and the obligation of member states to collaborate in proceedings, the question arises as to how the Panel should react to an unjustified invocation of Article XXI (a). Assuming that the exercise of Article XXI (a) is subject to review in line with the other provisions of the security exception, there is a possibility that the Panel could draw negative inferences from the exercise of this right if it believes the defendant is refusing to collaborate or otherwise abusing the provision.<sup>1378</sup> This issue was addressed by the Appellate Body in *Canada – Aircraft*:

*“[A] party's refusal to collaborate has the potential to undermine the functioning of the dispute settlement system. The continued viability of that system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement. In particular, a panel should be willing expressly to remind parties – during the course of dispute settlement*

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<sup>1376</sup> Schloemann and Ohlhoff, pp. 439 – 440 (arguing that if the national security exception did apply to the DSU, member states would be able to block dispute settlement proceedings within the WTO).

<sup>1377</sup> Panel, *Argentina – Footwear*, para.6.40; see also Pauwelyn, p. 233.

<sup>1378</sup> See Mavroidis, *Development of WTO Dispute Settlement Procedures Through Case-Law (We Will Fix It)*, in, *THE WTO DISPUTE SETTLEMENT SYSTEM 1995 – 2003*, (Frederico Ortino and Ernst-Ulrich Petersmann, (eds.), Kluwer Law International, The Hague, 2004, pp. 172 ff.

*proceedings – that a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld.*”<sup>1379</sup>

Accordingly, the Panel could draw a negative inference if it holds that the information in question contains evidence prejudicial to the party’s claim or denial.<sup>1380</sup>

## **2.2. Situations Covered by Article XXI(b) (i) & (iii)**

The United States is most likely to base its defence on Article XXI (b) (i) and (iii) and so the following sections concentrate on examining the requirements of these provisions. Article XXI only allows states to invoke the security exception in relation to specific objects or in concrete situations.<sup>1381</sup> Commentators have argued that these provisions should be examined first because they allow cases which do not fall within the scope of the provision to be excluded at the outset.<sup>1382</sup> The first two sub-clauses deal with objects of protection whereas Article XXI(b)(iii) deals with actual situations pertaining at the time the measure is taken. As explained above, these provisions are to be interpreted objectively.<sup>1383</sup>

### **2.2.1. “War”**

Situations of “war” and “peace” must be defined accurately considering the repercussions that the distinction has on society in general<sup>1384</sup> and throughout history, jurists (e.g. Cicero, Thomas

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<sup>1379</sup> See Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999 (adopted on 20 August 1999), para. 204.

<sup>1380</sup> *Id.*, para. 205.

<sup>1381</sup> In the disputes involving Article XXI the complainants also based their arguments on the objective limitations to Article XXI. In *U.S. – Czechoslovakia*, the complainant argued that the United States was unjustified in claiming the national security exception. In *Nicaragua II*, the complainant argued that the provision did not present a blanket exception but could only be invoked if the measure in question was necessary for the protection of essential security interests and taken in a time of war or other emergency in international relations. See *infra nn.* 1501 and 1195, respectively. See also *supra nn.* 1799 and 1800.

<sup>1382</sup> See Akande and Williams, p. 399.

<sup>1383</sup> *Id.*, p. 398 attach greatest weight to this section, arguing that determining the meaning of these sub-paragraphs will effectively determine the meaning of “essential security interests”, owing to the close connection between them. Therefore, this section should be examined first. See also Schloemann and Ohlhoff, p. 445.

<sup>1384</sup> See Mary Ellen O’Connell *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INTL. & COMP. L. 535, p. 535.

Acquinas and Hugo Grotius<sup>1385</sup>) have attempted to define and regulate these terms.<sup>1386</sup> For example, one commentator defines “war” as follows:

*“War is a sustained struggle by armed force of certain intensity between groups of a certain size, consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command.”*<sup>1387</sup>

In the post-war period, the use of force in international relations has been regulated by the Charter of the United Nations.<sup>1388</sup> This instrument only uses the term “war” once, in the preamble in reference to the U.N.’s overarching aim of saving “succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>1389</sup> The lack of reference to “war” reflects the aim of the Charter to outlaw the use of force in international relations according to Article 2 (4):

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*

Although international law does not provide a universal definition of “war” commentators argue that the Panel should define the term “war” in Article XXI objectively in accordance with its accepted meaning in international law.<sup>1390</sup> Both the WTO agreements<sup>1391</sup> and jurisprudence<sup>1392</sup>

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<sup>1385</sup> For an overview of the historical development of the law of war see < [www.lawofwar.org](http://www.lawofwar.org) > (website maintained by Prof. Evan J. Wallach).

<sup>1386</sup> See Henkin, p. 818 who states that “their careless and metaphoric use [...] threatens to confuse and dilute their significance in international law.”

<sup>1387</sup> See INGRID DETTER, *THE WAR OF LAW*, CAMBRIDGE 2000, p. 27.

<sup>1388</sup> See Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine For New Ills?* 59 STAN. L. REV. 415, who states at p. 418, “The international law rules and institutional arrangements that today govern the international use of force are based on the norms and structures established in the U.N. Charter at the end of the Second World War.” See also Henkin, p. 824.

<sup>1389</sup> By contrast with the UN Charter, the GATT retains the term “war.” This is a curious choice of words seeing as it refers to the Charter of the United Nations in Article XXI (c). Moreover, the choice of wording appears deliberate because the language of Article XIVbis of the GATS and Article 73 of the TRIPS simply repeat Article XXI of the GATT *ad verbatim*. The TBT Agreement on the other hand, makes no mention of the term “war” and simply refers to “national security.” The obvious question which arises is whether the two treaties are referring to the same thing.

<sup>1390</sup> See Schloemann and Ohloff pp. 445 - 456; Hahn, pp. 586 – 587; Akande and Williams 400 – 402 (all of whom argue that the term is justiciable and a term of public international law, despite not being ideally clear).

make clear that when interpreting WTO law, reference must be made to international law and the United Nations Charter in particular.<sup>1393</sup> Article 103 of the UN Charter also states that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, the latter are to prevail.<sup>1394</sup>

The major provision dealing with what may be termed a “war” situation is Article 51 of the UN Charter, which forms one of two exceptions to the general principle contained in Article 2 (4). This states that:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”*

The UN Charter continues the attempts of historical jurists to regulate and control the legality of war. By requiring an armed attack to have occurred, the provision outlaws pre-emptive strikes and effectively reduces a declaration of “war” to a counter-attack.<sup>1395</sup> Article XXI also refers to “at a time of war”, thereby requiring a state of war to exist *before* the measure has been taken.

The wording used in the UN Charter is ambiguous and capable of a broad interpretation. For example the wording permits states to act unilaterally and without prior approval from the UN Security Council. It also departs from traditional definitions of war because it does not require the armed attack to be carried out by state actors or by a regular army or militia. For this reason, the United States could argue that the Panel apply the “evolutionary interpretation” principle to adapt

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<sup>1391</sup> Article 3.2. DSU orders that WTO law must be interpreted in accordance with customary rules used in the interpretation of international law. According to Article III. 5, Article V:1 empowers the General Council to take suitable steps in the interests of effective co-operation with other international organizations.

<sup>1392</sup> Appellate Body, *U.S. – Gasoline*, p. 17 (stating that the WTO Agreement “cannot be read in clinical isolation from public international law”). See also, Panel, *U.S. – Shrimp*, para. 129 (terms must be interpreted in light of their contemporary meaning).

<sup>1393</sup> See Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?* 25 Mich. J. Int’l L. 929, p. 937, quoting Judge Oda, who, in reference to the law of the sea, stated “If the development of the law of the sea were to be separated from the general rules of international law and placed under a separate judicial authority, this could lead to the destruction of the very foundation of international law.”

<sup>1394</sup> See Weiner *supra n.* 1388.

<sup>1395</sup> See O’Connell, p. 538.

the concept of war to modern-day circumstances.<sup>1396</sup> However, this is to be rejected because the purpose of the UN Charter was not to broaden the definition of war and, thereby, the legitimacy of armed intervention. Under international law, the term “war” is to be interpreted restrictively.

### **2.2.2. Emergency in International Relations**

The term “emergency in international relations” is more ambiguous than the term “war.” However, this is a situation which must also exist before the state can introduce the security measure in question. Whereas the Panel can refer to the leading definitions of international law to interpret the meaning of “war”, the meaning of “emergency in international relations” is less well documented.<sup>1397</sup>

The ordinary dictionary meaning of “emergency” refers to “a situation demanding immediate action” or “a crisis.” According to some commentators, the context of Article XXI suggests a situation related to war which would exclude ordinary political tensions between states.<sup>1398</sup> Considering that the Container Security Initiative is a counter-terrorist measure,<sup>1399</sup> the question therefore arises whether, in the post-9/11 world, international terrorism could be considered as constituting an emergency in international relations. Unlike “war”, there does not appear to be any practice under international law for interpreting this term restrictively and so the Panel could adopt the evolutionary interpretation of the Appellate Body in order to ascertain the status of international terrorism.

The Security Council’s use of the term “terrorism” in its resolutions is controversial because it has failed to define the term<sup>1400</sup> owing to the lack of consensus between member states. However, there does appear to be consensus about the destructive capabilities of terrorists, particularly since 9/11. Accordingly, reference to the various legal instruments of the United Nations clearly

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<sup>1396</sup> See Frank A. Biggo, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 Case W. Res. J. Int’l L.1, pp. 17 – 18.

<sup>1397</sup> Hahn, p. 587, Schloemann and Ohlhoff, p. 484; Akande and Williams, p. 399.

<sup>1398</sup> Ohlhoff, p. 446; Hahn, p. 588, (describing the term as an “annex to the term war”).

<sup>1399</sup> According to CBP, “CSI addresses the threat to border security and global trade that is posed by potential terrorist use of a maritime container to deliver a weapon.” See CSIFACT SHEET, 30 September 2006, p. 1.

<sup>1400</sup> See Ben Saul, *Definition of ‘Terrorism’ in the UN Security Council: 1985 – 2004*, 4 CHINESE J. INT’L L. 141, pp. 157 – 161.



shows that international terrorism is capable of creating an emergency in international relations. Following 9/11, the Security Council issued Resolution 1368, which denounced the attack “like any act of international terrorism, as a threat to international peace and security.” According to Resolution 1456 (2003), terrorism “constitutes one of the most serious threats to peace and security” and that “it has become easier, in an increasingly globalized world for terrorists to exploit sophisticated technology, communications and resources for their criminal objectives.” As a result, acts of international terrorism and their support by a state may constitute a threat to international peace and security pursuant to Article 39, Chapter VII of the UN Charter.

### **2.2.3. Fissionable Materials**

In line with the other terms used in Article XXI (b) (i) – (iii), commentators argue that “fissionable materials” should be defined objectively. The definition and accepted handling of such materials is quite well documented in international law owing to various international agreements.

“Fissionable material” is often used as a synonym for “fissile material” which is defined “as material which can be fissioned by fast neutrons, including uranium 238.”<sup>1401</sup> The provision does not limit the use of such material to situations of war or peace and so its scope could be quite broad. For example, it is conceivable that a state may invoke this provision in connection with the 1980 Convention on the Physical Protection of Nuclear Material which regulates the safe transportation of nuclear materials for peaceful purposes.<sup>1402</sup>

Fissionable materials can also be used in the construction of nuclear weapons, which form part of a group of weapons known collectively as “Weapons of Mass Destruction.” Owing to their uniquely devastating effects, they are considered the most dangerous form of WMD and their use is tightly monitored and regulated.<sup>1403</sup> For example, the 1968 Treaty on Non-Proliferation of

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<sup>1401</sup> United States Nuclear Regulatory Commission, Glossary: < <http://www.nrc.gov/reading-rm/basic-ref/glossary.html> >.

<sup>1402</sup> Article 2(1) of the Convention applies to nuclear material used for peaceful purposes while in international nuclear transportation.

<sup>1403</sup> See International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, General List No. 95, 8 July 1996, “In [...] order correctly to apply to the present case the Charter law on the use of

Nuclear Weapons seeks to prevent the proliferation of nuclear weapons which could increase the danger of nuclear war.<sup>1404</sup> In Resolution 1540 (2004),<sup>1405</sup> the United Nations' Security Council stated that the "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security." Acting under its Chapter VII powers, the Security Council decided that all states were to "adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them."<sup>1406</sup>

Article XXI (b) (i) (unlike sub-paragraph (iii)) does not refer to an event that has already materialized and so does not prevent states from taking measures that pre-empt the use or traffic in fissionable materials. Recent events have shown that states take pre-emptive measures on the advice of their intelligence services based on their interpretation of raw data.<sup>1407</sup>

Article XXI (b) (i) arguably imposes a lower burden of proof on the party invoking the security exception than sub-paragraph (iii) in that the state must only prove that the measure is "relating to" fissionable materials. On the other hand, reference to the jurisprudence on Article XX(g) shows that such terms can also facilitate a narrow interpretation. On the basis of a contextual interpretation, the Panel in *Canada – Salmon and Herring* restricted the scope of "relating to" by interpreting it to mean "primarily aimed at" the conservation of natural resources. This

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force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come."

<sup>1404</sup> Article I of this Treaty states: "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."

<sup>1405</sup> S/RES/1540 stresses the need for all member states to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction. The resolution also recognized the threat that terrorists may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery. Last but not least, it recognizes the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery.

<sup>1406</sup> The need to prevent WMD falling into the hands of terrorists is also reflected in The United Nations Global Counter-Terrorism Strategy (adopted on 8 September 2006), Annex, Paragraph II (Measures to Prevent and Combat Terrorism) point 5 (international co-operation) point 13 (national efforts).

<sup>1407</sup> See ASSESSMENT OF THE BRITISH GOVERNMENT, p. 3.

corresponded to the lower standard which the wording in Art.XX (g) implied whilst restricting the trade measures that fell within its scope.<sup>1408</sup> One could argue that it is no longer possible to adopt such a narrow interpretation in respect of the exceptions following the ruling of the Appellate Body in *EC - Hormones*.<sup>1409</sup> According to one commentator, “[t]his reading of the GATT is inconsistent with a plain reading of the words of the agreement and significantly reduces the coverage of Article XX(g) to regulations that are solely intended to conserve the resource.”<sup>1410</sup> On the other hand, it could also be assumed that the function of “relating to” – like “necessary” – is to describe relationship between the measure and the protected interest and it is therefore capable of a range of meanings. In particular, considering that dispute settlement organs have interpreted “necessary” according to its legal meaning there appears no reason why a similarly legal interpretation could not be applied to “relating to.” Indeed, this would appear to be the only option because interpreting “relating to” according to its ordinary meaning would widen the scope of Article XXI (b) (i) unacceptably insofar as member states could justify any counter-terrorist measure as “relating to” the prevention of the proliferation of nuclear WMD by terrorists.

### 2.3. Is the Security Interest “Essential”?

The question arises as to what extent the term “its essential security interests” in Article XXI (b) is capable of review by the Panel. Commentators have argued that the term “essential” is a limiting factor and, as such, justiciable.<sup>1411</sup> Despite its subjective wording, the scope of the interests protected by the provision is limited:<sup>1412</sup> the historical materials make clear that the drafters perceived the need for an exception but did not intend to create an *unlimited* exception. On the other hand, some commentators find such an interpretation difficult to reconcile with

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<sup>1408</sup> See Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988 (L/S6268 – 35S/98), paras. 4.5 – 4.6 (The Panel observed that the Preamble to Article XX “was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources”).

<sup>1409</sup> *Supra n.* 1238.

<sup>1410</sup> See Brandon L. Bowen, *The World Trade Organization and its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, In Light of Recent Developments*, 29 GA. J. INT’L & COMP. L. 181, p. 185.

<sup>1411</sup> See Schloemann and Ohlhoff, p. 444.

<sup>1412</sup> HAHN, at p. 297, who describes threats to essential security interests as having an especially serious adverse effect on the situation of the state, e.g. threats to its political or military independence or its defining characteristics; *contra* Schloemann and Ohlhoff, *id.* who state that “[a] wide range of legitimate ‘essential security interests’ are conceivable”).

Article XXI (a) which grants member states the right to decide what information to withhold from Panel review.<sup>1413</sup> However, as argued above, Article XXI (a) similarly requires member states to prove that the information concerned relates to their “essential security interests.”

There is little case law which provides guidance on the interpretation of “essential.” However, in Article XXI (b), and other provisions of the GATT it serves to establish the relationship between the state and the particular interest to be protected.<sup>1414</sup> The choice of “essential” is deliberate: for example, Article XX uses a number of terms to describe this relationship, including “essential” (in paragraph (j)), “relating to”, “involving”, “for the protection of” and “in pursuance of.” The distinction between the terms was recognized by the Appellate Body in *US – Gasoline*:

*“It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.”*<sup>1415</sup>

The meaning of “essential” therefore implies a standard which is higher than “relating to” and closer to “necessary.”<sup>1416</sup> In this respect, it is significant that Article XII:3(b) and Article XVIII:10 even refer to “more essential”, thereby indicating that there are degrees of essentiality. Accordingly, the Panel should only examine whether the member state in question considered its *essential* security interests to be threatened.<sup>1417</sup>

#### **2.4. Extraterritoriality (Extrajurisdictionality)**

Article XXI differs from Article XX by prefacing the “essential interests” capable of protection with “its.”<sup>1418</sup> If the use of “essential” relates to the importance of the interests, the use of the

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<sup>1413</sup> Akande and Williams, p. 398.

<sup>1414</sup> See Bradley J. Condon, *GATT Article XX and Proximity of Interest – Determining the Subject Matter of Paragraphs (b) and (g)*, 9 UCLA J. INT'L L. & FOREIGN AFF. 137, pp. 142 – 144.

<sup>1415</sup> Appellate Body, *US – Gasoline*, p. 18.

<sup>1416</sup> See e.g. Panel, *Canada – Herring and Salmon*, BISD 35S/98, para. 4.6, (a trade measure has to be *primarily aimed* at the conservation of an exhaustible natural resource and not *necessary or essential*).

<sup>1417</sup> Akande and Williams, p. 399.

<sup>1418</sup> C.f. sub-paragraphs (a) – (f) of Article XX simply refer to interests of protection in the abstract. The only protected interests referred to in Article XXI(b) are “its essential security interests.”

possessive pronoun could be interpreted as indicating a requirement of a jurisdictional nexus between the state and the interest it seeks to protect. The question as to whether a state can protect interests lying outside its territory has arisen in a number of disputes. For example, in *Trade Restrictions Affecting Argentina*, member states imposed trade embargos against Argentina in response to its invasion of the Falkland Islands and sought to justify them on the basis of Article XXI.<sup>1419</sup> Argentina and its allies complained that Article XXI did not justify such action because the states were foreign to the conflict and therefore not seeking to protect their essential security interests.<sup>1420</sup> The question of the extraterritorial application of laws is also important in relation to the CSI, considering that the CBP is attempting to protect national security by “pushing the borders outwards.”

As far as the United States is concerned, the extraterritorial application of its laws is justified on the basis of the “effects doctrine.” This provides that the United States has jurisdiction where the conduct of a party in a foreign country produces “an effect” within its territory. The doctrine was elaborated in *U.S. v. Aluminium Co. of America*, a case which concerned antitrust law. The court stated that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its border which the state reprehends.”<sup>1421</sup> In later cases, the doctrine was modified owing to the opposition of other states.<sup>1422</sup> However, the United States has issued many laws with extraterritorial effects, for example, the extension of sanctions against Cuba on the basis of the Cuban (LIBERTAD) of March 1996.<sup>1423</sup>

Under international law, it is settled that a state’s laws primarily apply only within its own territory, insofar as its jurisdiction is defined and limited by the sovereign rights of other

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<sup>1419</sup> C/M/157 *supra n.* 1265,

<sup>1420</sup> *Id.* pp. 2 and 5.

<sup>1421</sup> 148 F.2d 416 (1945), at p. 443. Quoted in SHAW, p. 612.

<sup>1422</sup> SHAW, p. 612.

<sup>1423</sup> This Act provided for the institution of legal proceedings before the US courts against foreign persons or companies deemed to be trafficking in property expropriated by Cuba from American nationals. In particular, the European Community objected to the latter, stating that the U.S. claims were “contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidiaries, goods and technologies must be subject to the law of the country where they are located”. See Letter of the European Commission to the Congressional Committee, quoted in SHAW, p. 618.

states.<sup>1424</sup> However, the situation pertaining to the extraterritorial application of national laws is less clear. In the *Lotus Case*, the International Court of Justice held that, although international law defines jurisdiction by reference to territory, this did not amount to a general prohibition against the extraterritorial application of laws. According to the court, there was no rule of international law to prevent a State from exercising jurisdiction over aliens with regard to crimes committed abroad.<sup>1425</sup> The court stated that “[t]he territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty.”<sup>1426</sup> This ruling has not been generally accepted. For example, according to a later judgement of the European Court of Human Rights, “[w]hile international law does not exclude a State’s exercise of jurisdiction extraterritorially, the suggested bases of such jurisdiction are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states.”<sup>1427</sup> According to one writer, “[s]uch an understanding of sovereignty would be the very denial of the existence of a legal community.”<sup>1428</sup>

The extraterritorial application of laws has also been examined in GATT and WTO jurisprudence, most notably in two unadopted Panel reports concerning U.S. trade embargoes against states which failed to comply with U.S. statutory requirements for the import of tuna. In *U.S. – Tuna/Dolphin I*, the Panel did not use the term “extraterritoriality” but “extrajurisdictionality” instead.<sup>1429</sup> According to some commentators, it thereby drew a distinction between the regulation of objects outside a state’s borders (extraterritoriality) and the regulation of such objects by means of controls on transactions at the border (extrajurisdictionality).<sup>1430</sup> The Panel rejected the extrajurisdictional application of measures

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<sup>1424</sup> The concept of sovereignty refers to the “exclusive competence of a state in regard to its own territory: *Island of Palmas Case: Netherlands v. U.S.* (1928) Permanent Court of Arbitration. Sole Arbitrator: Huber. 2 R.I.A.A. 829. Quoted in HARRIS, pp. 187 *et seq.*

<sup>1425</sup> See WAINCYMER, p. 475.

<sup>1426</sup> The Case of the S.S. “Lotus”, PCIJ Ser. A, No. 10, 1927. < [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus/](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/) >

<sup>1427</sup> *Bankovic v. Belgium et al* No. 52207/99 (2001) 11 B.H.R.C. 435, DA, para. 50. The court also stated at para. 60, “[A] State may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects.”

<sup>1428</sup> Rao, p. 940.

<sup>1429</sup> Panel Report, *US – Tuna I*, para. 5.28.

<sup>1430</sup> See Daniel C. Esty, *Unpacking the Trade and Environment Conflict*, 25 Law & Pol’y Int’l Bus. 1259, p. 1262 at n. 11 (with further references). Owing to the fact that the Declarations of Principles do not give CBP officers any

under Article XX (b) and (g) on the basis that one member could not unilaterally determine the environmental policies of another state.<sup>1431</sup> In other words, the Panel based its ruling on the notion that there were inherent territorial limits on the environmental exceptions.<sup>1432</sup>

In *U.S. – Tuna/Dolphin II*, the Panel permitted a limited extrajurisdictional application of measures insofar as they regulated the external activities of nationals from the regulating state.<sup>1433</sup> It held that the General Agreement did not proscribe “in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.”<sup>1434</sup> On the other hand, it held that the measures in question could not be justified under Article XX (b) and (g) because trade measures designed to force other countries to change their policies within their jurisdiction would “seriously impair the balance of rights and obligations among contracting parties.”<sup>1435</sup> In *Shrimp – Turtle*, the dispute again centred on U.S. trade embargoes against states that did not comply with its environmental measures. The complainants argued that that Article XX (b) and (g) could not be invoked to justify a measure which applied to animals not within the jurisdiction of the Member enacting the measure. On the other hand, the United States responded that Article XX (b) and (g) contained no jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved.<sup>1436</sup> The Panel did not directly address the jurisdictional aspect of the dispute, holding that the measure contravened Article XX owing to the discriminatory effects of the measure:

*“However, we note that we are not basing our finding on an extra-jurisdictional application of US law. Many domestic governmental measures can have an effect outside the jurisdiction of the government which takes them. What we found above was that a measure cannot be considered as falling within the scope of Article XX if it operates so as to affect other governments' policies in a way that threatens the multilateral trading system.”*<sup>1437</sup>

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powers of law enforcement at foreign seaport, the question therefore concerns the extrajurisdictional application of the CSI.

<sup>1431</sup> Panel, *US – Tuna I*, para. 5.32.

<sup>1432</sup> See Howse, p. 6.

<sup>1433</sup> Gerd Winter, *The GATT and Environmental Protection: Problems of Construction*, 15 J. ENVTL. L. 113, p. 131.

<sup>1434</sup> Panel, *US – Tuna II*, p. 891.

<sup>1435</sup> *Id.* p. 894.

<sup>1436</sup> Panel, *US – Shrimp*, para. 7.24.

<sup>1437</sup> *Id.*, para. 7.51.

Although the Panel acknowledged that sea turtles could be a global resource, it held that the common interest of states in their conservation would be better addressed through the negotiation of international agreements than by unilateral measures determining market access.<sup>1438</sup> Nevertheless, it is noteworthy, that, in a decision widely criticized as placing the interests of free trade above environmental protection, the Panel did not rule out the extrajurisdictional application of a state's laws. Upon appeal, the Appellate Body also appeared to open the door to the possibility of extrajurisdictionality, holding that requirements on exporting countries to comply with or adopt certain policies prescribed by the importing state did not rule out its justification under Article XX.<sup>1439</sup> The issue of extrajurisdictionality itself was briefly referred to by the Appellate Body in the same dispute.

*“We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX (g).”*<sup>1440</sup>

The Panel did not elaborate on the elements of the “sufficient nexus” requirement. However, its comments suggest that it does not require the party invoking Article XXI to have exclusive ownership of the interest protected nor does it require that interest being within the jurisdiction of the defendant state all the time. Presumably, this issue would be decided on the balance of scientific evidence supporting or refuting the member state's interest in the object outside its territory.

In conclusion, the CSI appears to be extrajurisdictional rather than extraterritorial in nature. This is because the Declarations of Principles do not give the CBP any powers of law enforcement at foreign harbours, with the result that CBP can only enforce the 24 Hour Rule and DoPs at U.S. seaports instead. Overall, the law on the extrajurisdictional application of laws remains unsettled in WTO jurisprudence. However, in Article XXI the reference to “its security interests” at least

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<sup>1438</sup> *Id.*, para. 7.53.

<sup>1439</sup> Appellate Body, *US – Shrimp*, pp. 152-153.

<sup>1440</sup> *Id.*, para. 133.



offers a textual basis for imposing the nexus requirement on security measures adopted by member states.

## 2.5. Is the Measure “Necessary”?

Article XXI (b) subjects the measures introduced to a necessity test, similar to that in Article XX (b) insofar as the measure must be “necessary for the protection of” the interest concerned. However, whereas Article XX (b) is framed in objective terms, leaving the decision as to the necessity of the measure with the dispute bodies, Article XXI is framed subjectively, leaving the decision as to the necessity of the measure with the invoking state – to a certain extent.

Article XXI clearly specifies the degree of deference that a Panel must accord to decisions of member states<sup>1441</sup> as well as the individual framework conditions which must exist before the provision can be invoked. Contrary to statements by some member states, the wording of Article XXI does not grant a state unlimited discretion: the terms “necessary” and “essential” obviously impose limitations on the discretion of a state to take measures protecting its essential security interests. For example, writers have pointed out that the ordinary meaning of “considers” (i.e. to “reflect”, “deliberate” and “examine”) suggests that the state must follow a certain process when developing the measure in dispute, e.g. weighing up the evidence and developing measures which are necessary to protect.<sup>1442</sup> The jurisprudence on Article XX also interprets the term “necessary” narrowly, equating it with “indispensable.” This suggests that, within the self-regulating scope of Article XXI (b), “necessary” and “essential” set standards which the state must attain.<sup>1443</sup> In other words, the fact that Article XXI frames “necessary” in subjective terms (i.e. “it considers necessary”) does not affect the inherently objective *legal* meaning of the term as explained in *Korea – Beef*.<sup>1444</sup> What this means is that the member state must adduce *prima facie* evidence that it considers the measure to be indispensable to protect the security interest in question.<sup>1445</sup> As argued above, the Panel should be able to review this evidence.

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<sup>1441</sup> See e.g. Jan Neumann and Elizabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea – Beef, EC – Asbestos and EC – Sardines*, JWT, Vol. 37 No. 1 (Feb. 2003), pp. 207 – 208.

<sup>1442</sup> Schloemann and Ohlhoff, p. 443. The term “considers” is also used in Article XXI (a).

<sup>1443</sup> *Id.*

<sup>1444</sup> *Infra* p. 278.

<sup>1445</sup> *Contra* Akande and Williams at pp. 386 – 387.

The question then arises as to what test a Panel can apply to the member state's decision-making process (i.e. "it considers") to ensure that it has interpreted "necessary" in accordance with its narrow, legal meaning (i.e. "indispensable"). The most obvious comparison is the general exception, Article XX, which uses the term "necessary" in three provisions (sub-paragraphs (a), (b), (d) and (f)). The jurisprudence on Article XX could offer guidance on the relevant factors which the United States should consider in order to ensure the necessity of the Container Security Initiative.<sup>1446</sup> Although the WTO Secretariat has stated that, as a rule, the tests of necessity adopted in relation to specific provisions are not automatically transferable<sup>1447</sup> there are many arguments which support reference to Article XX jurisprudence. As mentioned above, the environment and national security are similar interests in a number of respects, not least the fact that they affect transboundary interests such as migratory species and the supply chain. There is also no evidence in the *travaux préparatoires* that the drafters ever intended the meaning of "necessity" in Article XXI to impose a lower standard than "necessity" in Article XX.<sup>1448</sup> Last but not least, the term "necessary" is capable of a range of meanings and it would contradict the *effet utile* principle if member states were permitted to choose the meaning at the lowest end of the scale, namely "convenient, useful, suitable, proper or conducive to the end sought."<sup>1449</sup> The following section examines the necessity test employed in relation to Article XX with a view to using it as a basis for examining the "necessity" of the Container Security Initiative under Article XXI.

### 2.5.1. Is There a Risk to Essential Security Interests?

The first stage of this investigation should be seen as representing the pre-condition to the necessity test.<sup>1450</sup> According to the Panel in *US – Section 337*, its function is to filter out those measures which do not come within the scope of Article XX.<sup>1451</sup> It does this by examining the

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<sup>1446</sup> See Cann, pp. 454 – 455; Browne, *supra* n. 1334.

<sup>1447</sup> See World Trade Organization, Working Party on Domestic Regulation, "Necessity Tests" in the WTO, Note By the Secretariat, S/WPDR/W/27, 2 December 2003, p. 3 at para. 11.

<sup>1448</sup> See Cann *supra* n. 1446.

<sup>1449</sup> Appellate Body, *Korea – Beef*, para. 160.

<sup>1450</sup> See Deborah Akoth Osiro, *GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation* in Legal Issues of Economic Integration Vol. 29 No.2, 123, p. 131 who describes this test as a "condition precedent" for conducting the necessity test.

<sup>1451</sup> Panel, *US – Section 337*, para. 5.22.

existence of a risk which causes a state to introduce its measures in the first place.<sup>1452</sup> This is supported by literature and jurisprudence. Commentators have argued that the existence of a threat to a state's essential security interests is the principle pre-requisite for the application of Article XXI.<sup>1453</sup> In *EC – Asbestos*, the Appellate Body held that the state invoking the provision had to show the existence of a risk to the interest deserving protection (in this case, human life or health) in order to show that the measure falls within the scope of Article XX:

*“... [T]he EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health.”*<sup>1454</sup>

Examining the existence of a risk filters out unjustified measures: it is unlikely that the import quota in the Swedish footwear dispute or the Argentinean embargo imposed by Britain's allies in the Falklands War would have passed such a test, for example.

The standard of review employed in relation to Article XX suggests that this examination would not interfere with the sovereign right of the member state to respond to genuine threats to its essential national security interests. The Panel should show deference where particularly vital interests are concerned. Again, this is supported by literature and jurisprudence. Some commentators argue that the Panel should only enquire as to whether the member genuinely believed that the measure taken was necessary to protect its national security interests.<sup>1455</sup> In *EC – Asbestos*, the Appellate Body held that the mere fact that asbestos presented a risk to human

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<sup>1452</sup> See Osiro, p. 132 (arguing that the causal connection in relation to Article XX (b) requires an assessment of the risk involved and the end pursued).

<sup>1453</sup> See Schloemann and Ohlhoff, p. 442.

<sup>1454</sup> Appellate Body, *EC – Asbestos*, para. 157.

<sup>1455</sup> Akande and Williams, pp. 386 – 387, 392.

health ensured that the measure fell under Article XX (b).<sup>1456</sup> Although the existence of a risk must be based on scientific evidence, the member state does not have to prove that it undertook risk analysis or that the evidence justifying the measure was based on conclusive evidence. According to the Appellate Body in *EC – Hormones*, (dealing with Article 5.1 of the SPS Agreement) divergent scientific opinion merely indicated a state of scientific uncertainty and did not mean that the measure was not necessary:

*“By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety.”*<sup>1457</sup>

In *EC-Asbestos* the Appellate Body referred to this decision, stating that “responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources.”<sup>1458</sup> Governments are not required to follow majority opinion and do not have to reach a decision under Article XX (b) GATT based on the preponderance of the evidence.<sup>1459</sup> The existence of a risk to the interest deserving protection is crucial in determining whether the measure falls within the scope of the exception.

### **2.5.2. The Necessity Test in Article XX**

The function of the necessity test is to establish whether the measure chosen by the state is the most GATT-compliant of the reasonably available alternatives open to the state. This requires an examination of a number of factors relating to measure, including the importance of the interests it seeks to protect and its effectiveness.

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<sup>1456</sup> *Id.* paras. 162 – 163.

<sup>1457</sup> Appellate Body, *EC – Hormones*, para. 194.

<sup>1458</sup> Appellate Body, *EC – Asbestos*, para. 178.

<sup>1459</sup> *Id.*

In *Korea – Beef*, the Appellate Body distinguished between the ordinary and legal meaning of the term “necessary.” It held that, from a legal standpoint, “necessary” was capable of various meanings insofar as it was “an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.”<sup>1460</sup> However, within the context of the general exception, the Appellate Body held that the meaning was closer to “indispensable.”<sup>1461</sup> This is supported by the fact that other terms used in Article XX appear to cover the lower end of the range of meanings that “necessary” is capable of having. For example, “relating to” used in Article XX (g) is closer to “contributes to” than “indispensable” and thereby implies a lower standard of proof.<sup>1462</sup>

The basis for the modern test of necessity under the GATT was laid down by the Panel in *US – 337*. It held that “necessary” in Article XX (d) meant that that no alternative measure existed which the country could be reasonably expected to employ and which was not inconsistent with other GATT provisions or which entailed the least degree of inconsistency with other GATT provisions.<sup>1463</sup> Although Panels adopted this test they tended to construe the meaning of necessity under Article XX ‘narrowly’.<sup>1464</sup> Critics accused the Panels of eviscerating the function of the general exception by setting a standard of proof that member states found impossible to satisfy.<sup>1465</sup> However, the creation of the WTO and introduction of a more text-based interpretation abolished the deliberately narrow interpretation of exceptions as a general rule.<sup>1466</sup> As a result, the test of necessity was broadened to pay greater attention to the regulatory aims of the member states. For example, in *US – Gasoline*, the Appellate Body stressed that the subject of the necessity test is the measure itself and not its policy goal.<sup>1467</sup> The decisions in *Korea – Beef* and *EC – Asbestos* also relaxed the necessity test by taking account of other factors. Therefore, in

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<sup>1460</sup> Appellate Body, *Korea – Beef*, para. 160.

<sup>1461</sup> *Id.*, paras. 160 – 161.

<sup>1462</sup> For example, it is not immediately apparent why it should be harder to prove a measure which seeks to protect human life under Article XX(b) than a measure which seeks to preserve natural resources under Article XX(g).

<sup>1463</sup> See Kennedy, p. 154, who describes “necessary” in Article XX as “shorthand for the minimum derogation principle, i.e. there must not be available any less trade restrictive alternative measure that would be equally effective.”

<sup>1464</sup> According to the international practice regarding exceptions, see Hahn, p. 579.

<sup>1465</sup> Arguably, the “narrow interpretation” would also violate the effect utile principle, according to which Panels and the Appellate Body are bound to give effect to all the provisions of a treaty. See Appellate Body, *US – Gasoline*, p. 23.

<sup>1466</sup> *Supra pp.* 231 – 232.

<sup>1467</sup> Appellate Body, *US – Gasoline*, p. 28.

order to determine whether a measure was necessary, a state had to weigh and balance a series of factors which were both legal and factual.<sup>1468</sup> As a result, the necessity test in its current form is a complex process of weighing up competing interests of the member states with the aims and objectives of the GATT.

### 2.5.2.1. Necessity Test: Factors to be Considered

In *Korea – Beef*, the Appellate Body summarized the main factors to be taken into consideration when ascertaining the necessity of the measure according to Article XX (d).<sup>1469</sup> Such factors primarily included 1) the contribution made by the compliance measure to the enforcement of the law or regulation at issue; 2) the importance of the common interests or values protected by that law or regulation and 3) the accompanying impact of the law or regulation on imports or exports.<sup>1470</sup> The Appellate Body also referred to these criteria in *EC – Asbestos* when determining whether France could reasonably have been expected to employ alternative measures to a total ban on asbestos products in order to protect human life and health.<sup>1471</sup>

In *US – Section 337* the requirement of necessity was interpreted as meaning that there was no reasonably available alternative consistent with the invoking state's obligations under the GATT.<sup>1472</sup> At this stage, the necessity test was still undergoing development but the Panel's decision is still referred to as containing the essence of the necessity test (i.e. the search for an alternative measure which is either GATT consistent or least GATT inconsistent).<sup>1473</sup> This part of the necessity test also takes account of the proportionality of a measure<sup>1474</sup> (although this principle has not been recognized as an independent principle of WTO law).<sup>1475</sup> As stated above,

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<sup>1468</sup> See S/WPDR/W/27 (*supra n.* 1447), para. 32

<sup>1469</sup> See Neumann and Türk, p. 211.

<sup>1470</sup> Appellate Body, *EC – Hormones*, para. 164.

<sup>1471</sup> Appellate Body, *EC – Asbestos*, para. 34.

<sup>1472</sup> Panel, *US – Section 337*, para. 5.26.

<sup>1473</sup> Appellate Body, *EC – Asbestos*, para. 25 (describing this report as containing the “classic formulation” of the necessity test).

<sup>1474</sup> Panel, *Korea – Beef*, para. 675 (holding that the measure could not be justified under Article XX (b) because it was disproportionate).

<sup>1475</sup> See Meinhard Hilf and Sebastian Puth, *The Principle of Proportionality on its Way into WTO/GATT Law* in CLAUS DIETER EHLERMANN, EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION 2002, pp. 119 – 218; Neumann and Türk, *supra n.* 1441. See also WAINCYMER, p. 501 at para. 7.25.7 (pointing out that WTO jurisprudence has never expressed “proportionality” as a principle).

the necessity test does not concern the policy motivating the measure nor the level of protection that the state wishes to achieve.<sup>1476</sup>

The introductory paragraph to Article XXI (b) uses the term “it considers”, which, according to some commentators, grants member states “a right to be cautious” when deciding whether a measure is necessary.<sup>1477</sup> This raises the question whether a state can act pre-emptively in order to head-off a risk which it believes to be imminent but which has not yet materialized.<sup>1478</sup> This question requires consideration of the precautionary principle which derives from the 1897 Ministerial Declaration on the Protection of the North Sea. Paragraph VII of this instrument states:

*“Accepting that, in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.”*<sup>1479</sup>

In other words, uncertain scientific information should not lead to inaction when confronted with possible damage to the environment. Its recognition in environmental conventions has led some writers to classify the principle as customary international law.<sup>1480</sup> The application of the precautionary principle was considered in *EC – Hormones*, a case concerning the Article 5.7 of the SPS Agreement. The Appellate Body held that, regardless of the status of the precautionary principle in international law, it would not override specific treaty provisions and could not be introduced without a clear textual directive to do so.<sup>1481</sup>

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<sup>1476</sup> Panel, *US - 337*, para. 5.26; see also Appellate Body, *US – Gasoline*, pp. 29 – 30; *US – Shrimp*, para. 185; Appellate Body, *EC – Asbestos*, para. 168; cf. *Korea – Beef*, para. 178.

<sup>1477</sup> See Schloemann and Ohlhoff, p. 443.

<sup>1478</sup> See BHALA, p. 562.

<sup>1479</sup> See SECOND INTERNATIONAL CONFERENCE ON THE PROTECTION OF THE NORTH SEA, LONDON 24 – 25 NOVEMBER 1987; this principle is also contained in principle 15 of the RIO DE JANEIRO DECLARATION: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” See also 1998 WINGSPREAD STATEMENT ON THE PRECAUTIONARY PRINCIPLE: < <http://www.sehn.org/wing.html> >.

<sup>1480</sup> See John M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, Nuclear Control Institute < <http://www.nci.org/i/ib3496a.htm> >.

<sup>1481</sup> See Report of the Appellate Body, *EC – Hormones*, paras. 123 – 124.

The complainant could argue that the words “it considers necessary” in Article XXI provide member states with a basis to take a precautionary or pre-emptive approach to national security by granting them “a right to be cautious.”<sup>1482</sup> This is supported by a contextual interpretation because it is only possible to prevent the risk presented by nuclear WMD (i.e. “fissionable materials”) by using pre-emptive measures (such as “pushing the border outwards”). A precautionary approach in international law is also reflected in risk management which is recognized by the Revised Kyoto Convention and the Framework of Standards. In addition, although the Appellate Body has not recognized a “precautionary principle” there is evidence that it permits a precautionary approach.<sup>1483</sup> As far as the CSI is concerned, the most important aspect of the precautionary approach relates to scientific evidence. In *EC – Asbestos*, the Appellate Body permitted states to evaluate a risk in qualitative rather than quantitative terms and did not oblige them to follow majority scientific opinion.<sup>1484</sup>

The test of necessity can be divided into two stages: first, the measure is assessed according to the importance of the interests protected and the effectiveness of the measure. If the measure is found not to be indispensable using these two criteria, a further test is undertaken to ascertain whether the measure is the least trade restrictive alternative.<sup>1485</sup>

### **2.5.2.2. First Stage: Importance of Interests and Effectiveness**

According to one writer, the jurisprudence on Article XX appears to divide measures into two classes: those which concern vital interests and those which do not.<sup>1486</sup> The former category of measures is more likely to be held necessary than the latter, despite their restrictive trade

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<sup>1482</sup> See Schloemann and Ohlhoff, p. 443 with further references.

<sup>1483</sup> See Laurent A. Ruessmann, *Putting The Precautionary Principle in its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial*, 17 AM. U. INT'L L. REV. 905, p. 911 (suggesting a distinction between a precautionary principle and precautionary approach); pp. 925 – 926 concerning deference of the Appellate Body to a precautionary approach.

<sup>1484</sup> See Appellate Body, *EC – Asbestos*, paras. 167 and 178. See also *id.*, p. 925.

<sup>1485</sup> For an examination of the stages of the necessity test under Article XX see Osiro *supra n.* 1450. However, the jurisprudence on Article XX shows that the necessity test may not follow this structure strictly, p. 135.

<sup>1486</sup> *Id.* p. 136



effects.<sup>1487</sup> Measures in the latter category will be subjected to the “least trade restrictive test” to find out whether they are nevertheless indispensable.

a) **Importance of the interests protected (level of protection):** in *Korea - Beef*, the Appellate Body held that it would be useful to bear in mind the context of “necessary” in Article XX (d). In appropriate cases, the treaty interpreter may take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect.<sup>1488</sup> This was confirmed by the Appellate Body in *EC-Asbestos*, which held that the availability of alternative measures had to take into account the aim of the measure employed. Referring to its decision in *Korea – Beef*, the Appellate Body stated:

*“In addition, we observed, in that case, that '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.”*<sup>1489</sup>

The member state is free to set the level of protection it considers appropriate and they can even choose to impose a “zero risk” level of protection.<sup>1490</sup> This consideration also applies to Article XX(b): the Appellate Body in *EC – Asbestos* held that it was “undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”<sup>1491</sup> However, if the measure is silent on the level of protection then it will be presumed that 100 percent protection was not intended.<sup>1492</sup>

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<sup>1487</sup> *Id.* pp. 134 – 135.

<sup>1488</sup> Report of the Appellate Body, *Korea – Beef*, para. 162.

<sup>1489</sup> *Id.*, paras. 170 – 172.

<sup>1490</sup> Report of the Appellate Body, *Australia – Salmon*, WT/DS18/AB/R, 20 October 1998 (adopted 6 November 1998), para. 125.

<sup>1491</sup> Appellate Body, *EC – Asbestos*, para. 168.

<sup>1492</sup> Appellate Body, *Korea – Beef*, para. 178.

b) **Contribution made by the compliance measure to the realization of the value pursued (effectiveness):** some commentators argue that necessity also depends on the effectiveness of a measure.<sup>1493</sup> Concerning Article XXI, they argue that the term “it considers” requires, by implication, that the measure must be “effective”, in order to have the necessary effect on protecting the interest.<sup>1494</sup> This is supported by jurisprudence on Article XX. For example, in *Korea – Beef*, the Appellate Body held that the greater the contribution of the measure to the realization of the end pursued, the more easily a measure might be considered to be “necessary.”<sup>1495</sup> In *EC-Asbestos*, it referred to “measures designed to achieve” the policy goal and in *EC – GSP* even suggested that there should be a nexus between the measure and the likelihood of attaining the goal.<sup>1496</sup> However, when examining the effectiveness of security measures, the Panel should also respect the deterrent value of the measure.

### 2.5.2.3. Second Stage: Trade Restrictiveness

In the *U.S. - Section 337* case, the Panel stated that if all methods reasonably available are inconsistent with the GATT, the country should use the *least inconsistent* method.<sup>1497</sup> This standard was increased by the Panel in *Thailand – Cigarettes*, which held that a measure was not to be regarded as “necessary” if “an alternative measure which it could reasonably be expected to employ and which was *less inconsistent* with other GATT provisions was reasonably available to it.”<sup>1498</sup> This decision imposed a very high burden of proof on the party seeking to justify the measures: if consistent or less consistent methods existed, the regulation would not be considered necessary.<sup>1499</sup> However, it was argued that such alternatives would always exist and it therefore

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<sup>1493</sup> See Tatanja Eres, *Limits of Article XX: A Back Door for Human Rights?* 35 GEO. J. INT’L L. 2004, 597, p. 631 (“It does not presume to judge the underlying domestic policy values, nor is it an empirical evaluation. However, it does involve an assessment of whether the policy implemented is reasonably suited to achieve the objective. Considering effectiveness in this way precludes the abuse of Article XX exceptions”).

<sup>1494</sup> Schloemann and Ohlhoff p. 443.

<sup>1495</sup> Appellate Body, *Korea – Beef*, para. 163.

<sup>1496</sup> Report of the Appellate Body *EC- Asbestos*, para 173; Report of the Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004 (adopted on 20 April 2004), para. 164.

<sup>1497</sup> Panel, *United States – Section 337*, para. 5.26. Confirmed by the Appellate Body, *EC – Asbestos*, para. 171.

<sup>1498</sup> Panel, *Thailand - Cigarettes*, para. 74.

<sup>1499</sup> Cynthia Maas, *Should the WTO Expand GATT Article XX: An Analysis of United States – Standards for Reformulated and Conventional Gasoline*, 5 MINN. J. GLOBAL TRADE 415, p. 430. As a result, states preferred to rely

would not be possible to prove that they were unviable to the Panel's satisfaction.<sup>1500</sup> Concerning Article XXI, it is possible to detect the consideration of the "least trade restrictive" alternative in *United States – Czechoslovakia*, where the British delegate made the following statement:

*"The United Kingdom system of control was designed to reduce uncertainty to a minimum and to put both would-be importers in other countries and their own exporters on notice as fully as possible of the restrictions and requirements that his Government applied. In this way it was careful to reduce interference with normal trade to a minimum."*<sup>1501</sup>

The necessity test also proved controversial in *Tuna – Dolphin I* (unadopted), where the Panel held that the United States had failed the "necessity requirement" of Art. XX (b) insofar as it had not demonstrated that it had exhausted all options reasonably available to pursue its objectives through measures consistent with the GATT, "in particular through the negotiation of international co-operative arrangements."<sup>1502</sup> In *Tuna – Dolphin II* (also unadopted), the Panel followed the standard of *U.S. – Section 337* to the effect that, in the absence of reasonable alternatives, the contracting party is obliged to use the measure which "entails the least degree of inconsistency with the other GATT provisions."<sup>1503</sup> However, the Panel in *United States – Gasoline* confirmed the standard of *U.S. – Section 337*: that alternative methods should be used which were *least* inconsistent with the GATT provisions.<sup>1504</sup> The Appellate Body in *Korea – Beef*, explained how this test was to be carried out:

*In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX (d), involves in every case a process of*

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on Article XX(g) which did not require the measure to be "necessary." See Report of the Panel, *United States – Taxes on Automobiles* DS31/R, 11 October 1994, (adopted on same date), para. 5.63 (holding that the availability of other less trade restrictive measures "did not imply that the measure could not be justified under Article XX(g).")

<sup>1500</sup> See Report of the Panel, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996, (adopted 20 May 1996), [hereinafter, Panel, *US – Gasoline*], para. 6.26 ("[W]hile the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement").

<sup>1501</sup> *United States – Czechoslovakia*, GATT/CP.3/SR. 20, p. 4 (emphasis added).

<sup>1502</sup> Panel, *US – Tuna I*, para. 5.28.

<sup>1503</sup> Panel, *US – Tuna II*, para. 5.35.

<sup>1504</sup> Panel, *US – Gasoline*, para. 6.24. As a result, states preferred to base their defence on Article XX(g) which imposed a lower standard, see also Howse, p. 7.

*weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.*<sup>1505</sup>

In other words, the measure must be proportional to the attainment of its aims. Although the test of proportionality is not as incursive as that employed in the EC, for example,<sup>1506</sup> it nevertheless requires the Appellate Body to assess the options available to member states in achieving its aims. In *Korea – Beef*, the Appellate Body upheld the Panel’s decision that traditional enforcement measures to combat deceptive practices were less trade-restrictive than the measure in dispute and reasonably available to the Korean government.<sup>1507</sup>

The assessment of whether a reasonable alternative exists requires the invoking state to consider the cost, technical difficulties and lack of expertise. In *EC – Asbestos*, the Appellate Body held that mere administrative difficulty would not prevent a measure from being considered a reasonably available alternative.<sup>1508</sup> Concerning Article XXI, there is no reason why the Panel should not adopt a similarly incursive investigation into whether reasonable alternative means of counter-terrorism exist. Otherwise, it would not be able to ensure that the member state has introduced measures “it considers necessary.”

### **2.5.3. Creating a Chapeau for Article XXI**

If a measure satisfies the necessity test, it is considered “provisionally justified.” The justification is only provisional because the measure must be subjected to a third examination under the chapeau to Article XX, i.e. whether a member is justified in exercising its right to apply a measure under the general exception. The following argues that the absence of a similar “chapeau” in the security exception should not exclude the application of the *abus de droit*

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<sup>1505</sup> Appellate Body, *Korea – Beef*, para. 164.

<sup>1506</sup> See Neumann and Türck, pp. 201 – 206.

<sup>1507</sup> Appellate Body, *Korea – Beef*, para. 180. According to the Panel, the dual retail system was “a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices.” See Panel Report, *Korea – Beef*, para. 660 – 674.

<sup>1508</sup> Appellate Body, *EC – Asbestos*, para. 169 (referring to the Panel, *US – Gasoline*, paras. 6.26 and 6.28).

doctrine owing to the fact that this doctrine stems from the principle of good faith – a pervasive principle of WTO law.

### 2.5.3.1. The Principle of Good Faith in WTO Law

“Good faith” is a general principle of international law and is recognized in some form by most national courts and international organizations, including the WTO.<sup>1509</sup> It has been described by the Appellate Body as a general principle of law and a principle of general international law<sup>1510</sup> which is pervasive in nature.<sup>1511</sup>

In fact, good faith has been expressly referred to in the WTO agreements and applied by the Panels and Appellate Body both in relation to application and interpretation, although its extent in WTO law appears restricted as far as estoppel and the protection of legitimate expectations are concerned.<sup>1512</sup> On the other hand, “good faith” is a very vague principle and does not give rise to legal obligations independent of a violation of treaty.<sup>1513</sup> Owing to the fact that good faith has moralistic connotations, it is not possible to construe the term in terms of what it is not (i.e. “bad faith”). According to the Panel, the possible imputation of bad faith to one of the parties would amount to a serious accusation on a member state’s integrity.<sup>1514</sup> In fact, WTO law presumes the good faith of all member states, as the Appellate Body stated in *EC – Sardines*:

*“We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of Pacta Sunt Servanda articulated in Article 26 of the Vienna*

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<sup>1509</sup> E.g. Article 2(2) of the UN Charter, which requires all member states, to “fulfil in good faith the obligations assumed by them in accordance with the present Charter.”

<sup>1510</sup> Appellate Body, *U.S. – Hot-rolled Steel*, para. 101.

<sup>1511</sup> Report of the Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001 (adopted on 5 November 2001), para. 81; see also Zeitler, p. 722 (pointing out that good faith has been referred to in almost all cases decided by the Panels and Appellate Body).

<sup>1512</sup> Laurent Ruessmann, *The Place of Legitimate Expectations in the General Interpretation of the WTO Agreements*, Institute for International Law, Working Paper No. 36, December 2002. See also *supra* pp. 133 – 134.

<sup>1513</sup> Andrew D. Mitchell, *Good Faith in Dispute Settlement*, MELB. J. INTL. L., pp. 341 *et seq.*; Zeitler, pp. 745 – 746. Accordingly, a good faith review should not be understood as elevating good faith to an independent legal obligation: but cf. Akande and Williams, p. 389 and Schloemann and Ohlhoff, p. 441 who refer to a “test of good faith” and “good faith test” respectively.

<sup>1514</sup> Panel, *US – Section 301*, para. 7.64. See also Zeitler, p. 727; Mitchell, p. 342.

*Convention. And always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.*"<sup>1515</sup>

This general principle of international law gives rise to further, more specific principles such as *pacta sunt servanda*, and *abus de droit* which have also found expression in the covered agreements and jurisprudence of the WTO. The former principle requires member states to perform their obligations under international treaties in good faith.<sup>1516</sup> This requirement is not satisfied by performing contracts to the letter; rather, parties must also avoid acts which would affect their ability to perform the treaty.<sup>1517</sup> The other offshoot of the good faith principle – the *abus de droit* doctrine – requires states to exercise their rights under treaties in good faith.<sup>1518</sup> This is particularly important in relation to the security exception and is dealt with in greater detail below.

*Zeitler* divides good faith into good faith performance and good faith interpretation of WTO agreements.<sup>1519</sup> On the one hand, the principle refers to the performance of treaty obligations (so-called “good faith application”), pursuant to Article 26 of the VCLT which obliges states to apply the provisions of a treaty in good faith. In other words, member states must not apply the provision in a way which would frustrate or defeat the purposes or objectives of the covered agreement in question.<sup>1520</sup> The doctrine of good faith can also be used as an interpretive tool: according to Article 31(1) of the VCLT, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The doctrine therefore forms part of the holistic interpretation to be adopted by the treaty interpreter.<sup>1521</sup> The Appellate Body in *US – Shrimp* appeared to draw a

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<sup>1515</sup> Report of the Appellate Body *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002 (adopted on 23 October 2002), at para. 278.

<sup>1516</sup> Article 26 of the VCLT is entitled “*pacta sunt servanda*” and provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

<sup>1517</sup> Mitchell, p. 347.

<sup>1518</sup> Appellate Body, *US – Shrimp*, para. 158.

<sup>1519</sup> *Zeitler* pp. 725 – 729 (interpretation) and pp. 729 – 743 (application).

<sup>1520</sup> Panel *US – Shrimp*, paras. 740 – 741.

<sup>1521</sup> Panel, *EC – Asbestos*, para. 8.46 (“to the extent that Article 31 of the Vienna Convention contains a single rule of interpretation and not a number of alternative rules, the various criteria in the article should be considered as forming part of a whole.”)

distinction between these two aspects of good faith,<sup>1522</sup> although the precise dividing line is unclear.<sup>1523</sup>

Article XXI does not offer any textual basis for adopting a test relating to good faith. However, it could also be argued that the Appellate Body's reference to a "pervasive" principle of WTO law, suggests that good faith – whether in the form of a test of reasonableness or the doctrine of *abus de droit* – does not need to be expressly stated in order to apply to Article XXI because it is an implied duty of WTO law.<sup>1524</sup> After all, not all provisions of the WTO agreements refer to good faith and yet it is the glue that binds the member states to their obligations arising thereunder.<sup>1525</sup> Admittedly, both good faith and the related concept of reasonableness are vague terms and their application in the absence of an express textual basis could lead to accusations of judicial activism were the Panel and Appellate Body to use them in order to justify their rulings.<sup>1526</sup> However, in practice, the Appellate Body has respected Article 3.7 DSU and shown restraint in using these concepts. It uses the doctrine of good faith to reinforce (as opposed to justify) its decisions and has generally made sure that its reference to the doctrine is clearly rooted in the wording of the covered agreements (although there are exceptions to this rule).<sup>1527</sup>

### 2.5.3.2 The Reasonable Exercise of a Right

The introductory paragraph to Article XX (the chapeau)<sup>1528</sup> prohibits the application of a measure in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. This passage reflects the *abus de droit* doctrine which was described by the Appellate Body in the *US – Shrimp/Turtle* case as follows:

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<sup>1522</sup> Appellate Body, *US – Shrimp*, para. 158.

<sup>1523</sup> *Id.*, para. 160 (after declaring that its task is to interpret the language of the chapeau, the Appellate Body then went on to examine the application of the measure).

<sup>1524</sup> This is also supported by the fact that the VCLT refers to good faith concerning the application (Article 26) and interpretation of law (Article 31).

<sup>1525</sup> Florestal, pp. 415 – 417.

<sup>1526</sup> Zeitler, pp. 753 – 755.

<sup>1527</sup> *Id.*, p. 754 (arguing that the Appellate Body has shown judicial restraint with regard to good faith); see also Mitchell, pp. 361 – 362, whose findings suggest that this has limited the development of good faith in WTO law.

<sup>1528</sup> The TBT Agreement contains a similar clause in its preamble, which states that the "technical regulations and standards [...] do not create unnecessary obstacles to trade."

“[The]... doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably.”<sup>1529</sup>

There is a need to control the application of Article XXI by means of a test of reasonableness because the subjective wording of the provision increases the risk of abuse. In fact, the danger that the right to protect national security could be abused has also been recognized by the United States Court of Appeal, which ruled in one case that “[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.”<sup>1530</sup> Some writers advocate a test of reasonableness in order to prevent member states abusing the provision.<sup>1531</sup> In this sense, therefore, the test of reasonableness is similar to the *abus de droit* doctrine insofar as it aims to prevent the unreasonable exercise of a right.<sup>1532</sup> The test does not refer to the substance of a measure but its application: accordingly, the standards applied by the *abus de droit* test will also be different from those contained in the substantive rules.<sup>1533</sup>

The major obstacle to subjecting measures under Article XXI to a test of reasonableness is the lack of an express textual basis in the provision.<sup>1534</sup> The Appellate Body in *India – Patents* stressed that the principles of interpretation embodied in Article 31 VCLT neither required nor condoned the imputation into a treaty of words that were not there or the importation into a treaty of concepts that were not intended. Moreover, the Panel was not to add to or diminish rights and obligations provided in the WTO Agreement.<sup>1535</sup> The imposition of a reasonableness test cannot be disguised as “gap-filling” either because there is no gap to fill: the wording and drafting history of Article XXI suggest that the drafters deliberately omitted a reference to the *abus de*

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<sup>1529</sup> Appellate Body, *US – Shrimp*, para. 158.

<sup>1530</sup> See *United States v. United States District Court for the Eastern District of Michigan et al. (Plamondon et al, Real Parties in Interest) Certiorari to the United States Court of Appeals for the Sixth Circuit No. 70 – 153*, Argued 24 February 1972, Decided 19 June, 1972.

<sup>1531</sup> Schloemann and Ohlhoff pp. 447 – 448; Akande and Williams, p. 382 n. 80. Finegan, pp. 14 – 15.

<sup>1532</sup> Although good faith review has been equated with reasonableness, commentators argue that this test is unsupported by the wording of Article XXI; Zeigler, p. 744; see also Report of the Appellate Body on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997 (adopted 16 January 1998), para. 45 (“[T]hese principles of interpretation neither require nor condone the imputation into a treaty of words that are not there, or the importation into a treaty of concepts that were not intended”).

<sup>1533</sup> Appellate Body, *United States – Gasoline*, p. 23

<sup>1534</sup> Cf. *id.*, pp. 16 – 17.

<sup>1535</sup> Appellate Body, *India – Patents*, para. 45.



*droit* doctrine.<sup>1536</sup> There are also other arguments against a test of reasonableness: the term is very broad<sup>1537</sup> and there is no jurisprudence of the WTO which deals with its precise meaning.<sup>1538</sup> Some writers also argue that, as a limited and conditional exception to the GATT obligations, Article XXI's justiciable terms will ensure that the measure is reasonable in any case.<sup>1539</sup>

On the other hand, a test of reasonableness could be justified by the requirement in Article 26 VCLT that states exercise their rights in good faith (i.e. good faith in application).<sup>1540</sup> The Appellate Body has also stated that the chapeau to Article XX is intended to prevent the abuse of exceptions.<sup>1541</sup> As an exception, Article XXI would have to be subject to a similar test otherwise the limitations and restrictions in its wording could easily be frustrated by the manner in which the measure was applied. The following statement of the Appellate Body made in respect of Article XX appears equally applicable to Article XXI:

*“To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.”*

The Panel in *US – Shrimp* considered this finding to be an application of the international law principle according to which international agreements must be applied in good faith, in light of

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<sup>1536</sup> The drafting history to Article XXI reveals that both the general and security exceptions were originally contained in one provision prefaced by the chapeau. The fact that the chapeau was deliberately excluded from the security exception could be interpreted as a deliberate decision not to subject Article XXI to a test of reasonableness “Good faith” as a tool of interpretation imposes a standard of “reasonableness” (although the actual standard to be applied has never been explained by the DSB). See Zeitler, p. 727.

<sup>1537</sup> Panel, *US – Section 301*, para. 7.64. The standard of review can be very high as in Article 17.6 of the Anti-Dumping Agreement, which states that “[I]n its assessment of the facts of the matter, the Panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.” By contrast, the GATT does not expressly stipulate the standard of the good faith review to be applied in either Article XX or Article XXI.

<sup>1538</sup> Appellate Body, *U.S. – Hot-Rolled Steel*, para. 101 (suggesting that measures which imposed “unreasonable extra burden” or entailed “unreasonable additional cost and trouble” would contravene the principle of good faith).

<sup>1539</sup> Cf. Akande and Williams, p. 392, (suggesting that the fact that Article XXI is not entirely self-judging means that there is no need to introduce a test of reasonableness).

<sup>1540</sup> Article 26 VCLT (*Pacta Sunt Servanda*) states “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>1541</sup> Appellate Body, *US – Gasoline*, p. 22.

the *pacta sunt servanda* principle.<sup>1542</sup> More specifically, failure to prevent the abusive application of Article XXI would also infringe Article XXIII of the GATT as well as the Panel's obligation under Article 3.2. DSU "to preserve the rights and obligations of the Parties under the covered agreements."<sup>1543</sup> It could also be argued that a ruling of the Panel which does not consider the reasonableness of the exercise of a right would not be achieving a satisfactory settlement pursuant to Article 3.4 DSU.

The obligation on member states to exercise their rights reasonably also reflects a general concern by the dispute settlement organs that member states should not avoid their obligations by formulating measures in a way which circumvents the provision, regardless of the express wording of the text. The Panel and Appellate Body have taken a similar approach towards the anti-discrimination provisions of Article I and Article XI GATT. In *Canada – Autos* and *Argentina – Hides and Leather* the Panel held that these provisions applied to *de jure* and *de facto* discrimination in order to prevent the frustration of the provision, despite the lack of express wording to this effect.<sup>1544</sup> The way that the Appellate Body interprets the chapeau also reflects this broad policy. For example, in *US – Gasoline*, it held that "[t]he fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."<sup>1545</sup> The major aim of the investigation would be similar to that underlying the chapeau of Article XX, namely to strike a balance between protecting the duties and rights of the parties concerned:

*"The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel*

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<sup>1542</sup> Panel, *US – Shrimp*, para. 7.41.

<sup>1543</sup> Appellate Body, *US – Shrimp*, p. 22 (the application of a measure would be unreasonable if it deliberately leads to diminishing the rights of other states "without due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned").

<sup>1544</sup> Panel, *Canada – Autos*, para. 10.38; Panel, *Argentina – Bovine Hides*, pp. 11.17.

<sup>1545</sup> Appellate Body, *US – Gasoline*, p. 25.

*out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”*<sup>1546</sup>

The exact form that the test of a reasonable exercise of a right could take is uncertain: after all, one of the main criticisms of “reasonableness” is its vagueness, which risks granting too much discretion to the Panel or Appellate Body.<sup>1547</sup> It has also proved difficult to establish general rules in relation to the chapeau of Article XX because a finding of discrimination depends on the unique circumstances of each case.<sup>1548</sup> Reliance on scientific evidence may provide the means of reaching an objective result but there is nevertheless a need to define the conceptual form that a reasonableness test should take. This could be achieved by limiting the *abus de droit* doctrine to specific situations, as Article XX does (i.e. discrimination and trade restriction), or by assessing the measure according to the standard of a “reasonable state.”<sup>1549</sup> These two methods are examined below.

A “reasonable state” test proposed by a leading authority on WTO law is an intriguing proposal because it appears to reflect the use of reasonableness in common law jurisdictions, i.e. as a means of judging the appropriateness of behaviour according to objective criteria.<sup>1550</sup> It could be argued that this test would be unacceptable in relation to Article XXI because it would require the Panel to place itself in the position of the member state and assess whether it was justified in taking the measures it did.<sup>1551</sup> Such an exercise would conflict with the subjective wording of

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<sup>1546</sup> Appellate Body, *US – Shrimp*, para. 158 – 159.

<sup>1547</sup> See Report of the Panel, *EC – Anti-Dumping Duties on Imports of Cotton-Type Bedlinens from India*, WT/DS141/R, 30 October 2000 (adopted 12 March 2001), para. 6.99 (“Thus, the use of actual data itself ensures that subjective judgments about the reasonability of the results do not affect the calculation of constructed normal value. We consider that no purpose would be served by testing the results obtained under the chapeau and subparagraphs (i) and (ii) against some arbitrary or subjective standard of reasonability”).

<sup>1548</sup> See Appellate Body, *US – Shrimp*, paras. 158 – 159 (“The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ”).

<sup>1549</sup> See BHALA, p. 562

<sup>1550</sup> See WILLIAM ROGERS ET AL, WINFIELD AND JOLOCWICZ ON TORT, 17<sup>th</sup> EDITION, LONDON 2002, pp. 64 – 65 at para. 3.5. The authors point out that the judge has to decide what this term means and that “it is inevitable that different judges may take variant views on the same question with respect to such an elastic term.”

<sup>1551</sup> Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575, at p. 1579, who points to “a very general tendency in the law to rely upon the standard of reasonableness as a criterion of right decision-making, of right action, and of fair interpersonal relationships within the law of property, the law of obligations, and family law.”

Article XXI (b)<sup>1552</sup> and could lead to complaints of judicial activism.<sup>1553</sup> Panels may be accused of “second guessing” the decision taking by member states or of applying seemingly objective standards through a subjective perspective (a criticism levelled at common law judges).<sup>1554</sup> The standards applied by this test would necessarily be multilateral in nature, with the “reasonable state” representing a universal best model for all 151 members of the WTO, whether least developed, developing or developed. It is difficult to reconcile this model with Article XXI which, as previously argued, specifically offers justification to measures protecting *national* security (i.e. unilateral measures).

Within the context of Article XX, the *abus de droit* doctrine assumes a very specific form, restricting the investigation to a far narrower range of subjects than it theoretically permits.<sup>1555</sup> During the Uruguay Round, the Members agreed on a text which deliberately limited the constellations of abuse to the arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The wording of the provision is also restrictive: for example, in *US – Shrimp*, the Appellate Body held that a finding of “arbitrary or unjustifiable discrimination” depended on the satisfaction of three requirements: 1) discrimination; 2) which is arbitrary or unjustifiable in character and 3) which must occur between countries where the same conditions prevail.<sup>1556</sup> It also pointed out that failure to comply with the requirements of the chapeau meant that the protection of the exception would not apply to the measure.<sup>1557</sup> Equally, however, it is possible that some cases of abuse will not fall within the scope of the provision even if these three conditions are met.<sup>1558</sup> For example, the Appellate

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<sup>1552</sup> E.g. Panel, *U.S. – Gasoline*, para. 6.26 the Panel did not accept the reasons put forward by the United States imported gasoline was relegated to the more exacting statutory baseline requirement because of these difficulties of verification and enforcement. It held that there was not any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States. See discussion of the Panel’s decision in Appellate Body, *U.S. – Gasoline*, pp. 25 – 27.

<sup>1553</sup> Ragosta et al, pp. 711 – 713.

<sup>1554</sup> Attempts to find objective elements in Article XXI cannot disguise the fact that the wording does not permit any conclusive interpretation: see Piczak, pp. 319 – 320 (“[E]ven given a panel member that may not shrink from the task of defining the term, ultimately he or she would be making a subjective assessment of the term”).

<sup>1555</sup> See Panizzon, p. 31, who identifies four ways in which a state can abuse its exercise of a right.

<sup>1556</sup> Appellate Body, *US – Shrimp*, para. 150; Appellate Body, *US – Gasoline*, p. 25 (the three terms were to be “read side-by-side” and “they impart meaning to one another”).

<sup>1557</sup> Appellate Body, *US – Shrimp*, para. 157.

<sup>1558</sup> For example, if the restrictive effects of the measure are limited to small traders of a foreign country. Such traders are unlikely to have the political weight to persuade their government to initiate dispute settlement proceedings at the WTO.

Body held that discrimination has to be foreseeable and not merely an inadvertent or unavoidable consequence of the application of the measure.<sup>1559</sup>

Of these two possible methods of carrying out a reasonableness test, the second is to be preferred because it respects the fact that Article XXI is designed to justify unilateral measures. Although a general test of reasonableness in relation to Article XXI would encompass a broader range of abuses than those covered by the chapeau of Article XX, the following investigation takes these two forms of abuse as its starting point. Existing jurisprudence on Article XX has examined the nature of “arbitrary and unjustifiable discrimination” and “disguised restrictions on international trade” in detail.

## **2.6. Intermediate Result**

### **1. Article XXI (a) cannot be interpreted wholly subjectively**

Member states must satisfy the objective elements of Article XXI (a) regarding national security and disclosure. Otherwise, member states could obstruct the investigation by refusing to submit the necessary information (p. 260).

Moreover, Articles 3.10 and 23 of the DSU requires states to co-operate with the Panel; failure to do so could lead it to draw negative inferences (p. 260).

### **2. Terms such as “war” and “emergency in international relations” must be interpreted in accordance with international law**

This is supported by the WTO agreements, jurisprudence and commentators. In addition, the Charter of the United Nations expressly states that its obligations are to prevail over those of any other agreement (pp. 263 – 264).

The evolutionary interpretation should not be applied because the United Nations did not intend the definition of war to be given a broad interpretation (p. 265).

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<sup>1559</sup> Appellate Body, *US – Gasoline*, pp. 28.

The term “emergency in international relations” is ambiguous and can only be properly defined with reference to resolutions of the United Nations (pp. 265 – 266).

The meaning of fissionable materials is well-documented in international law and can serve to limit the application of Article XXI (pp. 266 – 267). The term “relating to” must be narrowly interpreted, otherwise the scope of the provision would be too wide (pp. 267 – 268).

**3. The ordinary meaning of “essential” and “necessary” suggests a narrow scope of application**

This is supported by the fact that “essential” is clearly more restrictive than other adjectives used to describe the relationship between the state and the particular interest to be protected (pp. 268 – 269).

According to *Korea – Beef*, the term “necessary” – within the context of the general exceptions – is used in a legal sense and accordingly has a limited scope of application (p. 278)

**4. The extraterritorial application of laws may be acceptable provided there is a sufficient nexus between the object of regulation and the state issuing the regulation.**

This is supported by the ruling of the Panel in *US – Shrimp* (p. 272).

The legality of extraterritoriality under international law is not a settled issue (pp. 270 – 271).

**5. There must be a necessity test along the lines of the that contained in Article XX, taking into account the degree of deference indicated by the wording of Article XXI (p. 274)**

Environmental and national security interests are similar and also interrelated. Also, there is nothing in the *travaux préparatoires* indicates that “necessary” in Article XXI GATT imposes a lower standard than that in Article XX (p. 275).

According to *Korea – Beef*, the *effet utile* principle dictates that states should not be able to choose the standard most convenient to them (p. 275).

### **3. Examination**

This section subjects the Container Security Initiative to the necessity test as described above. The first stage examines whether the measure falls within the scope of Article XXI and forms the precondition to the necessity test. The next stage examines whether the measure is necessary using the test employed in Article XX as a basis. The final stage of the test examines whether the application of the measure amounts to an abuse of the right to invoke the security exception.

#### **3.1. Does the CSI Fall Within the Scope of Article XXI (b) (i)?**

The United States must first prove that it has introduced the CSI under the circumstances listed in Article XXI (b) (i) – (iii) GATT.<sup>1560</sup> As stated above, this question is to be judged according to objective criteria. The interpretation of many of the terms contained in this provision has been regulated by international instruments, particularly in resolutions issued by the Security Council of the United Nations.<sup>1561</sup> In general, there are two alternatives open to the United States: it could claim that the CSI relates to “fissionable materials” (Article XXI (b) (i) or that it has been taken “at a time of war or other emergency in international relations” (Article XXI (b) (ii)).

##### **3.1.1. Does the CSI Relate to Fissionable Materials?**

According to the CBP, “CSI addresses the threat to border security and global trade that is posed by potential terrorist use of a maritime container to deliver a weapon.”<sup>1562</sup> Therefore, the United States could seek to justify the CSI on the basis of Article XXI (b) (i), arguing that the primary aim of the CSI to detect WMD which use fissionable materials.<sup>1563</sup>

The main purpose of the Container Security Initiative is to identify the presence of materials in containers which could be used to construct Weapons of Mass Destruction. The detection equipment used at CSI harbours primarily aims to detect and prevent WMD (including nuclear

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<sup>1560</sup> See Finnegan, p. 15.

<sup>1561</sup> *Id.*

<sup>1562</sup> CSI FACT SHEET, p. 1.

<sup>1563</sup> By contrast, there are no fixed or universally accepted criteria for existence of a war or other emergency in international relations.

weapons) from being smuggled into the United States. This was the justification for introducing the CSI given by the statement of the former U.S. Commissioner for Customs in 2002:

*“Of ever-greater concern are the possibilities that international terrorists such as Al Qaeda could smuggle a crude nuclear device in one of the more than fifty thousand containers that arrive in the U.S. each day. One can only imagine the devastation of a small nuclear explosion at one of our seaports.”*<sup>1564</sup>

Therefore, the United States could argue that the CSI falls within the scope of Article XXI(b)(i), by reference to its aim of preventing the proliferation of WMD generally.

On the other hand, the complainant could argue that the CSI does not fall within the scope of Article XXI (b) (i) because it does not primarily relate to “fissionable materials.” The main aim of the CSI does not relate to the non-proliferation of nuclear weapons *per se* which, in any case, is a task more suited to other government initiatives such as the PSI Department of Energy’s Megaport Initiative.<sup>1565</sup> Rather, the CSI is designed to prevent the detonation of a “dirty bomb” at a US seaport. This term refers to a radiological bomb constructed e.g. with Cesium-137<sup>1566</sup> and as such does not constitute a “material which can be fissioned” for the purposes of Article XXI (b) (i) being a “nuclear fragment of heavy-element fission” (i.e. a by-product of the fission process).<sup>1567</sup> An “evolutionary interpretation” could not be used to expand the meaning of the term because this would risk contradicting the scientific definition of this term in international treaties. The complainant could also argue that even if the CSI was capable of detecting fissionable materials in containers it would still not fall within the scope of Article XXI because it is not “primarily aimed at” detecting *fissionable* materials in containers.<sup>1568</sup>

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<sup>1564</sup> U.S. Customs Commissioner, Speech of 17 January 2002.

<sup>1565</sup> GAO-05-375, p. 6.

<sup>1566</sup> See Opening Statement of Senator Coleman, Hearing of 28 March 2006, S. Hrg. 109–548, pp. 1 – 2. According to the US Environmental Agency the largest single source of Cesium-137 in the environment came from fallout from atmospheric nuclear weapons tests in the 1950s and 1960s, which dispersed and deposited Cesium-137 world-wide: see < <http://www.epa.gov/radiation/radionuclides/cesium.htm> >.

<sup>1567</sup> See < [http://www.atomicarchive.com/Docs/Effects/wenw\\_chp2.shtml](http://www.atomicarchive.com/Docs/Effects/wenw_chp2.shtml) >; see also OECD REPORT 2005, which makes a clear distinction between nuclear and radiological weapons.

<sup>1568</sup> Although the CSI STRATEGIC PLAN on p. 28 does refer to the detection of radiological and nuclear material, it states on p. 15 that the primary strategic goal is to “protect US borders against terrorists and terrorist weapons.”



### 3.1.2. Does the War Against Terrorism Amount to a State of War?

The United States could argue that, since 2001, it has waged a war on terrorism and that maritime transportation security represents a major component of this offensive. Therefore, the CSI is justified by Article XXI (b) (iii) because it is a measure taken “in a time of war.”

A declaration of war against the United States was made by Osama bin Laden and his followers on 23 August 1996.<sup>1569</sup> This was followed by a fatwa issued by the leader of Al Qaeda in which he stated that that “[t]o kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible.”<sup>1570</sup> 9/11 clearly showed that the Al Qaeda terrorist network had the power to launch an attack which passed the threshold test of the ICJ in the *Nicaragua v. United States* insofar as the sheer scale of an attack amounted to more than a mere “isolated border incident”. Indeed, in terms of destruction and the death toll, 9/11 was worse than the attack on Pearl Harbour.<sup>1571</sup> Al Qaeda’s attack on the WTC in New York on 11 September 2001 amounted to an “armed attack” according to Article 51 of the UN Charter and, under this provision, the United States is entitled to take measures to protect itself.

The United States Government has officially and consistently designated the terrorist atrocity of 9/11 as an “act of war” and has taken defensive action by declaring a “war against terrorism.”<sup>1572</sup> Since 9/11 the United States has fought a war against “terrorists of global reach” which it has described as “a global enterprise of uncertain duration.”<sup>1573</sup> Declaring severe acts of terrorism as “acts of war” and taking military action against terrorists reflected the precedent set by previous

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<sup>1569</sup> Osama bin Laden, *Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Expel the Infidels from the Arab Peninsula): A Message From Usama Bin Muhammad Bin In Laden To His Muslim Brethren All Over The World Generally And In The Arab Peninsula Specifically* (August 1996); see also REPORT OF THE 9/11 COMMISSION, pp. 47 – 48.

<sup>1570</sup> Osama bin Laden et al, *Jihad against Jews and Crusaders*, World Islamic Front, 23 February 1998.

<sup>1571</sup> Sean D. Murphy, *Terrorism and the Concept “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L. L. J. 41, p. 47 (“[T]o find U.S. deaths on the same scale in a single day requires going back to the U.S. Civil War”).

<sup>1572</sup> See NATIONAL STRATEGY FOR COMBATING TERRORISM, p. 1: “The terrorist attacks of September 11, 2001 [...] were acts of war against the United States of America and its allies [...]” See also 9-11 COMMISSION REPORT, pp. 47ff. and 59ff. See also President George W. Bush, *Address to a Joint Session of Congress and the American People* Office of the Press Secretary, 20 September 2001 (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated”).

<sup>1573</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Preamble by George Bush, p. 3.

administrations.<sup>1574</sup> Moreover, the President was supported by the Congress which issued the “Authorization for Use of Military Force”<sup>1575</sup> against “those responsible” for the attacks launched against the United States in accordance with Section 8(a)(1) of the War Powers Resolution.<sup>1576</sup> At international level, the reaction of the United States to 9/11 was supported by United Nations Security Council Resolutions and other nations.<sup>1577</sup> Although the United States is not using the term “war” in a conventional sense there is growing recognition amongst commentators that the law on war should be re-evaluated following 9/11 in light of the threat presented by global terrorism. Nowadays, the static and quantifiable threat of nuclear annihilation (i.e. MAD) has been replaced by “shadowy networks of individuals.”<sup>1578</sup> The response to this environment has been the so-called “Bush Doctrine” of pre-emptive self-defence, which is articulated in the National Security Strategy of the United States as follows:

*“As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.[...] The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”*<sup>1579</sup>

Categorizing the “war against terrorism” as a state of war pursuant to Article XXI GATT would also correspond to the evolutionary interpretation of treaty provisions which demands that terms contained in the WTO agreements reflect current conditions (in this case the threats to global security and economic stability in the post-Cold War security situation).<sup>1580</sup> Moreover, such an

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<sup>1574</sup> Ronald Reagan also described terrorist attacks as an “act of war” in 1985. See REPORT OF THE 9/11 COMMISSION, p. 99.

<sup>1575</sup> S.J. Res. 23, Section 2 (b) (1), 107<sup>th</sup> Congress, 1<sup>st</sup> Session, 3 January 2001 (“Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States”).

<sup>1576</sup> War Powers Resolution of 1973, Pub. L. 93 – 148, 93<sup>rd</sup> Congress, H.J. Res. 452, 7 November 1973 (USC Title 50, Chapter 33, §§1541 et seq.).

<sup>1577</sup> See Murphy, p. 48.

<sup>1578</sup> *Supra n.* 1178.

<sup>1579</sup> NATIONAL SECURITY STRATEGY, p. 15.

<sup>1580</sup> See Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT’L L. 677, pp. 681 – 685.

interpretation is not opposed by the wording of Article 51 of the UN Charter which is broadly worded and simply provides that states have a right to defend themselves when an armed attack occurs.<sup>1581</sup>

The complainant could argue that while certain aspects of these arguments may appear persuasive, especially following 9/11, they are to be rejected taking into account applicable international law. The evolutionary interpretation of Article XXI established by the Appellate Body in *United States – Shrimp/Turtle* requires the dispute settlement bodies to ascertain the contemporary meaning of treaty provisions by referring to the relevant international conventions.<sup>1582</sup> Its purpose is to ensure that the provisions of the WTO agreements *reflect* the contemporary usage of terms according to the applicable law rather than *shape* their possible or prospective interpretation. This is supported by customary rules of international law that the dispute settlement bodies are to apply when clarifying the meaning of the agreement. Article 31 (2) (c) VCLT states that the agreements also comprise of “any relevant rules of international law *applicable* in the relations between the parties.” In other words, WTO law cannot adopt an interpretation for which there is no authority in international law. As explained above,<sup>1583</sup> the law on war is determined by Articles 2 (4) and 51 of the UN Charter. The latter provision does not refer to state actors or non-state actors. Nevertheless, it has been the practice of the International Court of Justice to interpret the provision narrowly and limit its scope to state actors.<sup>1584</sup> An act by a non-state actor will only be considered an “armed attack” if it can be attributed to a state in accordance with control tests laid down by the ICJ in the *Nicaragua* and *Tadic* decisions.<sup>1585</sup> Despite the gravity of the attacks carried out by the 9/11 terrorists, the absence of a state connection means that they do not constitute “armed attacks” pursuant to Article 51 of the UN

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<sup>1581</sup> Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT’L L. 1, p. 35.

<sup>1582</sup> See Appellate Body, *US – Shrimp*, para. 130 stating that “it is pertinent to note” such agreements. However, the following paragraphs its interpretation is determined by UNCLOS and CITES which suggests that international agreements must form the basis for the evolutionary interpretation. Only by referring to such agreement could the AB ascertain “contemporary concerns of the community of nations about the protection and conservation of the environment”. Reference to international instruments is even more important when dealing with a term as crucial to peace and stability as “war.”

<sup>1583</sup> *Supra* pp. 262 – 265.

<sup>1584</sup> Mary Ellen O’Connell, *When is a War not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’L & COMP. L. 535, pp. 537 and 539 (“[I]t is time to restate and strengthen a narrow definition of war”).

<sup>1585</sup> See Jonathon Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL INSIGHT ,24 August 2006, Vol. 10 Issue 21.

Charter.<sup>1586</sup> This is the applicable law (in the sense of Article 51 VCLT), despite dissenting views in the ICJ judgements and literature.<sup>1587</sup> Therefore, according to the evolutionary interpretation, the war against terrorism does not constitute a “war” pursuant to Article XXI (b) (iii).

### 3.1.3. Does Maritime Terrorism Amount to an Emergency in International Relations?

Alternatively, the United States could deem the maritime terrorist threat to be an emergency in international relations. The term “other emergency in international relations” may be more ambiguous than “war” but it is also to be interpreted according to objective criteria. The context of the term makes clear that the crisis is similar or related to a situation of war.<sup>1588</sup> In addition, the event must precipitate an emergency in interstate relations.

Although terrorist attacks have traditionally constituted small-scale, isolated incidents they have increased in intensity and range since the 1990s. Transportation has played a major role in such attacks: apart from 9/11, examples include the destruction of Pan Am Flight 103 (“Lockerbie bombing”), the bombings of underground railways in Madrid and London as well as bus bombings in Northern Israel. All these incidents have provoked emergencies in international relations either relating to cross-border law enforcement proceedings or military reprisals.<sup>1589</sup> 9/11 itself also led to an emergency in international relations in terms of law enforcement and military action against those held responsible in Afghanistan and Iraq. In 2006 George W. Bush extended the national emergency with regard to the proliferation of weapons of mass destruction which had been announced by President George Bush in 1994:

*“Because the proliferation of weapons of mass destruction and the means of delivering them continues to pose an unusual and extraordinary threat to the national security, foreign policy,*

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<sup>1586</sup> Jörg Kammerhofer, *The Armed Activities Case and Non-state Actors in Self-Defence Law*, LEIDEN JOURNAL OF INTERNATIONAL LAW 20 (2007), 89 – 113, pp. 106 – 112.

<sup>1587</sup> See e.g. Markus Krajewski, *Preventive Use of Force and Military Actions against Non-state Actors: Revisiting the Right of Self-Defence in Insecure Times*, 5 BALTIC YEARBOOK OF INTERNATIONAL LAW, 2005, pp. 19 ff.

<sup>1588</sup> See Hahn, p. 558, who points out that the term “emergency” “is not used as a stand-alone term but as an annex to the term war.”

<sup>1589</sup> The Lockerbie Bombing led to economic sanctions being imposed on Libya (see Security Council Resolution 883 (1993)); bus bombings in Israel have led to military action by Israeli forces (see e.g. Stephan Farrell et al, *Israel urged to show restraint after bomb*, TIMES ONLINE, 6 March 2003).

*and economy of the United States, I have determined the national emergency previously declared must continue in effect beyond November 14, 2006”.*<sup>1590</sup>

Terrorist attacks on the international supply chain could also trigger an emergency in international relations. Oceans no longer act as barriers but connect nations by offering highways for commerce.<sup>1591</sup> With specific regard to the CSI, international container traffic has been described as “the lubricant for the world’s economy”<sup>1592</sup> and the economic consequences of an MSI on the scale of 9/11 is likely to prove intolerable for the United States and its trade partners.<sup>1593</sup> The United States has produced substantial and detailed information explaining how a ‘maritime security incident’ could trigger an international economic crisis which could plausibly be described as an emergency in international relations.<sup>1594</sup> As the following statement by the U.S. government makes clear, the maritime domain is of unparalleled strategy importance and offers a “broad array of potential targets”:<sup>1595</sup>

*“Maritime transportation [...] is the primary mechanism [...] for moving goods and commodities around the world quickly and cheaply. The ships that ply the Maritime Domain are the primary mode of transportation for world trade, carrying over 80 % of world trade by volume, making the security of the Maritime Domain critically important to the prosperity and liberty of billions of people [...].”*<sup>1596</sup>

The importance of maritime transportation to the international community and its vulnerability to acts of terrorism is also recognized by international organizations such as the World Shipping Organization, the International Maritime Organization and the European Union.<sup>1597</sup> The fact that

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<sup>1590</sup> Communication from the President of the United States transmitting notification that the national emergency declared with respect to the proliferation of weapons of mass destruction and their delivery systems declared by Executive Order 12938 on 14 November 1994, as amended, is to continue in effect beyond 14 November 2006, pursuant to 50 u.s.c. 1622(d), 9 November 2006, 105<sup>th</sup> Congress, 1<sup>st</sup> Session, (House Document 109 – 149).

<sup>1591</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 2.

<sup>1592</sup> RAND EUROPE REPORT, p.1; see also Section 101, Findings (2), MTSA 2002.

<sup>1593</sup> Loy and Ross, p. 3.

<sup>1594</sup> See e.g. PORT SECURITY WARGAME; Binnendijk et al, p. 3.

<sup>1595</sup> NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS, p. 2.

<sup>1596</sup> MARITIME COMMERCE SECURITY PLAN, p. 2.

<sup>1597</sup> WSC, Comments 9 September 2002 at p. 2 (referring to the fact that industry has recognized the importance of securing America’s trade and world trade from the threat of terrorist attack); European Commission, Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and

other countries have also started to take action to improve maritime security also proves that this issue is of global importance.<sup>1598</sup> Considering that two-third's of the world's people live within 240 miles of a seacoast, no population is immune from the threat of maritime terrorism.<sup>1599</sup>

On the other hand, the complainant could argue that the threat presented by terrorists to maritime transportation does not amount to an emergency in international relations. The expression “in time of” proves that Article XXI (b) (iii) refers to an existing rather than a potential situation.<sup>1600</sup> The fear that terrorists will use a container to deliver and detonate a dirty bomb is based on assumption and not scientific evidence.<sup>1601</sup> Reference to available evidence suggests that the assumed risk of container terrorism does not amount to an emergency in international relations. Maritime terrorists are reported to have targeted a range of vessels, including cruisers, freight ships, military vessels and ferries since 1992 but these attacks have not used containers.<sup>1602</sup> Incidents of maritime terrorism generally tend to be irregular small-scale attacks by a number of diverse terrorist groups<sup>1603</sup> and those which have occurred since 9/11 do not indicate any increase in scale or sophistication.<sup>1604</sup> This traditionally low threat level is reflected by the fact that the International Maritime Organization only introduced new legal measures to prevent maritime

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the Committee of the Regions on Enhancing Maritime Transportation Security, Proposal for a Regulation of the European Parliament and of the Council on Enhancing Ship and Port Facility, COM(2003) 229 final.

<sup>1598</sup> THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 3.

<sup>1599</sup> *Id.*, pp. 2 – 3.

<sup>1600</sup> This does not necessarily contradict the assertion that “it considers” allows pre-emptive measures. However, pre-emptive measures can only be justified if they are taken at the time of war or other emergency in international relations.

<sup>1601</sup> See OECD REPORT, pp. 36-37 (“[...] many government agencies in charge of overseeing the different parts of the container transport chain have not undertaken a thorough and comprehensive risk assessment according to internationally accepted risk management standards.”) and 40.

<sup>1602</sup> Al Qaeda is also reported to own and operate 15 container vessels which could be used to commit or support a terrorist attack: see Aaron Lukas, *Protection without Protectionism, Reconciling Trade and Homeland Security*, Trade Policy Analysis No. 27, 8 April 2004, p. 2.

<sup>1603</sup> For an overview of terrorist attacks prior and subsequent to 9/11, see Bryant, pp. 3-10; see also THE NATIONAL MARITIME SECURITY STRATEGY, p. 4.

<sup>1604</sup> For example, the most recent maritime terrorist plot was by a British Islamic terrorist cell which planned to attack the Mayport naval base in Jacksonville Florida. This too was an unsophisticated plot using conventional weapons and explosives. According to a newspaper report, messages exchanged by the plotters “referred to using six Chevrolet GT vehicles and three fishing boats and blowing up petrol tanks with rocket propelled grenades.” See John Steele, *45 Muslim Doctors Planned US Terror Raids*, DAILY TELEGRAPH ONLINE, 5 July 2007. See also ASSESSMENT OF U.S. EFFORTS, p. 5 recognizing that an attack using conventional explosives continues to be the most probable scenario.

terrorism following 9/11.<sup>1605</sup> There is also uncertainty as to the significance of containers in facilitating maritime terrorism. For example, there has not been any published judicial decision with regard to terrorism and the carriage of goods by sea<sup>1606</sup> and since its introduction in 2002, the CSI has not resulted in any discovery of WMD.<sup>1607</sup> It is also significant that container security does not feature in the measures taken by the IMO and WCO. The ISPS Code and related amendments to the SOLAS Convention introduced by the International Maritime Organization do not contain any provisions directly dealing with container security.<sup>1608</sup> This is also the case with the WCO's Framework of Standards which concentrates on security at the premises of importers and co-operation between customs authorities and does not refer to container security directly.

Overall, despite a number of attacks on maritime transportation assets following 9/11 (e.g. the attack on the Limburg by a group affiliated with Al Qaeda), terrorist attacks on maritime transportation facilities remain sporadic and primitive. There is also no evidence that terrorists have used or are likely to use containers in carrying out their attacks. The risk of terrorist attacks on maritime transportation is largely based on an *a priori* assumption<sup>1609</sup> and cannot be objectively classified as constituting an "emergency in international relations."

#### **3.1.4. Is there a Threat to U.S. Maritime Container Transport?**

The first stage of this test also requires the Panel to establish the threat to the essential security interests of the United States *within the context of maritime container transport*.<sup>1610</sup> In other words, the risk relates specifically to the threat of *container* terrorism in the United States rather than the threat of terrorism at internationally. Although the Panel should adopt a deferential

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<sup>1605</sup> Prior to 9/11, the IMO preferred to deal with such acts under the existing laws combatting piracy: see Bryant, p. 5 ("Until the horrific terrorist attacks of September 11, 2001, the IMO turned its attention to the more immediate problem of piracy and armed robbery at sea").

<sup>1606</sup> Clyne, p. 1187.

<sup>1607</sup> ASSESSMENT OF U.S. EFFORTS, p. 12.

<sup>1608</sup> Bryant, pp. 10 – 11.

<sup>1609</sup> Binnendijk et al, p. 2.

<sup>1610</sup> The CSI specifically targets containers and not, e.g. bulk shipments or the importation of other cargo which could be used to transport WMD, such as cars: see S. Hrg. 107 – 224, p. 88 ("Yet if a container can be used to transport a WMD, how about the 610,000 automobiles, trucks, buses, subways, cars, and huge crates that pass through our port every year?")

standard of review,<sup>1611</sup> the member state must nevertheless base its arguments on scientifically-based threat assessment.<sup>1612</sup> According to the GAO,

*“A threat analysis, the first step in determining risk, identifies and evaluates each threat on the basis of various factors, such as its capability and intent to attack an asset, the likelihood of a successful attack, and its lethality.”*<sup>1613</sup>

The United States could base its justification by drawing attention to the fact that it is not possible to define or quantify the terrorist threat precisely: the United States is facing “myriad non-traditional, asymmetric, and unpredictable threats from [...] terrorist organizations.”<sup>1614</sup> Threats to maritime interests are difficult to identify owing to the lack of transparency in the maritime domain.<sup>1615</sup> In addition, information on their activities is highly classified. Notwithstanding such inherent certainty, a leading maritime security expert has proved in detail that it would be technically possible for terrorists to ship a radiological bomb to the United States and detonate it at a seaport by remote control.<sup>1616</sup> Considering the catastrophic devastation that would result from such an attack, the United States government could argue that it is justified in introducing the CSI to prevent such an attack on the basis of its inherent right to protect its national security interests, as provided for in the GATT. Moreover, the actual threat of terrorism is compounded by the almost complete absence of counter-terrorist measures in the maritime domain prior to 9/11. Taking into account the evidence for and against a terrorist threat to maritime containers, an expert report for Congress concluded that whilst maritime terrorist attacks are difficult to execute,

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<sup>1611</sup> Akande and Williams, pp. 400 – 402.

<sup>1612</sup> OECD REPORT 2005, pp. 36 – 44.

<sup>1613</sup> GAO REPORT, COMBATING TERRORISM: THREAT AND RISK ASSESSMENTS CAN HELP PRIORITIZE AND TARGET PROGRAM INVESTMENTS, April 1998 (GAO/NSIAD – 98 – 74), p.3. See also p. 4 (“If properly applied, threat and risk assessments can provide an analytically sound basis for building programmatic responses to various identified threats, including terrorism.”); ECSA ANNUAL REPORT 2003 – 2004, p.18.

<sup>1614</sup> INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 2. Annex A of the strategy summarizes the major threats to the maritime domain.

<sup>1615</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 2.

<sup>1616</sup> FLYNN, pp. 16 – 29. This scenario was used to justify the introduction of the CSI: see U.S. Customs Commissioner, Speech of January 17 2002. It has also been routinely cited in all the hearings on CSI and is related to the wider aim of preventing the proliferation of nuclear weapons. See e.g. S. Hrg. 109 – 186 (statement of Senator Norm Coleman), p. 2. There is a potential overlap between the CSI and the NNSA’s Megaport Initiative in this respect, although the two agencies collaborate in achieving proliferation prevention.



“they nevertheless remain a significant possibility and warrant continued policy attention.”<sup>1617</sup> It is true to say that, nowadays, this view is shared by international maritime organizations and the maritime industry generally.

The Framework of Standards opens with the statement, “On 23 June 2005 safer world trade became a reality when [...] the 166 Members of the WCO [...] adopted the Framework of Standards [...]”, thereby implying that world trade is nowadays a potentially unsafe activity.<sup>1618</sup> It is true that container shipping is not an industry designed for security: its aim is to move goods through the international market place in the most expeditious manner.<sup>1619</sup> Once a container has been loaded and sealed it is impossible for customs authorities to verify its contents without carrying out a physical inspection.<sup>1620</sup> Prior to the 24 Hour Rule, the only source of information on the contents of a container was the cargo manifest which provided a minimal description of the cargo such as “said to contain” or acronyms such as “F.A.K.” (freight of all kinds). Criminals used the anonymity of containers to smuggle illegal goods such as narcotics, counterfeit goods and pornographic materials into a country and illegal immigrants used containers as a means of transportation to gain entry into the United States.<sup>1621</sup> Containers are still secured by little more than a “fifty cent lead seal”<sup>1622</sup> and criminals have become expert at opening containers unnoticed, in order to steal the contents or insert illegal merchandise.<sup>1623</sup> It would be easy for terrorists to exploit this lack of security in order to smuggle WMD into the United States.<sup>1624</sup>

Although the scale of crime at seaports became a source of concern for U.S. Customs long before 2001, the rise in container shipments soon outstripped their available resources. It has been claimed that 21,000 containers enter United States’ seaports every day but prior to 9/11, only 3.7

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<sup>1617</sup> PAUL W. PARFOMAK AND JOHN FRITTELLI, CRS REPORT FOR CONGRESS, MARITIME SECURITY: POTENTIAL TERRORIST ATTACKS AND PROTECTION PRIORITIES, 9 January 2007, p. 24.

<sup>1618</sup> See Statement of Michael Danet in WCO, Framework of Standards; FLYNN p. 13 (“A core obligation is to provide for the security and safety of its people. My concern has been that the imperative of openness has been trumping the public sector’s means to meet that responsibility”). Cf. THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 2 (“The openness that makes the maritime domain so important to international commerce also represents a great vulnerability”).

<sup>1619</sup> Binnendijk et al. p. 2.

<sup>1620</sup> Loy and Ross, p.3.

<sup>1621</sup> OECD REPORT 2003, p. 25 at para. 26.

<sup>1622</sup> S. Hrg. 108 – 55, p. 25.

<sup>1623</sup> INTERAGENCY REPORT, 2000, pp. 29 ff.

<sup>1624</sup> Section 101 (12) (A) and (14) MTSA 2002. For details on how terrorists could exploit the breaches in security see Flynn pp. 16 – 28.

percent of those container were inspected physically.<sup>1625</sup> In 1992, it was reported that U.S. Customs “could not adequately ensure that it was meeting its responsibilities to combat unfair trade practices or protect the American public from unsafe goods.”<sup>1626</sup> Two reports in 1999 revealed that crime was a continuing problem at seaports.<sup>1627</sup> For example, the numbers of stakeholders in the supply chain, each employing numerous workers at seaports, made it difficult to identify those involved with seaport crime and stamp out corruption.<sup>1628</sup> The Interagency Commission of 1999 reported that serious crime at seaports was probably more extensive than available evidence suggested.<sup>1629</sup> Regulatory intervention to ensure standards of security was therefore required because “industry, mostly for financial reasons has clearly failed to ensure satisfactory levels of ship safety and environmental protection by itself without government coercion.”<sup>1630</sup>

The United States could also present evidence supporting the existence of a risk to maritime container cargo in the form of a detailed plan explaining how a single terrorist could acquire the materials for a radiological bomb and send it to terrorist cells in Europe and United States for construction.<sup>1631</sup> Experts have confirmed that it is technically feasible to load a dirty bomb in a container and detonate it by remote control.<sup>1632</sup> The trafficking in WMD or their components is also a risk recognized by numerous international initiatives and which the CSI complements.<sup>1633</sup>

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<sup>1625</sup> S. Hrg. 108-55, p. 45.

<sup>1626</sup> GAO REPORT, MANAGING THE CUSTOMS SERVICE (GAO/HR-93-114), December 1992, p. 6.

<sup>1627</sup> U.S. Department of Transportation, AN ASSESSMENT OF THE U.S. MARITIME TRANSPORTATION SYSTEM: A REPORT TO CONGRESS, SEPTEMBER 1999 and the INTERAGENCY REPORT 2000.

<sup>1628</sup> See also S. Hrg 109 – 877 (Testimony of James P. Hoffa), p. 44.

<sup>1629</sup> INTERAGENCY REPORT 2000, Executive Summary, iii; Even today, crime is still a large-scale problem in the maritime transportation industry, see JOHN F. FRITTELLI, PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS, UPDATED 27 MAY 2005, CRS REPORT FOR CONGRESS, (RL31733), pp. 8 – 9.

<sup>1630</sup> PARAMESWARAN, p. 51.

<sup>1631</sup> Concerning maritime vulnerability see FLYNN, pp 81 – 110; see also S. Hg. 109 – 548 (testimony of Stephen E. Flynn), pp. 17 – 18. Expert opinion based on scientific evidence will be taken into account by the Panel. However, there are also other opinions on the threat. See e.g. *Is It Time To Get Off the Security Bandwagon?* LLOYD’S LIST, WLNR 7367746, 20 July 2004 (quoting Wolfgang Elsner, head of the European Commission’s intermodal security unit as stating “Our representatives in government are legislating in an attempt to protect us from the unpredictable.” According to the report “The Antwerp consensus seemed to be that the transport chain and Europe’s coastline was impossible to defend”).

<sup>1632</sup> Cf. Binnendijk, p. 3 (“Using simple mechanical triggering devices [...] a weapon-carrying container may be readily transformed into a precision-guided munition”).

<sup>1633</sup> See e.g. Treaty on the Non-Proliferation of Nuclear Weapons, which entered into force in 1970; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, which entered into force in 1997 and aims to eliminate this category of WMD; the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and

The United States could also argue that terrorists have the motive to launch an attack on an American seaport owing to their crucial economic importance. This was illustrated in 2002 when a leading consultancy firm in the United States simulated a “war game” in co-operation with over eighty leading stakeholders at U.S. seaports and thereby calculated the catastrophic damage that would result from the detonation of radiological device at a seaport.<sup>1634</sup> These findings were confirmed by a serious strike by dock workers at West Coast ports in 2002. Finally, a widely-publicized newspaper report of a suspected Egyptian Al Qaeda operative found hiding in container at a small Italian harbour<sup>1635</sup> confirmed CBP’s suspicions that terrorists were using containers to carry out a future attack on U.S. seaports.

On the other hand, the complainant could argue that this evidence amounts to nothing more than circumstantial evidence.<sup>1636</sup> There is no evidence that terrorists have used containers to carry out their attacks and, in any case, the difficulties in constructing a WMD together with the necessary detonation device make such an attack technically unfeasible.<sup>1637</sup> Moreover, the possible effects of such a detonation are irrelevant in determining the existence of a threat because they do not refer to the capability of terrorists to smuggle a WMD into the United States by means of containers primed for detonation on arrival.<sup>1638</sup> Prior to 9/11, the Congressional Research Service stated:

*“Many believe that while terrorist WMD attacks are possible, they are by no means inevitable. While some experts believe that a terrorist large-scale WMD attack is a low – probability, high-*

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on Their Destruction, which entered into force in 1975. See also S/RES/1540, whereby the Security Council affirmed that the “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.” In particular, the Security Council obliges all states (under its Chapter VII powers) to “adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.”

<sup>1634</sup> PORT SECURITY WARGAME, pp. 1 – 2.

<sup>1635</sup> OECD REPORT July 2003, p. 8, para. 23. For an overview of the available evidence see ASSESSMENT OF U.S. EFFORTS, pp. 3 – 5.

<sup>1636</sup> An overview of the available evidence is provided in ASSESSMENT OF U.S. EFFORTS, *id.*

<sup>1637</sup> See OECD REPORT 2005, p. 40, Box 3.1.

<sup>1638</sup> See Remarks of Christopher Koch before the Maritime Trades Department AFL-CIO 2005 Convention, Chicago 22 July 2005, p.2 who states “The Department of Homeland Security (DHS) has stated that there are no known credible threats that indicate terrorists are planning to infiltrate or attack the United States via maritime shipping containers.”

*consequence scenario, most seem to agree that possible future attacks would take the form of hoaxes and small scale attacks with chemical and biological weapons or materials, using low-tech dissemination methods, such as contamination of food sources.*"<sup>1639</sup>

The GAO has also stated that "to be considered a threat, a terrorist group must not only exist but also have the intention and capability to launch attacks."<sup>1640</sup> The United States has not proved either of these elements, a point which has also been recognized by the OECD.<sup>1641</sup> The literature on WMDs makes clear that such weapons are complicated to construct and difficult to detonate reliably and accurately.<sup>1642</sup> It is generally accepted that terrorist groups lack the technological ability to construct a dirty bomb capable of being detonated by remote control.<sup>1643</sup> For example, research into smart containers has revealed the difficulties in tracking individual container movements<sup>1644</sup> and the challenge of finding a nuclear bomb in a container has been compared to looking for a needle in a hay-stack.<sup>1645</sup> Terrorists seeking to detonate a nuclear device hidden in a container would be confronted by the same problems. Even the latest satellite tracking equipment (needed to locate a container for detonation by remote control) is attached to the outside of a container and easily visible to customs officers.<sup>1646</sup> Overall, the evidence put forward so far by in support of the threat of a radiological bomb does not prove, on the balance of probabilities, that terrorist groups have the required technical know-how to detonate a WMD or radiological bomb in container.<sup>1647</sup> The improbability of a bomb transported by container also appears to be

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<sup>1639</sup> CRS REPORT FOR CONGRESS, 8 December 1999, p. 5.

<sup>1640</sup> See GAO-03-519T, p. 7.

<sup>1641</sup> See OECD REPORT 2005, p. 77 ("However, very real questions remain as to terrorists' readiness, motivation and/or capability to use a container as a delivery platform for a CBRN weapon").

<sup>1642</sup> See e.g., the Militarily Critical Technologies List (MCTL), Part II, Weapons of Mass Destruction Technologies (Section 1 – Means of Delivery Technology), September 1998.

<sup>1643</sup> THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, pp. 71ff., 108ff., 190ff.; see also Law Enforcement, Counterterrorism and Intelligence Collection Prior to 9/11, Staff Statement No. 9.

<sup>1644</sup> World Shipping Council et al, *In-Transit Container Security Enhancement*, 9 September 2003, p. 14.; GAO-03-770.

<sup>1645</sup> S. Hrg. 107 – 224, p.2.

<sup>1646</sup> S. Hrg. 108–55, p. 48 (photograph of antenna visible on exterior of Operation Safe Commerce Phase One container). Pictures of the latest technology also show the GPS device clearly attached to the door hinges of containers (see e.g. <[http://www.globaltrackingtech.com/container\\_tracking.html](http://www.globaltrackingtech.com/container_tracking.html)>). However, cf., FLYNN, p. 23 who points out that most cargo movements are automated and therefore such an antenna would not be seen by customs officers.

<sup>1647</sup> See OECD REPORT 2005, p. 40.

recognized by the Department of Homeland Security itself in its budget allocation for 2006 which did not include it in its list of plausible attack scenarios.<sup>1648</sup>

Hitherto, the United States has tended to rely on the technical possibility of constructing a device as well as the catastrophic damage that an MSI could cause.<sup>1649</sup> The lack of hard evidence is compounded by the fact that during the five years that the CSI has been in operation, neither the stationing of U.S. Customs officers at foreign seaports nor the advance submission of the cargo manifest has revealed any interference with cargo containers attributable to terrorist groups.<sup>1650</sup> Considering the comments of the Panel with regard to the burden of evidence in *Argentine – Hides*, it is unlikely to consider this evidence as substantiating the classification of maritime terrorism as an “emergency in international relations.”<sup>1651</sup> Moreover, the lack of a scientific threat assessment may mean that the measures are not proportional to the actual risk and not take into account the needs of commerce as required by statute.<sup>1652</sup>

### **3.2. Is the CSI Necessary to Protect US Essential Security Interests ?**

As explained above, the necessity test in relation to Article XXI should take two steps: first, the determination of whether the interests that the measure aims to protect are vital and, second, whether the measure is effective and proportional to achieve its societal goal (i.e. the protection of essential security interests). If this is not the case, then the second stage of the test examines whether the measure is the least trade-restrictive means available. This would involve an examination of whether the measure is proportional to the societal aims to be achieved.<sup>1653</sup>

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<sup>1648</sup> See CRS REPORT FOR CONGRESS, MARITIME SECURITY: POTENTIAL TERRORIST ATTACK AND PROTECTION PRIORITIES, 9 January 2007, p. 13.

<sup>1649</sup> S. Hrg. 109 – 548 (testimony of Stephen E. Flynn), pp. 17 ff.

<sup>1650</sup> See ASSESSMENT OF U.S. EFFORTS, p. 12 (“To date, of the high-risk containers inspected overseas, no WMD have been discovered”).

<sup>1651</sup> It is questionable whether this evidence can be considered “scientific evidence.” Although the views of experts are important, there conflicting evidence on whether containers actually present a threat to national security. See e.g. S. Hrg. 107 – 224, p. 88; S. Hrg 109 – 877, p. 38 (“But we believe that we are not concentrating all of our efforts in the right place. Weapons of mass destruction do not necessarily come in containers”).

<sup>1652</sup> As required by Section 343 (a) (3) (H) of the Trade Act 2002 (impact of the 24 Hour Rule on trade flows) and (I) (redundancy of 24 Hour Rule).

<sup>1653</sup> Appellate Body, *EC – Asbestos* (which decided this question simply on the basis of the importance of the values that the measure sought to protect).

### 3.2.1. Does the CSI Protect Essential Security Interests?

The United States could argue that the objectives of the CSI protects two essential security interests of the United States: on the one hand, it seeks to prevent nuclear and radiological materials being smuggled into the United States and, on the other, it seeks to protect seaports, which represent critical infrastructure and are related to U.S. national security interests.<sup>1654</sup>

The essential security interests of the United States have been articulated in its various *national* strategies<sup>1655</sup> which were published in response to 9/11 in order to address different aspects of the counter-terrorist effort. Concerning the first argument, the **National Strategy for Maritime Security**<sup>1656</sup> states that:

*“Defending against enemies is the first and most fundamental commitment of the United States Government. Pre-eminent among our national security priorities is to take all necessary steps to prevent WMD from entering the country and to avert an attack on the homeland.”*<sup>1657</sup>

Concerning the second argument, the national security strategies make clear that maritime transportation facilities are of crucial economic and social importance. For example, the **National Security Strategy for Homeland Security** highlights the need to assure the continuity of the security of international shipping containers in order to maintain vital commerce and defence readiness<sup>1658</sup> and the **National Strategy for the Physical Protection of Critical Infrastructures and Key Assets** (February 2003), aims to protect the most critical structures of American society

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<sup>1654</sup> Section 101 (12) (A) and (B) of the MTSA 2002. See also THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 10.

<sup>1655</sup> Winston P. Nagan and Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375 at p. 382 (“[...] all national security doctrines contain at a minimum implicit claims that the doctrine is necessary for the survival of the state [...]”).

<sup>1656</sup> For details of its introduction and progress see *Press Release: Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Port Security Legislation*, 5 April 2006.

<sup>1657</sup> *Id.*

<sup>1658</sup> NATIONAL SECURITY STRATEGY FOR HOMELAND SECURITY, p. 23. Some seaports in the United States also have military importance: see S. Hrg 109 – 877, p. 5 (“[T]hey serve as the conduit for 90 percent of the war material destined for major theatre operations.”); see also ASSESSMENT OF THE U.S. MARITIME TRANSPORTATION SYSTEM 1999, p. 3.

including the maritime shipping infrastructure.<sup>1659</sup> The **National Strategy for Maritime Security** claims that terrorists are targeting telecommunications and international commercial logistics in order to damage global, political and economic security.<sup>1660</sup>

The status of maritime transportation facilities as critical infrastructure is supported by the potential economic devastation which could result from the detonation of a radiological bomb in a container at an American seaport. A Transportation Security Incident of this magnitude would undoubtedly constitute an Incident of National Significance. This was dramatically illustrated in 2002 when the consultants Booz, Allen and Hamilton conducted a Port Security War Game.<sup>1661</sup> The simulation predicted that the likely response of the U.S. Government would be to shut down the maritime transportation system at enormous cost to the US and its trade partners.<sup>1662</sup> It estimated that it would take approximately three months to clear the container backlog resulting from closings of 12 days. In addition, the total cost of the strike to the U.S. economy was \$ 58 billion.<sup>1663</sup> In view of the results, the report recommended that the process of detecting and capturing dangerous materials had to begin overseas where goods are loaded and shipped.<sup>1664</sup> Business and government had to work together to prevent tampering with cargo. Moreover, international standards were needed for preloading container inspections.<sup>1665</sup> This simulation may be considered as representing scientific evidence: according to the report, the simulation involved “85 leaders from a range of government and industry organizations with a critical stake in port security.”<sup>1666</sup> Practical evidence of the economic havoc that shutting down a port would have on a seaport was also provided by the West Coast U.S. dockworkers’ labour dispute of September

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<sup>1659</sup> NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS, pp. 61ff.

<sup>1660</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 3.

<sup>1661</sup> This was a strategic simulation of a terrorist attack, with the aim of assessing the economic impact that a terrorist attack would have on America's cargo transportation system and supply chains. The scenario commenced with the discovery of a "dirty bomb" in a container on a truck as it left the port of Los Angeles. A few weeks later another bomb was discovered in Minneapolis and a third exploded in Chicago. See PORT SECURITY WARGAME (*supra n.* 302); see also Garry Fields, *Disaster Waiting to Happen*, WALL STREET JOURNAL, March 2003; OECD REPORT 2003, pp. 19 – 23, paras. 61 – 64. The United States has also carried out simulations of terrorist attacks under its Assymmetric Warfare Initiative since 2003. This has included “a nuclear device aboard an incoming vessel in a 55 gallon drum”, see CRS REPORT FOR CONGRESS, 9 January 2007, p. 9.

<sup>1662</sup> For a summary of the effects see OECD REPORT 2003, pp. 20 – 23.

<sup>1663</sup> *Id.* at p.3

<sup>1664</sup> *Id.*

<sup>1665</sup> *Id.*

<sup>1666</sup> *Supra n.* 302, p. 1.

2002.<sup>1667</sup> This strike also affected countries neighbouring the United States: for example, the Asian economy is heavily dependent on West Coast ports and the people of Hawaii and Alaska depend on mainland shipments for survival.<sup>1668</sup>

Considering that ports are situated close to crowded metropolitan areas,<sup>1669</sup> the detonation of a radiological bomb at a US seaport would also have devastating consequence on human life and the environment.<sup>1670</sup> It would also cause loss of human life to harbour workers and potentially severe injury to those residing in the vicinity of the harbour. For example, one report prepared for the U.S. Department of Transport states:

*“The economic impact of even a single nuclear terrorist attack on a major U.S. seaport would be very great. In the three plausible scenarios examined, a successful attack would create disruption of U.S. trade valued at \$100-200 billion, property damage of \$50-500 billion, and 50,000 to 1,000,000 lives could be lost.”*<sup>1671</sup>

The loss of life and property also leads to liability issues which should not be underestimated. In the absence of a Victim’s Compensation Fund,<sup>1672</sup> survivors and relatives of victims would seek

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<sup>1667</sup> The lockout lasted for 10 days and led to 200 ships being stranded outside West Coast ports. The port shutdown was estimated to have cost \$1-2 million a day. It left perishable goods rotting in ships and docks and retailers without merchandise to sell. Its repercussions were felt throughout the country as manufacturers were forced to close factories temporarily and lay off workers. The backlog of cargo from 200 ships affected by the shutdown was estimated to have taken six to seven weeks to clear. See S. Hrg. 108 – 55, p.35; see also OECD REPORT 2003, pp. 18 – 19, paras. 56 – 58 (on estimates of loss) and 55 – 59; *Calculating Cost of West Coast Dock Strike Is a Tough Act*, LOS ANGELES TIMES, Tuesday, 26 November 2002; Sam Zuckerman, *Shutdown not so bad after all*, Friday, 18 October 2002 SAN FRANCISCO CHRONICLE. Concerning other countries, a more recent 12-day industrial strike in Marseilles led to losses of \$150 million and 1,750 workers being laid off: see UNCTAD REPORT 2006, p. 79.

<sup>1668</sup> S. Hrg. 108 – 55, pp. 17-19.

<sup>1669</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 9.

<sup>1670</sup> *Id.*, p. 6.

<sup>1671</sup> Clark C. Abt, *The Economic Impact of Nuclear Terrorist Attacks on Freight Transport Systems in an Age of Seaport Vulnerability*, Executive Summary, 30 April 2003, p. 3.

<sup>1672</sup> Following 9/11, the U.S. government limited the liability of airline companies and set up the Victims’ Compensation Fund to meet any claims from survivors and relatives of victims. The federal government was concerned that liability claims would clog the courts and create further economic harm. It established the Victims Compensation Fund to make payments to families for the deaths and injuries of victims: see LLOYD DIXON AND RACHEL KAGANOFF STERN, *COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS*, RAND INSTITUTE FOR CIVIL JUSTICE, 2004. However, it is uncertain whether such a fund would be set up in the case of a maritime security incident.



compensation for their loss from private sector stakeholders in the supply chain.<sup>1673</sup> Economic participants who fail to comply with the statutory requirements of the 24 Hour Rule SAFE Ports Act and CSI will expose themselves to potential civil liability for the injury caused by its acts or omissions.<sup>1674</sup> As the Lockerbie bombing showed, companies not permitted to limit liability would not be able to survive a finding of negligence.<sup>1675</sup> Public policy may now support the imposition of liability to provide incentives for tighter security and “to highlight culpable conduct facilitating terrorism.”<sup>1676</sup> According to CBP, a TSI would have “collateral consequences to persons, property and the local environment which would be virtually impossible to calculate.”<sup>1677</sup>

The United States could also seek to justify the extrajurisdictional character of the CSI by arguing that there is a nexus between foreign seaports and its essential security interests. The maritime domain is a global resource and cargo enters the United States from the ports of 165 countries around the globe.<sup>1678</sup> The security of U.S. borders cannot be secured by the traditional single layer of security at US border crossings, with customs officers authorized to inspect cargo and passengers *after* the means of transportation had reached at the U.S. port of entry.<sup>1679</sup> However, 9/11 proved that a retroactive approach was inadequate to combat terrorism: a container often passes through numerous intermodal transfer points on the way to its final destination, each of

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<sup>1673</sup> There are several classes of potential claimants including the crew, passengers, shore-based individuals injured or killed by the attack, cargo interests and private property owners. Possible tortfeasors include shippers, seaport authorities, security firms and shipping companies: see *id.*, p. 9.

<sup>1674</sup> See Antonio J. Rodriguez, *When Your Ship Is in the Bull's Eye: The Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties Resulting from a Terrorist Attack*, 17 U.S.F. MAR. L. J. 241, p. 255 (the detonation of a dirty bomb aboard a commercial vessel could give rise to the civil liability of the vessel owner or charterer, even if that party had no knowledge of the device's existence).

<sup>1675</sup> In the Lockerbie bombing case, Pan American World Airways was held liable for the wrongful death of the passengers and was not allowed to limit its liability because it had failed to meet the applicable regulatory and industry standards. The airline subsequently went into bankruptcy and ceased operations.

<sup>1676</sup> Rodriguez, p. 16 (“Civil liability for negligence resulting in terrorism could be a powerful tool in constructing a more secure nation”).

<sup>1677</sup> Bryant, pp. 22 – 25; concerning civil liability for terrorist attacks see also Tarun Mehta, *A Duty Breached? Can Aggrieved Citizens Sue the U.S. Government Under the Federal Tort Claims Act for 9/11?* 6 HOW. SCROLL SOC. J. L. REV. 51; Joseph Dellapenna, *International Terrorism: Prevention and Remedies*, 22 SYRACUSE J. INT'L L. & COM. 13; Joe Wientge, *Forseeable Change: The Need for Modification of the Foreseeability Standard in Cases Resulting from Terrorist Acts After September 11<sup>th</sup>*, 74 UMKC L. REV. 165.

<sup>1678</sup> CRS REPORT FOR CONGRESS, 9 January 2007, p. 4.

<sup>1679</sup> See GAO/HR-93-114, p. 10. The traditional mission of U.S. Customs is explained in GAO REPORT, CUSTOMS SERVICE, TRADE ENFORCEMENT ACTIVITIES IMPAIRED BY MANAGEMENT PROBLEMS, September 1992 (GAO/GGD-92-123), pp. 12 – 13. See also MARITIME COMMERCE SECURITY PLAN, p. 3.

which was a potential location of criminal activity.<sup>1680</sup> Once a container, truck or aircraft carrying a WMD or armed terrorists passes the single layer of customs controls at U.S. ports of entry it will be free to travel to any destination in the United States without encountering any security obstacles.<sup>1681</sup> Therefore, experts recommended the strategy of “pushing the borders outwards”, examining containers, trucks and aircraft passengers at the point of departure before their arrival at a U.S. port of entry.<sup>1682</sup> This pre-emptive strategy has contributed to the creation of layered security system which offers greater protection against terrorist attacks planned from abroad.<sup>1683</sup>

On the other hand, the complainant can argue that the CSI does not protect the “essential security interests” of the United States because it is motivated by commercial and political interests. Concerning the first point, the CSI seeks to protect seaports and containers which are purely economic assets. Although CBP has stated that the CSI seeks to protect human life (which is considered a vital interest under WTO law) one report has stated that the detonation of a radiological bomb at a seaport “would likely entail very few actual casualties – even in the worst case [...]”.<sup>1684</sup> The justifications that CBP has presented for the Container Security Initiative tend to emphasize the economic consequences of a terrorist attack rather than the threat of loss of life or environmental damage.<sup>1685</sup> In this respect, it is also significant that the implementation of the CSI at foreign seaports has been largely due to trade incentives in the form of expedited clearance.<sup>1686</sup> Therefore, the CSI cannot be considered as designed to protect human life. Writers

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<sup>1680</sup> OECD REPORT 2003, p. 24, para. 67.

<sup>1681</sup> See generally, NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS, FEBRUARY 2003, pp. 68 ff; see also Loy and Ross, p. 3 (“Under these kinds of minimal security safeguards, a container could be used quite easily for WMD transport into the United States for an attack”). The Booz Allen Hamilton wargame was also based on a container with a WMD being found on a truck destined for Los Angeles, see PORT SECURITY WARGAME, p. 1.

<sup>1682</sup> See PORT SECURITY WARGAME, p. 3 (“The process of detection and capture of dangerous materials must begin overseas where goods are loaded and shipped. Options are limited once a container has arrived”). See also NATIONAL STRATEGY FOR HOMELAND SECURITY JULY 2002, p. 23

<sup>1683</sup> Andrew P. Studdert, *Statement before the National Commission on Terrorist Attacks Upon the United States*, January 27, 2004. See also GAO REPORT, SUMMARY OF CHALLENGES FACED IN TARGETING OCEANGOING CARGO CONTAINERS FOR INSPECTION, 31 March 2004, pp. 4 – 5.

<sup>1684</sup> See OECD REPORT 2005, p. 40.

<sup>1685</sup> See e.g. CSI STRATEGIC PLAN, p. 11, which concentrates only on the economic effects of a terrorist attack. The “primary aim of the CSI” as described in the official Fact Sheet refers exclusively to trade. The economic character is also reflected in speeches by Robert C. Bonner, the former U.S. Commissioner for Customs, in which the prevention of economic devastation is clearly the major justification of the CSI. See e.g. Customs Commissioner, Speech of 17 January 2002 (announcing the CSI); see also Customs Commissioner, Speech of 26 August 2002.

<sup>1686</sup> See Jau, p. 12; S. Hrg. 109 – 186, p. 31

have argued that the term “essential security interests” is to be interpreted narrowly<sup>1687</sup> to exclude interests which are primarily economic or commercial in nature.<sup>1688</sup> Holding otherwise would give member states the right to use protect their industries and gain competitive advantages on the basis of national security.<sup>1689</sup>

The complainant could also attack the extraterritorial nature of the CSI by arguing that there is, in reality, no nexus between foreign CSI ports and the essential security interests of the United States.<sup>1690</sup> The CSI seeks to regulate the supply chain, which, as a transborder economic asset, may affect the essential security interests of the United States. However, the object of the CSI’s regulations are foreign seaports and the United States has not produced any objective evidence proving that these facilities adversely affect the essential security interests of the United States itself (e.g. that the security standards at foreign seaports are lower than the seaports maintained in the United States).<sup>1691</sup> Article XXI arguably reflects the traditional principle of state sovereignty insofar as it refers to “its essential security interests.” The use of “its” implies that member states can only seek to regulate essential security interests within their territorial jurisdiction.<sup>1692</sup> This would accord with international law as reflected in other international instruments on security.<sup>1693</sup> The complainant could argue that the concept of “pushing out the borders” is simply a means to shift the cost and administrative inconvenience of security measures to foreign seaports.<sup>1694</sup> The

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<sup>1687</sup> See Schloemann and Ohlhoff, pp. 444 – 445; see also Cann, pp. 415 – 416; Akande and Williams, p. 391; Hahn, pp. 588 - 589.

<sup>1688</sup> See Schloemann and Ohlhoff, p. 444.

<sup>1689</sup> See e.g. Swedish footwear dispute, *supra n.* 1212.

<sup>1690</sup> Further aspects of the extraterritorial nature of the CSI, in particular its voluntary nature and transfer of risk are discussed below as part of the “reasonable application test.”

<sup>1691</sup> Section 108 (a) (1) of the MTSA 2002, which provides for security inspections of foreign ports from which vessels depart for the United States or which the Secretary believes poses a security risk to international maritime commerce. Cf. Flynn, p. 102.

<sup>1692</sup> According to Article 2 of the UNCLOS, which states that 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. According to Article 3, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles.

<sup>1693</sup> For example, whereas S/RES/1373 and the Framework of Standards stress the need for bilateral agreement in combating terrorism, neither instrument expressly condones extraterritorial or extrajurisdictional law enforcement. However, S/RES/1373 does recognize that the territory of one state could be used to plan atrocities in the territory of another (para. 2 (b)).

<sup>1694</sup> See e.g. S. Hrg 109 – 877, pp. 23 – 24; see also WSC, Statement of 30 July 2007 (“As a practical matter, this legislation requires the rest of the world to do what cannot be done today in U.S. ports”). This statement can also apply to other aspects of the CSI as well. See e.g. GOVERNMENT ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, UNITED STATES SENATE, MARITIME SECURITY: ENHANCEMENTS MADE, BUT IMPLEMENTATION AND SUSTAINABILITY REMAIN KEY CHALLENGES (STATEMENT OF MARGARET T. WRIGHTSON), GAO-05-448T, 17 May 2005, p. 14; but see GOVERNMENT ACCOUNTABILITY OFFICE,

customs administrations of CSI partners are forced to sign the DoPs owing to the threat of economic reprisals by the U.S. in the form of redlane clearance.

### **3.2.2. Is the CSI Effective in Protecting US Essential Security Interests?**

This aspect represents Achilles' heel of the CSI: investigations by Congress and the GAO have revealed substantial weaknesses in the CSI<sup>1695</sup> which cast doubt on its effectiveness in securing U.S. seaports against terrorist attack.<sup>1696</sup> The following provides an overview of the weaknesses in the CSI as well as the steps taken in to improve the measure in the SAFE Port Act 2006.

#### **3.2.2.1. The 24 Hour Rule is Seriously Flawed**

The 24 Hour Rule is seriously flawed in a number of respects.<sup>1697</sup> A fundamental weakness is its use of the cargo manifest as a source of advance information on container shipments entering the United States. This document is generally regarded by industry and security experts as being the least reliable source of information on incoming containers.<sup>1698</sup> It is a commercial instrument not designed for security purposes<sup>1699</sup> and not issued by the parties who have direct knowledge of the cargo.<sup>1700</sup> Therefore, it is impossible for CBP to ensure the contents of a container without a physical inspection.<sup>1701</sup> The unreliability of the cargo manifest could adversely affect the

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TESTIMONY BEFORE THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS U.S. SENATE, DEPARTMENT OF HOMELAND SECURITY PROGRESS REPORT ON IMPLEMENTATION OF MISSION AND MANAGEMENT FUNCTIONS (STATEMENT OF DAVID M. WALKER), GAO-07-1081T, 6 September 2007, p. 4 (noting substantial progress in maritime security).

<sup>1695</sup> See, in particular, ASSESSMENT OF U.S. EFFORTS; see also *US Security System Has 'Crippling Flaws'*, LLOYD'S LIST, WLNR 8349665, 27 May 2005.

<sup>1696</sup> See GAO-05-557, p. 2 "The program is promising but our previous work has raised concerns about its management and its ability to achieve its ultimate goal of improved cargo security." See also S. Hrg. 109 – 186. p. 10, "[...] I am afraid that the report card is one that will not make anyone particularly proud. The Administration has failed on port security."

<sup>1697</sup> See OECD REPORT 2003, p. 48 at para. 138 (describing the rule as "probably the most contentious of all of the security measures announced to date."); see also WSC, Comments of 9 September 2002, p.8 expressing doubt as to whether the rule would enable overseas customs personnel to identify high-risk containers.

<sup>1698</sup> See ASSESSMENT OF U.S. EFFORTS, pp. 26 – 27.

<sup>1699</sup> WSC, Comments of 9 September 2002, p. 4 ("It was not designed for this purpose and has some limitations in this regard").

<sup>1700</sup> See GAO-05-557, p. 21.

<sup>1701</sup> Under the CSI, such examinations are only to be carried out in the last resort owing to the disruption they cause to supply chain. See S. Hrg. 109 – 186, p. 23 (comments of Robert C. Bonner ("I have no-load authority, and we have used that sparingly [...] because we don't want to [...] sour the relationship with the host nations [...]").

effectiveness of the ATS system by feeding it with inaccurate information.<sup>1702</sup> According to one expert:

*“In fact, of the 65 percent of the containers that were classified as high-risk and were reviewed by the staff overseas, our detailed work at the ports suggested that even within that 65 per cent, there is no guarantee that all those were high-risk or not high-risk.”*<sup>1703</sup>

A terrorist group intent on shipping a dirty bomb to a U.S. harbour could circumvent U.S. security controls by filling out cargo manifests in the required manner.<sup>1704</sup> In addition, the fact that bulk cargo is wholly exempt from the requirements of the 24 Hour Rule suggests that terrorists could conceal a weapon in bulk cargo shipments without risk of detection.<sup>1705</sup>

### **3.2.2.2. The CSI Offers Inadequate Security Coverage**

Under the CSI, the inspection of high-risk cargo is carried out at the seaport of departure (i.e. the last seaport where cargo is loaded on a vessel for export to the United States). However, the port of departure represents only one point in the entire supply chain and a container may make several stops and change hands several times during its transport to the CSI harbour.<sup>1706</sup> Accordingly, containers could be interfered with by terrorists at non-CSI ports earlier in the supply chain and packed with WMD before reaching the CSI port.<sup>1707</sup> At the host port itself, CSI teams only target a specific threat, i.e. the transport of WMD. It has been reported that host customs authorities have refused inspections for narcotics or other contraband on the basis that

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<sup>1702</sup> The strategic importance of precise information is undisputed: as far back as 1999, it was recognized that without a way to ensure that the data supplied by the business community are accurate, the entire trade system is at risk. See, REPORT OF THE INTERAGENCY COMMISSION, p. 90. See also ASSESSMENT OF U.S. EFFORTS, p. 28.

<sup>1703</sup> S. Hrg. 109 – 186, p. 46.

<sup>1704</sup> *Id.*, at p. 51 (“I am not comfortable in saying that a container can move from a high-risk designation to a low-risk designation simply because the author filled out the paperwork correctly”). See *Letter by the Japan Machinery Centre for Trade and Investment to the U.S. Customs Service*, 9 September 2002 (“It is difficult to imagine a terrorist honestly describing terrorist weapons as such”).

<sup>1705</sup> For example, a report by the OECD suggests that terrorists could conceal a weapon inside a bulk shipment of ammonium nitrate or use a vessel in a suicide operation by making use of cargo containing modified fertilizer, of the type used in the Oklahoma City Bombing on 19 April 1995. See OECD REPORT 2003, pp. 9 – 11

<sup>1706</sup> *Id.*, pp. 24 ff.

<sup>1707</sup> *Id.*

such inspections do not relate to anti-terrorism efforts.<sup>1708</sup> Therefore, the CSI fails to prevent terrorists from financing their activities by smuggling narcotics or other contraband.<sup>1709</sup>

The CSI also offers a very limited zone of security, with only 50 CSI ports concentrated on industrialized countries.<sup>1710</sup> As a result “a substantial majority of [...] ports worldwide are not part of the CSI program.”<sup>1711</sup> For example, there are no CSI ports in countries which pose a terrorist threat to the United States.<sup>1712</sup> This is an obvious shortcoming that was noted in the early stages of the CSI.<sup>1713</sup> Even if the containers from “high-risk” countries pass through CSI seaports, the absence of CBP officers offers no deterrence to terrorists at the non-CSI high-risk seaport and no information-sharing with the customs administrations of such countries.<sup>1714</sup> Moreover, staffing and budgetary constraints mean that it is unlikely that the CSI will extend to high-risk seaports<sup>1715</sup> or be maintained indefinitely at current member ports.<sup>1716</sup>

### **3.2.2.3. Bilateral Agreements are Ineffective**

The Declarations of Principles do not require inspections to be carried out according to a uniform set of criteria or using standard equipment<sup>1717</sup> and they do not grant CBP any powers to enforce

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<sup>1708</sup> GAO-05-466T, p. 21; see also GAO-05-557, p. 23 (“Some of these denials were for inspection requests based on factors not related to security threats. [...] They told us that their rationale in denying these requests was that [...] identifying customs violations was not the purpose of CSI.”); cf. THE NATIONAL MARITIME SECURITY STRATEGY, p. 5, which points out that “[m]aritime drug trafficking generates vast amounts of money for [...] terrorist organizations.”

<sup>1709</sup> NATIONAL STRATEGY FOR COMBATING TERRORISM, p. 8, (“Terrorists are increasingly using criminal activities to support and fund their terror”). U.N. Resolution 1456 also recognizes that “terrorists must also be prevented from making use of other criminal activities such as transnational organized crime, illicit drugs and drug trafficking, money-laundering and illicit arms trafficking.”

<sup>1710</sup> Cf. THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 4 (stressing the need for a “coordinated and consistent approach to building international support”).

<sup>1711</sup> S. Hrg. 109 - 186, p. 8.

<sup>1712</sup> *Id.*, at p. 27, where the U.S. Commissioner states that most of the cargo from high-risk ports moves through CSI ports.

<sup>1713</sup> See S. Hrg. 108-55, pp. 8 and 10.

<sup>1714</sup> Cf. GAO-05-557, p. 17.

<sup>1715</sup> The U.S. Commissioner for Customs has stated “Although CSI will be expanded to a few more foreign seaports, we already have built a security network that can recover rapidly from a terrorist attack exploiting the supply chain.” See Robert C. Bonner, *Remarks to the CBP Trade Symposium Ronald Reagan Building, Washington, D.C.*, 11 March 2005. According to its official website, “CBP’s goal is to have 50 operational CSI ports by the end of fiscal year 2006.” < [http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/csi\\_in\\_brief.xml](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml) >.

<sup>1716</sup> Concerning the limitations on the CSI see GAO-05-557, pp. 4 and 19. See also S. Hrg. 109 – 186, p. 6 (comments of Senator Levin).

<sup>1717</sup> S. Hrg. 109 – 186, pp. 28 – 30; see also S. Hrg. 108 – 55, p. 30.

inspections or security standards; CBP is also prohibited from recommending branded equipment.<sup>1718</sup> The Declarations of Principles do not require the host customs administration to conduct inspections of cargo deemed high-risk<sup>1719</sup> either and the actual level of co-operation with regard to requests to inspect containers is variable.<sup>1720</sup> According to the GAO, of the containers designated high-risk and referred to the host customs administration for inspection, 28 percent were not inspected.<sup>1721</sup> Financial and technical burdens involved in dealing with high-risk containers may test the foreign customs administration's readiness to co-operate.<sup>1722</sup> For example, the Port of Le Havre in France must pay compensation to shippers whose containers are inspected and which do not contain any WMD.<sup>1723</sup> The costs aspect may dissuade foreign customs administrations from agreeing to inspect high-risk containers.<sup>1724</sup>

In addition, political and practical considerations have limited the number of staff stationed at seaports<sup>1725</sup> and compromise the effectiveness of inspections. For example, there are problems involved in accommodating CSI teams at seaports<sup>1726</sup> and integrating their tasks into the working practices of the foreign seaport. Co-operation with the foreign customs administration depends on effective communication.<sup>1727</sup> However, linguistic barriers, foreign working practices and practical limitations may be difficult to avoid.<sup>1728</sup> These difficulties are likely to increase in so-called

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<sup>1718</sup> ASSESSMENT OF U.S. EFFORTS, p. 9.

<sup>1719</sup> *Id.*, p. 8

<sup>1720</sup> See S. Hrg. 109 – 186, p. 3 (“[S]ome CSI reports [sic] [...] routinely “waive” the inspection of high risk containers, despite requests by CSI personnel for an inspection. As a result, numerous high risk containers are not subjected to an examination overseas, thereby undermining the primary objective and purpose of CSI.”); see also GAO-05-557, p. 4 (indicating that the Port of Le Havre appears to be the worst offender in this regard).

<sup>1721</sup> S. Hrg. 109 – 186, p. 21 (in cases where high-risk containers are not inspected at the CSI seaport, they are inspected at the U.S. seaport of arrival. Although CBP has claimed that 93 percent of non-inspected containers were inspected, there are no records which can verify this); ASSESSMENT OF U.S. EFFORTS, pp. 11 ff.

<sup>1722</sup> Concerning the costs of incurred by identifying high-risk containers, see S. Hrg. 107 – 224, pp. 87 – 88 (“Every container that is considered to be a “high interest” container [...] requires a co-operative emergency response effort on the part of numerous federal, state and local agencies. Each incident is different, some taking hours or even days to render safe, most utilizing 20 – 50 people who are primarily in stand-by mode in the event that something does happen”).

<sup>1723</sup> AN ASSESSMENT OF U.S. EFFORTS, p. 18.

<sup>1724</sup> Concerning the Megaports Initiative, the major obstacle to co-operation has been the operation costs, which must be borne by the foreign port. Concerning the costs, see GAO-05-375, p. 5.

<sup>1725</sup> GAO-05-557, p.4

<sup>1726</sup> *Id.*, p. 19; S. Hrg. 109 – 186, p.11 (“In some cases, DHS personnel in the CSI program are stationed an hour away from where the actual loading takes place”).

<sup>1727</sup> See GAO-03-770, p. 32.

<sup>1728</sup> See Stephen E., Flynn, *The Ongoing Neglect of Maritime Transportation Security*, Council on Foreign Relations, 25 August 2004, p. 4 (“Inspectors are receiving no formal language or other training to prepare them for these overseas postings”).

“hardship posts”, i.e. seaports in countries where there is a high-risk of terrorism.<sup>1729</sup> The high turnover of staff has also proved an additional concern in this respect because it adversely affects the liaison of CBP officers with foreign customs administrations.<sup>1730</sup>

#### **3.2.2.4. Inspection Equipment at Seaports is Ineffective**

The costs for acquiring, operating and maintaining security equipment, carrying out inspections, and disposing of the WMD must be borne by the host state.<sup>1731</sup> The reliance on the largesse of foreign states limits CBP’s ability to stipulate security standards.<sup>1732</sup> However, the absence of minimum requirements for inspection equipment means there is no guarantee that the equipment will be state of the art or effective in identifying fissionable materials. Indeed, one group of reporters even succeeded in smuggling low grade radioactive material hidden in a container through a CSI port to the United States.<sup>1733</sup>

Doubt has been cast on the effectiveness of inspection equipment generally. It has been reported that radiation detectors cannot distinguish between the natural radiation emitted by normal products and that emitted by fissionable materials.<sup>1734</sup> In the U.S. most anti-terrorism equipment acquired since 9/11 has had to be replaced because it is ineffective, unreliable or too expensive to operate.<sup>1735</sup> Non-intrusive equipment has also proved unable to identify the contents of trash containers.<sup>1736</sup> Seaports are notoriously short of space and this can limit the locations for large-scale x-ray machines.<sup>1737</sup> In addition, some foreign governments are reluctant to hire the additional customs officials needed to operate the radiation detection equipment.<sup>1738</sup>

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<sup>1729</sup> GAO-03-770, p. 28.

<sup>1730</sup> *Id.*, p. 12; see also Flynn, *supra n.* 1728, at p. 4 (“Given that the teams are so small—only eight inspectors in Hong Kong which is the world largest port, they are able to inspect only the tiniest of percentages of containers”).

<sup>1731</sup> See GAO-05-557, p. 17.

<sup>1732</sup> S. Hrg. 109 – 186, p. 28.

<sup>1733</sup> See ASSESSMENT OF U.S. EFFORTS, p. 27.

<sup>1734</sup> *Id.*, pp. 30 ff.

<sup>1735</sup> See Eric Lipton, *U.S. to Spend Millions More to Alter Security Systems*, NEW YORK TIMES, 7 May 2005.

<sup>1736</sup> ASSESSMENT OF U.S. EFFORTS, p. 41.

<sup>1737</sup> S. Hrg. 109 – 186, pp. 24 – 25.

<sup>1738</sup> See GAO-05-375, p. 4.



### **3.2.2.5. Improvements to the CSI by the SAFE Port Act 2006**

The United States could counter these criticisms by referring to the steps it has taken to improve the effectiveness of the CSI, primarily in the SAFE Port Act 2006. This piece of legislation was passed by Congress in response to the aforementioned concerns about its effectiveness. Sections 203 – 205 address the infrastructural weaknesses in the CSI, which was heavily criticised by the PSI. Section 205 (k) requires the Secretary to submit a report on the effectiveness of the CSI no later than 30 September 2007 to the appropriate congressional committees.

Section 203 responds to criticisms of the 24 Hour Rule<sup>1739</sup> by mandating improvements to the ATS including the expansion of the data elements required by the 24 Hour Rule (Section 203(b)). Enhancing the quality of information will improve the accuracy of targeting high-risk containers. It also provides for various system improvements to the ATS such as the inclusion of smart features and the capability to electronically compare and other available data for cargo entered into or bound for the United States.

Sections 204 and 205 address criticisms of the CSI, in particular the lack of uniform standards for inspections<sup>1740</sup> and inadequate security equipment. Section 204(a) of the SAFE Port Act requires the DHS to issue regulations establishing minimum standards and verification procedures for securing containers in transit to a US importer within 90 days of its enactment. Section 204 (a) (4), requires all containers bound for the US port of entry to comply with these standards within 2 years after their promulgation. According to Section 204 (b), the standards must be regularly reviewed and enhanced based on tests of commercial technology as it becomes available, to detect cargo intrusion and highest consequence threats, especially WMD. Section 204 (c) encourages the DHS to promote international standards of container security, work with foreign governments and international organizations.

Section 205 regulates the Container Security Initiative and seeks to strengthen US control over the security standards employed at CSI ports. Section 205 (b) provides that, before DHS can

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<sup>1739</sup> ASSESSMENT OF U.S. EFFORTS, pp. 26 – 29.

<sup>1740</sup> *Id.*, p. 19 (“Overall, the CSI team in Felixstowe demonstrated that a lack of knowledge, resources and inspections may in fact be adding to the cargo security challenge”).

designate a foreign port as a CSI port, the DHS must carry out an assessment of that port considering factors listed in the Act. For example, Section 205 (b) (4) refers to the commitment of the government of the country in which the foreign seaport is located to co-operating with the Department in sharing critical data and risk management information and to maintain programmes to ensure employee integrity. Section 205 (c) requires the Department to submit its assessment of the foreign port to the appropriate congressional committees before it can officially declare the foreign port as being a member of the CSI. There must also be annual discussions between the Secretary and the foreign governments of countries with CSI ports concerning standards and procedures at CSI ports (Section 205 (i)). Concerning overseas inspections, Section 205 (e) lays down requirements and procedures in sub-paragraphs (A) – (D) and Section 205(g) requires DHS and other federal agencies to identify foreign assistance programmes that could help implement programmes at CSI and non-CSI ports.

Section 232 concerns the level of screening and scanning carried out on cargo which enters the United States harbours. This provision resulted from an amendment tabled by Senator Norm Coleman, who was the Chairman of the Permanent Subcommittee on Investigations regarding the Container Security Initiative.<sup>1741</sup> It reflects the findings of the PSI report, which found that Hong Kong harbour had developed a system which could screen 100 per cent of containers without impeding the flow of commerce.<sup>1742</sup> Section 232 (a) of the SAFE Port Act provides for the screening of all containers which enter the United States from foreign seaports. In addition, any containers which are deemed high-risk must be scanned before leaving the seaport facility in the United States. In order to implement this, Section 232 (b) requires the Secretary, in coordination with the Secretary of Energy and foreign partners, as appropriate, to ensure that integrated scanning systems are fully deployed to scan, using non-intrusive imaging equipment and radiation detection equipment, all containers entering the United States before such containers arrive in the United States as soon as possible. However, the Secretary must first determine that the integrated scanning equipment is fit for purpose according to criteria laid down in Section 232 (b) (1) – (6).

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<sup>1741</sup> S. Amdt. 4982, To require the Secretary of Homeland Security to ensure that all cargo containers are screened before arriving at a United States seaport, that all high-risk containers are scanned before leaving a United States seaport, and that integrated scanning systems are fully deployed to scan all cargo containers entering the United States before they arrive in the United States, proposed and accepted on 13 September 2006.

<sup>1742</sup> ASSESSMENT OF U.S. EFFORTS, p. 35.

A recent amendment to the SAFE Port Act 2006 also improves security by providing for 100 percent scanning of containers destined for the United States at all foreign seaports by 2012.<sup>1743</sup> The measure will effectively abolish the risk assessment strategy upon which the CSI has been based and imposes a blanket requirement on all cargo containers, regardless of the seaport of origin.<sup>1744</sup> This is a response to the concerns of senators that high-risk cargo is still entering the United States without being inspected.

### **3.3. Is the CSI the Least Trade Restrictive Measure Available?**

If the Panel decides that the interests which the CSI seeks to protect are not “essential security interests” or that the CSI is ineffective, it will proceed to the second stage of the necessity test, which examines the availability of reasonable alternatives. This test ascertains whether the disputed measure is proportional to the attainment of the relevant societal aims by weighing and balancing a range of factors.<sup>1745</sup> The following examines whether multilateral agreement or 100 percent scanning are less GATT inconsistent than the CSI and whether they are reasonably available to the United States.<sup>1746</sup> It should be noted that the SAFE Port Act 2006 also seeks to ensure the GATT compliance of the CSI.<sup>1747</sup> In addition, the National Security for Maritime Security states:

*“First, preserving the freedom of the seas is a top national priority. The right of vessels to travel freely in international waters, engage in innocent and transit passage, and have access to ports is an essential element of national security.”*<sup>1748</sup>

Supply chain security represents a public resource which all states of the world have the right to use.<sup>1749</sup> The supply chain and international peace and security are also “pure public goods” which

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<sup>1743</sup> *Supra pp.* 39 – 40.

<sup>1744</sup> *Id.*

<sup>1745</sup> Osiro, pp. 134 – 135.

<sup>1746</sup> Panel, *US – Section 337*, para. 5.26.

<sup>1747</sup> Section 204 (d) seeks to ensure that minimum standards and procedures for securing containers in transit to the United States do not violate its international trade obligations or other international obligations.

<sup>1748</sup> NATIONAL STRATEGY FOR MARITIME SECURITY, p. 7.

<sup>1749</sup> *Id.*, pp. 1 – 2.

means that they benefit all states (“non-exclusivity”).<sup>1750</sup> In relation to the environment – another “pure public good” – the jurisprudence of the GATT/WTO has made clear that protective measures should be based on multilateral agreement.<sup>1751</sup> However, the security standards of the CSI are inward looking, determined by the United States alone with the primary aim of protecting its own seaports against terrorist attack.<sup>1752</sup> It has also been heavily influenced by domestic political interests rather than the needs of the international trading community.<sup>1753</sup> The complainant could argue that the Container Security Initiative in its current form is more GATT restrictive than necessary because it based on unilateral standards because it does not provide for mutual recognition of security standards. Although Section 201 of the SAFE Port Act 2006 contains provisions requiring the establishment of a strategic plan to enhance the security of the *international supply chain*, the United States nevertheless takes a unilateral approach towards supply chain security insofar as the CSI is under the control of the Secretary for Homeland Security and does not directly involve international organizations.<sup>1754</sup> The SAFE Port Act also

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<sup>1750</sup> See Benvenisti, p. 681; Philippe Dulbecco and Bertrand Laporte, *How can the Security of International Trade be Financed in Developing Countries? A Global Public Good Approach*, WORLD DEVELOPMENT VOL. 33 NO. 8, pp. pp. 1202 – 1203.

<sup>1751</sup> See Panel, *US – Tuna I*, para. 5.28, arguing that the requirement of necessity meant that member states were under an obligation to undertake multilateral negotiations in respect of transboundary objects of protection. This aspect of the report has been upheld in other reports: see Appellate Body, *US – Shrimp*, para. 166.

<sup>1752</sup> This becomes clear from several hearings on the CSI. Senators consider and debate the measure purely from the viewpoint of the United States. See generally, S. Hrg. 107 – 224; S. Hrg. 108–55; S. Hrg. 109 - 186; S. Hrg. 109 - 877. There is practically no reference in these hearings to the adverse effects of the measure on foreign companies. To the author’s knowledge there is no recorded statement of senators or CBP representatives considering the economic effect of the CSI on the economies of *foreign* states. But see, S. Hrg. 107 – 224, 2002, p. 56 (comments of Mark E. Souder (referring to the possible burden on small companies)) and p. 95 (concerning the negative effects of security measures on foreign exporters (“If we put the pressure, might they look to go to another port of entry and never come to New York?”)). See also Appellate Body, *US – Gasoline*, p. 28 (“At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners”). See also S. Hrg. 109 – 186, (comment by Senator Lautenberg) p. 27.

<sup>1753</sup> Many of the senators involved in the CSI represent coastal states and have vested interests in port security. For example, Senator Patty Murray (Washington State): see S. Hrg. 109 – 877, p. 10 (“My home State of Washington is the most trade-dependent State in the Nation. We know what is at stake if there were any incident at any of our ports.”); Senator Susan Collins (Maine); Senator Frank Lautenberg (New Jersey); Senator Robert Menendez (New Jersey); Senator Joseph Lieberman (Connecticut); Congressman Jerrold Nadler (New York 8<sup>th</sup> Congressional District); Senator Earnest Hollings (former Senator of South Carolina); Congressman Bennie Thompson (Mississippi).

<sup>1754</sup> Section 201 (a) of the SAFE Port Act only requires the Secretary to consult with national bodies in the creation of this plan. Paragraph (f), as well as Section 204 (c) merely encourage the Secretary to consider the standards of international organizations. In other words, the standards of e.g. the WCO are not mandatory. This represents a unilateral approach to security an international resource.

refuses to recognize the maritime security measures of its trading partners or international organizations as equivalent to its own.<sup>1755</sup>

The complainant could argue that United States should take into account the various international instruments relating to security.<sup>1756</sup> Although such instruments permit states to take their own counter-terrorist measures, they nevertheless underline the need for co-operation in combating terrorism.<sup>1757</sup> For example, with regard to international terrorism generally, paragraph 3 (c) of UN Resolution 1373 obliges all states to “co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.”<sup>1758</sup> In addition, international conventions which regulate important aspects of the fight against international terrorism also recognize that the financing of terrorist organizations as well as the trafficking in conventional arms and WMD can only be effectively prevented by states *co-ordinating* their national counter-terrorist measures and *co-operating* to enforce them.<sup>1759</sup> States must also ensure that any measures taken to combat terrorism comply with their obligations under international law.<sup>1760</sup>

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<sup>1755</sup> According to Section 205 (j) of the SAFE Port Act cargo loaded in a foreign seaport designated under the Container Security Initiative is treated as presenting a lesser risk than similar cargo loaded in a foreign seaport that is not designated under the Container Security Initiative, for the purpose of clearing such cargo into the United States. Cf. Framework of Standards, para. 1.1. (“Customs administrations should not burden the international trade community with different sets of requirements to secure and facilitate commerce, and there should be recognition of other international standards”). See also THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 14 (“New initiatives will be pursued diplomatically through international organizations”).

<sup>1756</sup> See e.g., *US – Shrimp*, para. 132 the Appellate Body sought guidance on how to approach the protection of transboundary interests from international agreements.

<sup>1757</sup> In particular, the United Nations views international terrorism as one of a number of threats to the security of all nations: A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, p. 23.

<sup>1758</sup> This instrument obliged members to take action at national level to combat terrorism. However, this unilateral response should form part of a multilateral response as shown by Article 4, which “emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security.”

<sup>1759</sup> See e.g., The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, which entered into force on 3 July 2005 and obliges states to take action at national level but which, in Article 13 (1), also requires signatory states to “co-operate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition”; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999. Article 12 requires states to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings”; S/Res/1450 underlines the need for international co-operation by calling on states to strengthen multilateral anti-proliferation treaties, (para. 6 (a)), “to renew and fulfil their commitment to multilateral co-operation”, (para. 6 (c)) as well as “to promote dialogue and co-operation on non-proliferation” (para. 7).

<sup>1760</sup> Resolution adopted by the General Assembly on the World Summit Outcome [hereinafter A/Res/60/1], para. 85.

Taking these Resolutions of the United Nations' Security Council into account, the complainant could argue that the SAFE Port Act 2006 should be amended to recognize and incorporate international standards and best practices.<sup>1761</sup> For example, the United States could increase the GATT – compliance of the CSI by offering a single agreement to all of its trading partners based on the international standards of e.g. the Revised Kyoto Convention and Framework of Standards.<sup>1762</sup> This latter instrument aims to strike a balance between trade facilitation and security controls using risk management techniques.<sup>1763</sup> However, unlike the CSI, it leaves the implementation of security standards to states themselves. The security standards of such an agreement would be based on the WCO's Model Bilateral Agreement.<sup>1764</sup> The CBP could monitor the implementation of the Framework of Standards by dispatching inspection teams to foreign seaports on a periodic basis.<sup>1765</sup> Seaports which fail to maintain adequate security standards will be subject to increased inspections at U.S. seaports or trade embargoes.

Considering that the supply chain is a global asset and that the United States is the world's largest importer, the complainant could argue that membership of the CSI should be opened to all states who comply with the security standards of this agreement.<sup>1766</sup> This appears to be a reasonably available alternative because the United States has already adopted this approach in the Agreement between the European Community and the United States of America on intensifying and broadening the Agreement of 28 May 1997 on customs co-operation and mutual assistance in

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<sup>1761</sup> E.g. the Preamble to Annex I, RKC, aims at co-operation with "other national authorities, other customs administrations and the trading communities" as well as the "implementation of relevant international standards". See also Standard 6.7. This would reflect the approach advocated in para. 3 (c) S/RES/1373, which obliges states to "co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts."

<sup>1762</sup> Accordingly, the United States would implement the standards agreed by international organizations. Cf. Section 204 (c) of the SAFE Port Act which does not make international standards mandatory.

<sup>1763</sup> Framework of Standards, p. 3. Each country that joins the Framework commits to employing a consistent risk management approach to address security threats (c.f. 24 Hour Rule/NTC & ATS). Risk management forms the subject of Standard 4, which recommends that customs establish a risk-management system to identify potentially high-risk containers and automate that system. The system should include a mechanism for validating threat assessments and targeting decisions and identifying best practices.

<sup>1764</sup> Standard 7.5, p. 28.

<sup>1765</sup> U.S. Customs Commissioner, Remarks of 23 June 2005 ("But as others have noted [...] approval of this Framework by this council itself will mean very little unless it is in fact implemented"). See also *Historic Agreement Brings World Together to Protect Global Trade*, US Customs and Border Protection Today, July/August 2005.

<sup>1766</sup> E.g. ECSA ANNUAL REPORT 2003 – 2004, p. 19 ("Measures should not be solely inward looking. They should take into account the global character of trade and services").

customs matters to include co-operation on Container Security and related matters.<sup>1767</sup> This agreement implements the Container Security Initiative in all EU member states by means of a single multilateral agreement under the auspices of the European Commission and United States.<sup>1768</sup> Paragraph 3 of the Agreement extends the CSI to all ports within the European Union where the exchange of sea-container traffic is more than *de minimis*.<sup>1769</sup> Opening membership of the CSI to all states with an interest in trading with the United States would encourage the implementation of the Framework of Standards, thereby broadening the security coverage of the CSI and minimizing discriminatory effects.<sup>1770</sup> That mutual recognition of security standards is possible has also been shown by the European Community's AEO programme, which specifically provides for the recognition of security and safety certificates granted by other governments.<sup>1771</sup>

The complainant could therefore argue that there are reasonable alternatives to the CSI which are more GATT compliant.

### **3.4. Has the United States Exercised its Right Reasonably?**

This section examines whether the United States has abused its right to invoke Article XXI by implementing the measure in a way which constitutes unjustifiable discrimination and a disguised restriction on trade. Before starting this investigation it is worth bearing in mind the following statement of the United States government:

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<sup>1767</sup> COUNCIL DECISION on the signature and conclusion of the Agreement between the European Community and the United States of America on intensifying and broadening the Agreement of 28 May 1997 on customs co-operation and mutual assistance in customs matters to include co-operation on Container Security and related matters Brussels, 22 January 2004 COM(2004) 36 final. The Agreement was formulated on November 2003 and accepted by the Council on 30 March 2004. The agreement was signed on 22 April 2004 by the State Secretary Tom Ridge and the Irish Minister of Finance, Charlie McCreevy.

<sup>1768</sup> However, the issue still remains controversial: see e.g. "Warning on risk posed by Container Security Initiative", WLNR 7192695, LLOYD'S LIST INT'L, 21 April 2004

<sup>1769</sup> The provision also refers to "certain minimum requirements" and "adequate inspection technology", thereby lessening the criteria for seaports to satisfy before joining the CSI group of seaports.

<sup>1770</sup> Multilateral agreement is the appropriate method of regulating global resources, see Panel, *U.S. – Tuna I*, para. 5.28.

<sup>1771</sup> *Supra n.* 281.

*“Overly restrictive, unnecessarily costly, or reactionary security measures to reduce vulnerabilities can result in long-term harm to the United States and global economies, undermine positive countermeasures, and unintentionally foster an environment conducive to terrorism.”*<sup>1772</sup>

The complainant could argue that the United States is unreasonable in invoking Article XXI because the CSI **unjustifiably discriminates** against non-member seaports. The measure effectively creates “bilateral security corridors” between the United States and CSI member states which grant preferential trading conditions.<sup>1773</sup> According to one report this runs the risk of creating a two-tier system of trade with nations divided into “favoured and less-favoured trading partners.”<sup>1774</sup> The following statement by the former U.S. Customs Commissioner suggests that this is CBP’s intention.<sup>1775</sup>

*“In the not-too-distant future, I see two types of shipments entering the United States - those that are low risk, and that will speed through the “green lane” into the U.S. economy, and everybody else.”*<sup>1776</sup>

Such an approach could have severe economic consequences for states whose seaports are not invited to participate in the measure. Developing countries are at particular risk in this regard and the failure of CBP to take their needs into account constitutes a clear breach of the Preamble to the Marrakech Agreement.<sup>1777</sup>

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<sup>1772</sup> The NATIONAL STRATEGY FOR MARITIME SECURITY, p. 19.

<sup>1773</sup> See John Arnold, *Best Practices in Management of International Trade Corridors*, The World Bank Group, Transport Papers, (TP-13), December 2006, p.5 ff.. Like a bilateral trade corridor, this security corridor is based on bilateral agreement (only it pertains to security not trade), is governed by legislation (24 Hour Rule and SAFE Port Act) and involves a wide range of stakeholders. Security also plays a role in trade corridors (pp. 9 – 10).

<sup>1774</sup> See OECD REPORT 2005, p. 54 at para. 157.

<sup>1775</sup> See Appellate Body, *US – Gasoline*, p. 28, stating that discrimination resulting from the method of implementation “must have been foreseen, and not merely inadvertent or unavoidable.” This issue is relevant to the question of reasonableness because if the member state has chosen a method of implementation knowing that it would lead to serious economic harm to other states, it would not be fulfilling its obligations under the multilateral trade system in good faith and would therefore be acting unreasonably.

<sup>1776</sup> See U.S. Customs Commissioner, Remarks of 30 October 2003.

<sup>1777</sup> *Supra* pp. 150 - 155



The Complainant could argue that the CSI has exercised its right unreasonably because it has taken no steps to ensure that the CSI does not unduly restrict trade owing to discriminatory and arbitrary administration. In particular, the statutory provisions that seek to regulate the CSI do not contain any appeal procedures for importers affected by the measure and do not reflect any principles of international law or best practices.<sup>1778</sup> In addition, the measure remains non-reciprocal insofar as it does not recognize the security standards of other countries or organizations.<sup>1779</sup>

The United States is unreasonable in invoking Article XXI to justify 100 percent scanning. The effects of this measure suggest that it is a **hidden restriction on trade**. 100 percent scanning dispenses with risk assessment and imposes a blanket scanning requirement on all containers entering the United States. It therefore makes no attempt to balance the needs of trade facilitation with security controls. The measure is also inherently discriminatory because the technology required to carry out 100 percent scanning is likely to be out of reach of developing countries. The potential repercussions of this policy would be felt both within and outside the United States<sup>1780</sup> and it has been strongly opposed by the White House (as being “neither executable nor feasible”)<sup>1781</sup> as well as international organizations, including the World Shipping Council.<sup>1782</sup> It also appears to contradict the United States’ own assertion that “[t]here need not be an inherent conflict between the demand for security and the need for facilitating travel and trade essential to continued economic growth”<sup>1783</sup> and that “[s]ecurity must be a team effort.”<sup>1784</sup> The introduction of this measure is imminent owing to the recent approval of H.R. 1 by the Senate and is set to enter into force no later than 2012. Senators supporting the bill have argued that the scanning of all containers entering the United States is “reasonably available” insofar as there are two ports in China and Russia which operate such a strategy.<sup>1785</sup>

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<sup>1778</sup> *Supra pp.* 39 - 42

<sup>1779</sup> *Supra pp.* 326 - 328

<sup>1780</sup> See NATIONAL STRATEGY FOR MARITIME SECURITY, p. 8 ([A] disruption or slowing of the flow of almost any item can have widespread implications for the overall market, as well as upon the national economy”).

<sup>1781</sup> *Supra n.* 730.

<sup>1782</sup> WSC, Statement of 30 July 2007.

<sup>1783</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY, p. 8.

<sup>1784</sup> THE INTERNATIONAL OUTREACH AND COORDINATION STRATEGY, p. 4.

<sup>1785</sup> However, the technical feasibility of this strategy has been rejected by international organizations: see e.g. WSC, Statement of 30 July 2007.

As stated above, the *abus de droit* doctrine *per se* is not only limited to cases of discrimination and trade restrictions and if it is accepted that it represents an implied condition of the exceptions other constellations of abuse could be possible. In particular, the complainant could argue that the CSI breaches the equality of nations under international law and is nothing more than a political measure which responds to domestic political pressure to take security measures. The following deals with these two points in turn.

The complainant could argue that the CSI violates the principle of the sovereign equality of states as enshrined in Article 2 (1) of the Charter of the United Nations<sup>1786</sup> and recognized by the WTO.<sup>1787</sup> Through its strategy of “pushing the borders outwards”, the United States makes the territory of other states its first line of defence and thereby shifts the risk of a terrorist explosion to foreign territories. As stated above, it is doubtful whether the bilateral agreements which implement the CSI at foreign seaports can be viewed as voluntary agreements *per se* because the United States has used the threat of trade sanction to pressurize states into giving their consent.<sup>1788</sup> This arguably violates Resolution 36/103 of the United Nations which prohibits a state from interfering “in any form or for any reason whatsoever in the internal and external affairs of other States.”<sup>1789</sup> Invoking Article XXI in order to justify acts which are illegal under international law would constitute an unreasonable application of the security exception.<sup>1790</sup> In the event that a bomb did explode in a CSI harbour, the United States may be liable for a wrongful act in accordance with the Draft Articles on Responsibility of States for International Wrongful Acts in 1996.<sup>1791</sup> This general rule that a state is liable for the damage arising from its

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<sup>1786</sup> Article 2 (1) states “The Organization is based on the principle of the sovereign equality of all its Members.”

<sup>1787</sup> Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EURJIL 969, pp. 972 – 973.

<sup>1788</sup> Ravi Agarwal, *Shifting Environmental Risks, India Together*, “*Environmental improvement is considered by many to be a simple question of using the right technology to clean-up and reduce pollution. It is not instantly obvious that such a clean-up could be the cause of a problem somewhere else.*” < <http://www.indiatogether.org/environment/opinions/raviag02-1.htm> >.

<sup>1789</sup> Paragraph 1, United Nations General Assembly, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (A/RES/36/103), 9 December 1981. Paragraph 2 (b) prohibits “coercion or threat in any form whatsoever.”

<sup>1790</sup> Panizzon *supra n.* 1555. Alternatively, if the acts are not considered illegal under international law, The Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities may apply (cf. esp. Articles 9 & 10).

<sup>1791</sup> They generally provide that where a state is in breach of its international obligations, it is responsible for the damage arising from that breach. See Commentary to the Draft Articles on Responsibility of States for International Wrongful Acts, pp. 59-60. The International Law Commission selected state responsibility as suitable for codification in 1949 at its first session. It commenced the study of state responsibility at its seventh session in 1955. The Commission adopted the text of the draft articles on state responsibility at its 2459<sup>th</sup> meeting on 12 July 1996.

wrongful acts is subject to exceptions, including consent, necessity and self-defence.<sup>1792</sup> Assuming that the bilateral agreements are not considered valid, the only defence open to the United States would be Article 24 (1), which states that a situation of distress may preclude the wrongfulness of an act, provided there is no alternative. However, as discussed above, there is a reasonably available alternative to the United States in the form of multilateral agreement and it is unlikely to be acting in a situation of distress considering that the threat of maritime terrorism does not amount to an emergency in international relations.

Finally, the complainant could argue that the United States is invoking Article XXI unreasonably because it is attempting to justify a measure which is primarily serves political aims before establishing its true costs and consequences.<sup>1793</sup> Evidence of this is provided by the Dubai Ports controversy and 100 percent scanning as well as Phase III of the CSI.<sup>1794</sup> Although senators complained that this transaction represented an unacceptable security risk,<sup>1795</sup> it had been approved by the Committee on Foreign Investment<sup>1796</sup> and simply reflected the involvement of

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The Commission has now completed its second reading of the Draft Articles and adopted the final text of the Articles and accompanying commentaries in August 2001 at the end of its 53<sup>rd</sup> session. See <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>.

<sup>1792</sup> Chapter V, Circumstances Precluding Wrongfulness.

<sup>1793</sup> FLYNN, p. 10.

<sup>1794</sup> Florestal, p. 403 (“And certainly Pakistan is a poster-child for the tangible benefits that accrue to co-operative partners in the War on Terror”).

<sup>1795</sup> S. Hrg. 109 – 877, (comment of Patty Murray), p. 12 (“Two months ago, the American people woke up and spoke out when they heard that a foreign-government-owned company could be running our ports”); (testimony of James P. Hoffa), p. 43 (“We believe that American ports should be run by Americans. We believe that port security should be managed by Americans”).

<sup>1796</sup> The Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988 (Amending Section 721 of the Defense Production Act 1950 and codified at US Code 50 App. 50a § 2170, available under <[http://www.law.cornell.edu/uscode/search/display.html?terms=2170&url=/uscode/html/uscode50a/usc\\_sec\\_50a\\_0\\_0002170----000-.html](http://www.law.cornell.edu/uscode/search/display.html?terms=2170&url=/uscode/html/uscode50a/usc_sec_50a_0_0002170----000-.html)>) by providing the President with a mechanism to review and restrict foreign direct investment that presents a risk to national security.<sup>1796</sup> The President delegated this authority to the Committee on Foreign Investment in the United States (“CFIUS”) by Section 3-201 of Executive Order 12661 (Amending Executive Order 11858 of 7 May 1975, Chapter 31 available under <<http://www.archives.gov/federal-register/codification/executive-order/12661.html>>). This Committee is an interagency body, composed of the representatives of twelve U.S. government agencies and departments. It has primary responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States and for coordinating the implementation of United States policy on such investment (EO 11858, Section 1 (a)(b)). According to Section 7(1) EO 1158, the Committee is designated to receive notices and other information, to determine whether investigations should be undertaken, and to make investigations, pursuant to Section 721(a) of the Defense Production Act. Upon completion or termination of any investigation, the Committee shall report to the President and present a recommendation. National security is not defined in the regulations and this reflects the intention that the term is to be defined “interpreted broadly and without limitation to particular industries.” See 30 CFR 800, p. 1006 (“Ultimately, under Section 721 and the Constitution the judgment as to whether a transaction threatens national security rests within the President's discretion”). In 1992 Congress passed the National Defense Authorization Act

foreign companies in the operation of port facilities.<sup>1797</sup> Following its termination, senators used the failed transaction as illustrating the need for tighter port controls.<sup>1798</sup> This desire to make political capital out of maritime security is can also be seen in the recent Sail Only if Scanned Act. Despite the opposition to this bill by CBP, the U.S. administration as well as international organizations owing to the disruption it is likely to cause, the bill has recently been passed into law. The United States<sup>1799</sup> has not been alone in using Article XXI to justify such measures in the past.<sup>1800</sup> However, the limitations and conditions of the national security exception suggest that it cannot be used to justify measures predominantly motivated by political concerns.<sup>1801</sup> Invoking a provision for a different purpose than that for which it is intended constitutes a clear case of abuse.<sup>1802</sup>

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for Fiscal Year 1993 (the so-called “Byrd Amendment”) which amended the Exon-Florio statute. Section 837(a) of this Act authorizes the CFIUS to undertake an investigation in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States (USC50 App. 50a §2170(b)).

<sup>1797</sup> See Trujillo and Nombela, pp. 5, 16 ff..

<sup>1798</sup> See Jill Caiazzo and Cyndee Todgham et al, pp. 192 – 193; *contra* comment of Daniel E. Lungren Hearing of 5 April 2006, p. 13 (“I think it is important to note that neither this effort in the Senate nor the companion effort in the House with the SAFE Ports Act is an afterthought to the recent Dubai Ports World controversy.”) However, it is worth noting that all senators regard the transaction as a security risk, see pp. 3, 12, 31.

<sup>1799</sup> In 1949 against Czechoslovakia, in 1984 against Nicaragua and in 1996 against Cuba. The WTO Secretariat has noted that “U.S. trade policies are connected to its broader policy aims.” US TRADE POLICY REVIEW 2004, para. 18; see also US TRADE POLICY REVIEW 2006, p. 14, para. 9, “The United States continues to pursue a policy of advancing open markets and the rule of law as part of a broader global security objective.”

<sup>1800</sup> The United States is not alone in regarding Article XXI as linked to its foreign policy aims. See e.g. trade sanctions applied by the European Union against Argentina for non-economic reasons in 1982 (*supra n.* 1265). The trade embargoes in this case were adopted in a display of solidarity with another member state. However, the states in question were not confronted by any threat to their essential security interests. In addition, none of the situations covered by Article XXI (b) (i) – (iii) appear to have existed. See C/M/157, p. 2. The Argentinian representative complained that “the measures were based on reasons of a political nature and were meant to exert political pressure on the sovereign decisions of Argentina in order to intervene in a conflict in which only one of the countries concerned was involved.” Clearly, the economic sanctions applied by members who were not involved in the conflict are objectively difficult to justify under Article XXI.

<sup>1801</sup> See Spanogle, p. 1338 “[Article XXI]... may not be available for trade-related measures, but it does seem available for politically motivated measures.”

<sup>1802</sup> Panizzon *supra n.* 1555.

**4. Final Result: Does the CSI Comply with WTO Law?**

**On the balance of probabilities, the Panel is likely to hold that the Container Security Initiative is not justified by Article XXI and therefore contravenes WTO law.**

In order to comply with Article XXI, the United States must satisfy three requirements. In this, the burden of proof is on United States to justify its claims by establishing a *prima facie* case. If succeeds in doing so, the complainant would then have to adduce its own evidence to refute the presumption of justification. As stated earlier, the standard of review is basically objective but defers to the member states invoking the provision in cases of doubt (pp. 239 – 240). The findings of the dissertation with regard to the three requirements are summarized below:

	Likely	Uncertain	Unlikely
<b>1) Does the CSI fall within the Scope of Article XXI?</b>			
Does the CSI relate to fissionable materials?		X	
Is the war on terror “a state of war”?			X
Is maritime terrorism “an emergency”?			X
Is there a threat to maritime transport?		X	
<b>2) Is the CSI “necessary”?</b>			
Does the CSI protect “essential security interests”?		X	
Is the CSI effective?		X	
Is the CSI the least trade-restrictive measure available?			X
<b>3) Has the CBP used its right under Article XXI “reasonably”?</b>			
Is the CSI unjustifiably and arbitrarily discriminatory?	X		
Is the CSI a disguised restriction on trade?	X		

**1. It is uncertain or unlikely that the CSI will be deemed to fall within the scope of Article XXI**

It is uncertain whether the Panel would hold that the CSI falls under Article XXI (b) (i) as a security measure which relates to fissionable materials (pp. 296 – 297). On the one hand, CBP has expressly stated that the reason for its introduction was to prevent a “dirty bomb” from entering the United States (p. 297) and, on the other, jurisprudence suggests that the Panel may

well decide to interpret the term “relating to” in a narrow sense (i.e. “primarily aimed at”) (pp. 267 – 268). If the Panel were to hold otherwise, the standard imposed by this provision would arguably be too low. The Panel is unlikely to hold that the “war on terror” constitutes a “time of war” under Article XXI (b) (iii) because this understanding of war does not correspond to the applicable international law (p. 300). In addition, maritime terrorism is unlikely to be deemed an “emergency in international relations” because evidence suggests that terrorist attacks on vessels and maritime facilities are too small-scale and sporadic (pp. 301 ff.). As far as the threat to U.S. maritime container transport is concerned, the Panel is likely to adopt a deferential standard to the arguments of the United States (pp. 304 – 305). That said, it is unlikely that the United States will be able to present enough evidence to substantiate a level of threat justifying the severity of the security measures introduced (particularly 100 percent scanning) (pp. 308 – 310).

### **2. It is unlikely or uncertain that the CSI will be deemed “necessary”**

The Panel is likely to hold that the CSI seeks to protect the “essential security interests” of the United States owing to the economic importance of seaports for societies generally (pp. 311 – 314). Although the effectiveness of the measure has been doubted, the improvements mandated by the SAFE Port Act 2006 may satisfy the Panel that action has been taken to remedy this situation (pp. 322 – 324). On the other hand, the CSI is clearly *not* the least trade-restrictive measure reasonably available because it would be possible for CBP to offer an agreement based on the WCO’s Framework of Standards to all states and to mutually recognize the security standards of other states without jeopardizing its own security standards (pp. 327 – 328). Amending the measure in this way would not require a large scale overhaul of the CSI either because the Framework of Standards is largely modelled on the CSI and C-TPAT (pp. 49 – 51).

### **3. It is unlikely or uncertain that the CBP will be deemed to have exercised its right under Article XXI “reasonably”**

Should the examination move to the final stage of the test, the Panel is likely to hold that the United States has failed to reasonably exercise its right to take security measures under Article XXI. This is because the CSI, in its present form, is unjustifiably discriminatory (pp. 329) and a disguised restriction on trade (p. 330). The investigation has also suggested that it may be possible for the complainant to prove other forms of abuse as well.

## Abbreviations

### LINGUISTIC ABBREVIATIONS

App.	appendix
Ann.	annex
Art., Arts.	article, articles
Ch.	chapter
e.g.	exempli gratia
ed.	edition
Eds.	editors
et seq.	et sequentia
fig.	figure
Id.	the same
Infra.	below
n. , nn.	note, notes
p. , pp.	page, pages
Prmbl.	preamble
Para., paras.	paragraph
Pub. L.	public law
S.	statute
Sec.	section
Stat.	statute
Supra	above

S. Hrg. Sess.	Senate hearing Session
S.Amdt.	Senate amendment
Vol.	Volume
USC	United States Code

### SOURCES

ADMIN. L. REV.	Administrative Law Review
AM. J. INT'L L.	American Journal of International Law
ALB. L. REV.	Albany Law Review
AM. U. INT'L. L. REV.	American University International Law Review
Ann. Surv. Int'l & Comp. L.	Annual Survey of International and Comparative Law
B.C. INT'L & COMP. L. REV.	Boston College International Comparative Law Review
BERKELEY J. INT'L L.	Berkeley Journal of International Law
BROOK. L. REV.	Brooklyn Law Review
CAL. L. REV.	California Law Review
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CHI. J. INT'L L.	Chicago Journal of International Law
CHINESE J. IN'L L.	Chinese Journal of International Law
COLUM. J. ENVTL. L.	Columbia Journal of International Law
CORNELL INT'L L.J.	Cornell International Law Journal
DUKE L.J.,	Duke Law Journal
EUR. J. INT'L L	European Journal of International Law
FLA. J. INT'L L.	Florida Journal of International Law



FRBNY ECON. POL'Y. REV.	FRBNY Economic Policy Review
GA. J. INT'L & COMP. L.	Georgia Journal of International and Comparative Law
GEO. L.J.	Georgetown Law Journal
GEO. PUB. POL'Y REV.	Georgetown Public Policy Review
GEO. WASH. J. INT'L L. & ECON.	George Washington Journal of International Law and Economics
HARV. J. L. & TECH.	Harvard Journal of Law and Technology
HOUS. L. REV.	Houston Law Review
HOW. SCROLL SOC. J. L. REV.	Howard Scroll: The Social Justice Law Review
IND. L. REV.	Indiana Law Review
INT'L L. Q.,	International Law Quarterly
INT'L & COMP. L. Q.	International and Comparative Law Quarterly
ILSA J. INTL. & COMP. L.	ILSA Journal of International and Comparative Law
INTL ECON. L.	International Economic Law
INT'L LAW REVIEW	International Law Review
INT. T.L.R.	International Trade Law and Regulation
J. ENVTL. L.	Journal of Environmental Law
JHESM	Journal of Homeland Security and Emergency Management
J. INT'L ECON. L.	Journal of International Economic Law
J. MAR. L. & COM.	Journal of Maritime Law and Commerce
JWT	Journal of World Trade
LAW AND POL'Y INT'L BUS.	Law and Policy in International Business
LEIDEN J. INTL L.	Leiden Journal of International Law

LLOYD'S LIST INT'L	Lloyds List International
LOY. L.A. INT'L & COMP. L. REV.	Loyola of Los Angeles International and Comparative Law Journal
MICH. J. INT'L. L.	Michigan Journal of International Law
MINN. J. GLOBAL TRADE	Minnesota Journal of Global Trade
MORNING NEWS TRIB.	Morning News Tribune
NOTRE DAME L. REV.	Notre Dame Law Review
N.Y.U. J. INT'L L. & POL.	New York University Journal Of International Law and Policy
N. Y. INT'L REV.	New York International Review
PACIFIC RIM L. & POL'Y J.	Pacific Rim Law and Policy Journal
PUBLIC ADMIN. DEV.	Public Administration and Development
SANTA CLARA L. REV.	Santa Clara Law Review
STAN. L. REV.	Stanford Law Review
STAN. J. INT'L L.,	Stanford Journal of International Law
STETSON L. REV.	Stetson Law Review
SYRACUSE J. INT'L L.	Syracuse Journal of International Law
TRANSP. L. J.	Transportation Law Journal
TUL. L. REV.	Tulane Law Review
TUL. MAR. L. J.	Tulane Maritime Law Journal
U.C. DAVIS L REV.	University of California at Davis Law Review
UCLA J. INT'L L. & FOREIGN AFF.	UCLA Journal of International Law and Foreign Affairs
U. MIAMI INTER-AM. L. REV.	University of Miami Inter-American Law Review
UMKC L. REV.	UMKC Law Review

U. PA. J. INT'L ECON. L.	University of Pennsylvania Journal of International Economic law
U.S.F. MAR. L.J.	Univeristy of San Francisco Maritime Law Journal
VA. J. INT'L L	Vanderbilt Journal of International Law
Vermont Bar J.	Vermont Bar Journal
VIRGINIA J. INT'L L.	Virginia Journal of International Law
WLNR	West Law News Reports
WRLDNWSC	World News Connection (Newswire)
WORLD ARB. & MEDIATION REP.	World Arbitration and Mediation Reports
YALE J. INT'L LAW	Yale Journal of International Law

#### **SECURITY-RELATED MEASURES**

ACE	Automated Commercial Environment
AEO	Authorized Economic Operator
AMS	Automated Manifest System
ASEAN	Association of South-East Asian Nations
ATS	Automated Targeting System
BASC	Business Alliance for Secure Commerce
BIC	Bureau Internationale des Containers
CBP	Customs and Border Protection
CC	Customs Code
CCIP	Customs Code Implementing Provisions
C.F.R.	Code of Federal Regulations
CIR.	Circuit

CRS	Congressional Research Service
CSI	Container Security Initiative
C-TPAT	Customs – Trade Partnership Against Terrorism
DOE	Department of Energy
DoPs	Declaration of Principles
ECMT	European Council of Ministers for Transport
ECSA	European Community Shipowners' Association
Exec. Order	Executive Order
FAST	Free and Secure Trade Programme
FAQ	Frequently Asked Questions
Fed. Reg.	Federal Register
GAO	Government Accountability Office
H.R.	House of Representatives
HSPD	Homeland Security Presidential Directive
ICJ Rep.	International Court of Justice Reports
ILM	International Legal Materials
IMO	International Maritime Organization
INS	Immigration and Naturalization Service
ISPS	International Ship and Port Facilities Security Code
NAFTA	North Atlantic Free Trade Association
NSPD	National Security Presidential Directive
OECD	Organization for Economic Co-operation and Development
O.J.	Official Journal

P.C.I.J.	Permanent Court of International Justice
PSI	Proliferation Security Initiative
RKC	Revised Kyoto Convention
SENTRI	Secure Electronic Network for Travelers Rapid Inspection
SFI	Secure Freight Initiative
S.J. Res.	Senate Joint Resolution
SOLAS	Convention on the Safety of Life At Sea
TIR	Transports Internationaux Routiers
UNCTAD	United Nations Conference on Trade and Development
USCG	United States Coast Guard
U.N.	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
US-VISIT	United States Visitor and Immigrant Status Indicator Technology
WB	World Bank
WCO	World Customs Organization
WMD	Weapons of Mass Destruction
WSC	World Shipping Council
WTO	World Trade Organization

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