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Thinking Outside the Border: National Security and the Forward Deployment of the U.S. Border

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ARTICLE

THINKING OUTSIDE THE BORDER: HOMELAND SECURITY AND THE FORWARD DEPLOYMENT OF THE U.S. BORDER

*Gregory W. Bowman**

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I. INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, there has been a huge amount of legal scholarship on a broad range of national security topics. Yet perhaps surprisingly, the subject of inbound cargo security remains underdeveloped in legal literature. Post-September 11, 2001, U.S. cargo security initiatives have been addressed, but much of the treatment of these programs has been long on description and short on analysis.¹ Generally speaking, there has not been enough broad, thematic discussion of these programs or their important legal and practical implications.² Therefore, this Article aims to think outside the box—or border—to rectify this shortcoming.

1. Legal scholarship on the subject of U.S. cargo security includes Douglas M. Browning, *The Smart Border: Movement of Goods—Transportation and Customs Aspects*, 29 CAN.-U.S. L.J. 151, 153 (2003) (briefly discussing the U.S. government's "effort to balance trade and security interests and look at ways to extend the border"); Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183 (2003) (reviewing post-September 11, 2001, security efforts for ocean-going cargo); Leslie Alan Glick, Lecture, *World Trade After September 11, 2001: The U.S. Response*, 35 CORNELL INT'L L.J. 627 (2002) (summarizing the U.S. Customs and Coast Guard responses to the 9/11 attacks); Sung Y. Lee, *The Container Security Initiative: Balancing U.S. Security Interests with the European Union's Legal and Economic Concerns*, 13 MINN. J. GLOBAL TRADE 123 (2004) (discussing Container Security Initiative (CSI)); Matthew T. McGrath & Cortney O'Toole Morgan, *Customs Law*, 37 INT'L LAW. 245 (2003) (generally summarizing U.S. customs law developments, including efforts to push the border outward); 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, 355 (2002) (noting, in discussing CSI, that "[t]he favored solution in the United States [to the problem of vessel security and inspection] is the concept of pushing U.S. borders outward"); Thomas J. Schoenbaum & Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11th*, 77 TUL. L. REV. 1333, 1347–49 (2003) (discussing the establishment of CSI, the Customs-Trade Partnership Against Terrorism (C-TPAT) program, and the 24-Hour Rule, discussed *infra* in Part III); Jessica Romero, Recent Development, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHI. J. INT'L L. 597 (2003) (summarizing the development of CSI and briefly discussing sovereignty concerns raised by this program).

Other scholarship on this topic from outside the legal academy includes Irvin Lim Fang Jau, *Not Yet All Aboard . . . But Already All at Sea over the Container Security Initiative*, J. HOMELAND SECURITY, Nov. 2002, <http://www.homelandsecurity.org/journal/Articles/Jau.html>, which identifies sovereignty-related concerns raised by post-September 11, 2001, U.S. border security initiatives and concludes that cooperative efforts are required for success, and AARON LUKAS, CTR. FOR TRADE POL'Y STUD., CATO INST., PROTECTION WITHOUT PROTECTIONISM: RECONCILING TRADE AND HOMELAND SECURITY 11 (2004), <http://www.freetrade.org/pubs/pas/tpa-027.pdf>, which discusses the tension between trade and homeland security in economic terms and briefly touches on sovereignty issues.

2. For an exception, see Marjorie Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National Security Measures*, 72 BROOK. L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=945012, which argues that CSI violates GATT.

What is particularly striking about current U.S. inbound cargo security programs is that the U.S. government describes them as efforts to improve national security by “push[ing] the border outwards.”³ Robert C. Bonner, the former Commissioner of Customs and Border Protection (CBP), the federal agency charged with primary implementation and oversight of these programs,⁴ has characterized them as efforts to “expand our perimeter of security away from our national boundaries and towards foreign points of departure.”⁵ In fact, the phrase “pushing the border outward” has become something of a U.S. national security battle cry in recent years, and its rise to prominence has paralleled the entry of the term “homeland security” into our national discourse.⁶ The phrase “pushing the border outward” (or some close variant) has appeared in multiple CBP statements and publications,⁷ congressional testimony by

3. See, e.g., *Port and Maritime Security Act: Hearing on S. 1214 Before the S. Comm. on Commerce, Science, and Transportation*, 107th Cong. 20 (2002) [hereinafter *Port and Maritime Security Act Hearing*] (statement of U.S. Customs Comm'r Robert C. Bonner) (“I believe that Customs must also do everything possible to ‘push the border outwards.’”); Robert C. Bonner, *Commissioner’s Message: Pushing the Border Outward*, U.S. CUSTOMS TODAY, Jan. 2002, <http://www.cbp.gov/xp/CustomsToday/2002/January> (“Lately, I have been speaking in many forums about the need for U.S. Customs to ‘push the border outward’ to better protect against the international terrorist threat, including the possible concealment of weapons of mass destruction.”); *Everything Changed: 1989–2003*, U.S. CUSTOMS TODAY, Feb. 2003, <http://www.cbp.gov/xp/CustomsToday/2003/February/everything.xml> (“Days after the [September 11th] attack, newly sworn-in Commissioner Robert C. Bonner began talking about the need to push the border outward”); see also Harold J. Creel, Jr., Chairman, Fed. Maritime Comm’n, Remarks at the South Carolina Int’l Trade Conference (May 21, 2002), available at http://www.fmc.gov/speeches/newsrelease.asp?SPEECH_ID=59 (“The universal concept underlying the government’s efforts is to push the border outward to ensure that cargo is secure from the point of origin, and to have complete information about incoming vessels long before containers are even loaded on the vessels.”).

4. U.S. Customs & Border Prot., Protecting Our Borders Against Terrorism, <http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited Apr. 14, 2007). Customs and Border Protection is the successor agency to the U.S. Customs Service. *Id.*

5. *Port and Maritime Security Act Hearing*, *supra* note 3, at 20 (statement of U.S. Customs Comm'r Robert C. Bonner).

6. A December 30, 2005, Lexis search for “homeland w/3 security and ‘national security’” in the “US Law Reviews and Journals, Combined” database uncovered only one U.S. law review article that used the term “homeland security” without referencing the September 11, 2001, attacks or terrorism. Even the sole article uncovered was a Fall 2001 publication, Katherine Swartz, *Justifying Government as the Backstop in Health Insurance Markets*, 2 YALE J. HEALTH POL’Y L. & ETHICS 89, 101–02 (2001), generally discussing funding issues for national security or homeland security versus other government programs such as insurance.

7. See *Treasury and General Government Appropriations for Fiscal Year 2003: Hearings on S. 2740 Before Subcomm. of S. Comm. on Appropriations*, 107th Cong. 202 (2002) [hereinafter *Fiscal Year 2003 Budget Request Hearing*] (statement of U.S. Customs Comm'r Robert C. Bonner) (noting that U.S. Customs is “fostering initiatives that ‘push the border outwards’ and extend our [national] security perimeter”); *Port and Maritime*

U.S. Coast Guard personnel,⁸ and Congressional Research Service reports on national security law matters.⁹ President George W. Bush drew upon the related theme of forward deployment during the 2004 presidential election.¹⁰ The Bush Administration's first National Security Strategy, issued in September 2002, did not employ this precise phrase, but it did speak of "identifying and destroying [terrorist] threat[s] before [they] reach[] our borders," which in many respects is much the

Security Act Hearing, supra note 3, at 20 (statement of U.S. Customs Comm'r Robert C. Bonner) ("In approaching our primary mission to prevent terrorists and terrorist weapons from transiting our borders, I believe that Customs must also do everything possible to 'push the border outwards.'"); U.S. CUSTOMS & BORDER PROT., PERFORMANCE & ANNUAL REPORT 13 (2004) (on file with the *Houston Law Review*), available at http://www.cbp.gov/linkhandler/cgov/toolbox/publications/admin/cbp_annual.ctt/cbp_annual.pdf (listing an ongoing Customs and Border Protection goal of "[c]ontinued implementation of proven programs," such as the Container Security initiative, that have been characterized as efforts to forward deploy the U.S. border); U.S. BUREAU OF CUSTOMS & BORDER PROT., PERFORMANCE & ANNUAL REPORT 2 (2003) (on file with the *Houston Law Review*) ("Pushing our zone of security outward through joint initiatives with foreign governments such as the Container Security Initiative . . ."); see also McGrath & Morgan, *supra* note 1, at 247 (positing that the primary purpose of the CSI "program is to push the cargo screening process beyond the United States' borders and ports"); Leslie Woolf, *Global Terrorism Three Years Later*, CUSTOMS & BORDER PROT. TODAY, Sept. 2004, <http://www.cbp.gov/xp/CustomsToday/2004/Sep/global.xml> (suggesting that "push[ing] the border out" is "one of [the] oldest military tactics").

8. See *Fiscal Year 2004 Budget Requests: Hearing Before the Subcomm. on Oceans, Fisheries, and Coast Guard of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 8 (2003) (testimony of Admiral Thomas H. Collins, Commandant, U.S. Coast Guard) ("Homeland Security necessitates pushing America's maritime borders outward, away from ports and waterways so layered, maritime security operations can be implemented.").

9. See WILLIAM H. ROBINSON ET AL., CONG. RES. SERV., CRS REP. RL32841, BORDER AND TRANSPORTATION SECURITY: POSSIBLE NEW DIRECTIONS AND POLICY OPTIONS 5 (2005), available at <http://www.fas.org/sgp/crs/homesecc/RL32841.pdf> (discussing U.S. government programs and policies to "push[] the border outwards to intercept unwanted people or goods before they reach the United States"); LISA M. SEGHETTI ET AL., CONG. RES. SERV., CRS REP. RL32840, BORDER AND TRANSPORTATION SECURITY: SELECTED PROGRAMS AND POLICIES 6–11 (2005), available at <http://www.fas.org/sgp/crs/homesecc/RL32840.pdf> (discussing the pushing-out-the-border initiative); see also *Pushing the Border out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 2 (2004) (statement of Rep. John N. Hostettler) ("[T]his hearing . . . will also examine new initiatives and proposals that might help 'push the border out' in combating alien smuggling on all levels . . ."); U.S. Customs & Border Prot., Fact Sheet: U.S. Customs and Border Protection Actions Taken Since 9/11 (Sept. 17, 2004), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/2004/09172004.xml (summarizing the initiatives taken to protect the border since 9/11).

10. See Press Release, Office of White House Press Secretary, President's Remarks on Homeland Security in New Jersey (Oct. 18, 2004), available at <http://www.whitehouse.gov/news/releases/2004/10/20041018-11.html> ("Our first duty in the war on terror is to protect the homeland. . . . In a free and open society, it is impossible to protect against every threat. . . . [W]e must pursue a comprehensive strategy against terror. The best way to prevent attacks is to stay on the offense against the enemy overseas.").

same thing.¹¹ *The 9/11 Commission Report* backs this conceptual approach by recommending that foreign visitor screening be done abroad and by noting that “[t]he further away from our borders that screening occurs, the more security benefits we gain.”¹²

The prevalence of the phrase “pushing the border outward” thus presents an interesting question: is it simply an exercise in appealing rhetoric and imagery, or is there real substance lurking behind the words? To state the question differently, are these programs relatively uneventful administrative measures, or do they represent important, material alterations to international cargo trade? This Article argues that, far from being mundane or rhetorical, the U.S. cargo security programs described as “pushing the border outward” are in fact transforming how U.S. borders operate from both a conceptual and practical perspective. Specifically, by moving certain aspects of border functionality to locations well-removed from the physical U.S. border, these programs are making U.S. regulation of inbound trade significantly more extraterritorial in its reach and thus more akin to U.S. export control laws, which for decades now have been characterized by substantial extraterritoriality. These changes to U.S. border functionality will not only affect U.S. national security, but, perhaps even more importantly, they promise to work enormous changes on the pattern and growth of international trade.

11. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), available at <http://www.whitehouse.gov/nsc/nss.html>. This language in the 2002 National Security Strategy appeared in the context of asserting the right of self-defense via a preemptive military strike, but it is not unreasonable to read the greater (preemptive military strike) to include the lesser (employing nonmilitary measures to counter terrorist threats). In any event, the language of the 2002 National Security Strategy was intentionally nonspecific.

The administration’s revised National Security Strategy of March 2006 is even more nonspecific, and speaks broadly (and rather definitionally) of preventing terrorist attacks “before they occur . . . by using a broad range of tools.” THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12 (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>. Even more so than the 2002 version, the 2006 language clearly would include nonmilitary measures to prevent terrorist attacks, such as those discussed in this Article.

12. See THE 9/11 COMMISSION REPORT 389 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>. Even the outcry in early 2006 concerning the proposed acquisition of managerial control of major U.S. seaports by a United Arab Emirates company, Dubai Ports World, underscores from a different angle the significance that border and port security matters occupy in U.S. governmental policy. In that case, the concern centered on the proposed operation of major U.S. ports by a Middle Eastern firm, which many observers viewed as an incursive breach of the U.S. international trade security perimeter. Accord Editorial, *Goodbye, Dubai*, L.A. TIMES, Mar. 10, 2006, at B12; *US Economic Barriers: Bush Must Set out a Stronger Case Against Protectionism*, FIN. TIMES, Mar. 13, 2006, at 14; Jonathan Weisman, *Arab Firm Offers to Delay Deal on Seaports*, WASH. POST, Feb. 24, 2006, at A1.

In order to fully develop and explore this thesis, this Article is structured as follows. Part II summarizes relevant aspects of the pre- and post-September 11, 2001, international trade landscape. This section illustrates that the perceived tension between the promotion of international trade and the furtherance of U.S. national security is a key driver of current U.S. cargo security programs to “push the border outward.” Part III then provides a concise technical overview of the primary post-September 11, 2001, U.S. government programs that “push the border outward” in terms of ocean-going, overland, and air transit cargo. This section also discusses how these activities fit into the overall framework of current U.S. national security efforts. Next, Part IV analyzes these programs through the lens of early- and mid-twentieth century political geography, which is helpful for evaluating the defensive rhetoric and actual structure of these U.S. government programs. Part V addresses jurisdictional and sovereignty aspects of these forward deployment efforts, with particular emphasis on the current trend toward multilateralizing and internationally harmonizing these cargo security programs.

Finally, Part VI offers observations concerning the short- and long-term effects of these forward deployment programs. In particular, cargo security programs designed to “push the border outward” can be seen as transforming the U.S. inbound trade sector from one of largely domestic application to one for which extraterritoriality is a core feature. In the short term, this has resulted in greater U.S. control or influence over foreign commercial and regulatory activities, which is a significant development. In the long term, the effect of such extraterritoriality will depend upon whether these U.S. programs become truly and permanently multilateral in application or remain largely bilateral or unilateral in effect. If they remain bilateral or unilateral, the short-term status quo of greater U.S. extraterritorial reach will remain in place. If permanent multilateralization occurs, however, these cargo security programs could help reduce or erase many of the current distinctions between domestic cargo shipments and international cargo shipments. This, as explained below, could transform the nature of international trade in cargo.

II. THE INTERNATIONAL TRADE LANDSCAPE PRIOR TO AND FOLLOWING SEPTEMBER 11, 2001

In order to fully appreciate the perceived U.S. need to “push the border outward” following September 11, 2001, it is worth

first reviewing certain international trade developments over recent decades. As explained below, the reduction in customs tariffs since the 1960s, the advent of containerized cargo, and the adoption of “just-in-time” inventory practices have fueled an explosive increase in U.S. international trade. However, these developments also have created or exacerbated security weaknesses in the structure of international trade in goods, and this in turn has led to current U.S. government efforts to “push the border outward.”

A. *Efforts to Facilitate International Trade Prior to September 11, 2001*

It is well-established that international trade is a powerful engine for economic growth, largely due to the effects of comparative advantage and specialization. However, the transaction costs involved in international trade—costs such as multimodal transport through multiple jurisdictions, regulatory fees and customs duties, various inspections, and the need for transactions to comply with the rules of at least two legal regimes—are generally recognized as more numerous and more significant than those in domestic transactions, and these can have a dampening effect on trade.¹³ In response, certain aspects of the modern, global marketplace are the result of efforts, both regulatory and purely commercial, to reduce transaction costs and to promote international trade.

Since the 1940s, the members of the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO), have worked to reduce customs duty levels and other barriers to international trade, thus making international trade more economically viable.¹⁴ WTO trade statistics show that in goods alone, world trade levels have increased approximately seventy-fold since 1960, not accounting for inflation.¹⁵ In the United States, international

13. See RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 470 (2005) (observing that customs procedures for international transactions can impede or even prevent trade).

14. See generally RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS §§ 9.2–3 (2d ed. 2001).

15. Specifically, worldwide import levels have increased from US \$137 billion in 1960 to US \$9.495 trillion in 2004, and worldwide export levels have grown from US \$130 billion in 1960 to US \$9.153 trillion in 2004. See World Trade Organization, Statistics Database, <http://stat.wto.org/Home/WSDBHome.aspx?Language> (last visited Mar. 12, 2007) (data available on the WTO “Time Series” searchable database: Click “Time Series” link, then make “Selection” with the following choices: Subject: Total merchandise trade; Reporter: World; Partner: World; Trade Flow: Exports and Imports; Unit: US dollar at

trade levels have increased exponentially over the past several decades.¹⁶

Another effort to reduce transaction costs in international trade has been the widespread use of containerized ocean cargo, which began in the 1950s.¹⁷ Prior to containerization, international cargo shipments were characterized by “break-bulk” cargo handling: goods destined for foreign markets were packed piecemeal onto trucks or rail cars for domestic transport to a seaport, where these goods would be unpacked, laden onto ocean-going vessels, and repacked. The same process would occur in reverse at the foreign port. With containerized shipping, by contrast, goods can be loaded onto a container at a centralized warehouse and can be transported to the seaport, where the sealed container is laden onto a sea-going vessel without unpacking and repacking.¹⁸ Containerized shipments thus require less handling, which significantly reduces shipping costs, loading time, and cargo breakage.¹⁹ It has been estimated that approximately 90% of current global trade in goods uses shipping containers.²⁰

More recently, just-in-time inventory practices have further reduced the cost of doing business, both domestically and internationally, by often reducing the need to maintain large stocks of inventory.²¹ This freeing up of capital and resources previously devoted to inventory has contributed significantly to

current prices; Year: 1960 and 2004).

16. According to the U.S. Department of Commerce’s Census Bureau, U.S. imports of goods rose from approximately US \$15 billion in 1960 to approximately US \$1.473 trillion in 2004, an increase of nearly 10,000% (not accounting for inflation). U.S. Census Bureau, U.S. Trade in Goods and Services—Balance of Payments (BOP) Basis (Feb. 13, 2007), <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>. In like fashion, U.S. exports of goods increased from approximately US \$20 billion in 1960 to over US \$800 billion in 2004, a rise of over 4,000% (again not accounting for inflation). *Id.* It is worth noting that outbound and inbound foreign investment levels also have experienced exponential growth in recent decades. See Gregory W. Bowman, *E-Mails, Servers, and Software: U.S. Export Controls for the Modern Era*, 35 GEO. J. INT’L L. 319, 321–22 & nn.7, 9 (2004).

17. See Mellor, *supra* note 1, at 347–48.

18. *Id.* at 348.

19. *Id.* (“The implementation of this new system of containerization created positive economic benefits for both shippers and ship owners.”).

20. Stephen E. Flynn, *The New Reality in Canada/U.S. Relations: Reconciling Security and Economic Interests and the “Smart Border Declaration,”* 29 CAN.-U.S. L.J. 9, 14 (2003); Press Release, U.S. Consulate Gen., U.S. Customs Container Security Initiative Forging Ahead (Aug. 12, 2002), available at http://hongkong.usconsulate.gov/pas_pr_2002081201.html.

21. See Mellor, *supra* note 1, at 352 (“As logistical and manufacturing processes have become more efficient, manufacturers have reduced capital expenditures by decreasing their inventories and relying on just-in-time delivery of parts and supplies.”).

international economic growth over the past decade.²² Thus, the triumvirate of reduced customs duties and other trade barriers, containerized shipping, and just-in-time inventory practices has fueled a global economic revolution in recent decades, and international trade levels (as well as foreign direct investment levels) have skyrocketed.²³

B. U.S. International Trade Security Prior to September 11, 2001

This increase in international trade presented problems, of course. Between the rise in international trade volumes, the difficulty of inspecting containerized shipments, and the emergence in recent decades of a limited number of international trade “megaports”—ports such as Singapore and Bremerhaven, Germany, that serve as transshipment hubs for large portions of ocean-going trade²⁴—international ocean shipments arriving in the United States were replete with containers from unverified vendors holding goods that might or might not match their shipping documentation.²⁵ Shipments by sea and land regularly arrived in the United States with little advance information regarding the contents or source.²⁶

Nonetheless, the security of inbound international trade shipments remained a relatively low-profile issue prior to September 11, 2001, at least in comparison to concerns over drug interdiction and the facilitation of international trade flows.²⁷

22. *Id.*

23. *See supra* note 16 (documenting the increase in international trade and foreign direct investment levels).

24. *See* Press Release, *supra* note 20. The U.S. Customs Service (now CBP) has used the term “megaport” loosely to refer to high-volume ports. Others have suggested more formal definitions based on factors such as a port’s infrastructure and ability to serve high-volume, deep draft cargo vessels. *See, e.g.,* Mellor, *supra* note 1, at 350 n.43 (citing John G. Fox, *Sea Change in Shipping*, U.S. NAVAL INST. PROC., at 62 (May 2001); *The Economic Impact of Port Regionalization and Expansion*, TEX. S. INTERIM COMM. ON NAT. RES., 77th Leg., at 35–36 (2000)).

25. *See, e.g.,* *Cargo Containers: The Next Terrorist Target?: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 72 (2003) [hereinafter *Container Security Hearing*] (written statement of Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations) (stating that the United States could only “examine between 1–2 percent” of incoming shipments); Mellor, *supra* note 1, at 348–49 (noting that only the shipper and the recipient truly know the contents of a container).

26. *See* Mellor, *supra* note 1, at 341–43 (reflecting on the dearth of inspection capability for cargo arriving at U.S. ports); *see also* JOHN F. FRITTELLI, CONG. RES. SERV., CRS REP. RL31733, PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS 3 (2005), available at <http://www.fas.org/spp/crs/homesecc/RL31733.pdf> (reporting the low inspection rates for cargo delivered to U.S. ports).

27. *See* Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 101(14), 116 Stat. 2064, 2067 (stating a congressional finding that a 1999 study of port

Trade security concerns did not gain significant political traction largely because there had been relatively few high-profile security problems.²⁸ Thus, as trade volumes continued to rise, the percentage of U.S. import shipments inspected prior to entry into the United States continued to fall, until by 2001 fewer than 2% of sea-going cargo containers arriving at U.S. ports were being inspected.²⁹

In other words, prior to September 11, 2001, the U.S. government's modus operandi (although certainly not its official policy) was that national security was not significantly impaired by an import system that (a) obtained little reliable advance

crimes emphasized drug smuggling as one of the most prevalent port crimes); *Container Security Hearing*, *supra* note 25, at 72–73 (statement of Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations) (suggesting that no comprehensive cargo risk management existed prior to September 11, 2001); *see also* Sandra Guerra Thompson, *Did the War on Drugs Die with the Birth of the War on Terrorism?: A Closer Look at Civil Forfeiture and Racial Profiling After 9/11*, 14 FED. SENT'G REP. 147, 147 (2001–2002) (discussing preemption of the “war on drugs” by the post-September 11, 2001, “war on terrorism”); Ronn Ronck, *Customs Trade Symposium Highlights Agency Priorities*, U.S. CUSTOMS TODAY, Jan. 2001, http://www.cbp.gov/xp/CustomsToday/2001/January/custoday_tradesymp.xml (discussing Customs’ pre-September 11, 2001, focus on facilitating trade flows via automation); Robert C. Bonner, U.S. Customs Comm’r, Speech Before the Center for Strategic and International Studies (CSIS) (Jan. 17, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/jan172002.xml (noting significant public concern following September 11, 2001, over the fact that “Customs manages to inspect only about 2% of the total volume of trade entering the country each year”).

In fact, a review of U.S. Customs (now CBP) publications and press releases prior to September 11, 2001, reveals a clear lack of focus on trade security matters. *See, e.g.*, Rob Scholtens, *Customs Cooperation Results in a Major Hashish Seizure*, U.S. CUSTOMS TODAY, May 2000, <http://www.cbp.gov/custoday/may2000/anticoun.htm> (celebrating the seizure of one of the largest hashish shipments ever by border inspectors); *see also* *Customs and UL Fight Counterfeiting Threats to Public Safety*, U.S. CUSTOMS TODAY, Aug. 2001, http://www.cbp.gov/xp/CustomsToday/2001/August/custoday_safety.xml (discussing safety hazards posed by counterfeit goods); “*It’s Your Skin—Teaming up Against Counterfeiters*,” U.S. CUSTOMS TODAY, Aug. 2001, http://www.cbp.gov/xp/CustomsToday/2001/August/custoday_skin.xml (same).

28. Even WTO multilateral efforts to establish a framework for facilitating and regulating optional preshipment inspection of international cargo shipments focused not on security concerns, but rather on regulating the use of private inspection companies by developing countries, which was increasingly seen by developed countries as impeding international trade with those countries without improving the accuracy of shipment documentation. *See* WORLD TRADE ORGANIZATION, AGREEMENT ON PRESHIPMENT INSPECTION 199–200 (1994), http://www.wto.org/english/docs_e/legal_e/21-psi.pdf; Kenneth P. Kansa, Note, *A Cure Worse Than the Disease? The Case Against Continued Reliance on Preshipment Inspection Services as Customs Alternatives*, 39 VA. J. INT’L L. 1151, 1152 (1999) (positing that many inspections were conducted merely to verify that the cargo conformed to what had been ordered by the recipient); *How to Reduce the Cost and Delays of Preshipment Inspections*, MANAGING EXPORTS, Feb. 2001, *available at* <http://www.fita.org/ioma/inspections.html> (affirming that inspections were merely commercial in nature).

29. *See* Mellor, *supra* note 1, at 342 (highlighting the 2% inspection rate); Schoenbaum & Langston, *supra* note 1, at 1345–46 (same).

information regarding inbound shipments, (b) conducted few inbound shipment inspections, and (c) eschewed security efforts in favor of trade facilitation. For example, sea-going cargo vessels arriving at U.S. ports did not have to file vessel manifests describing their contents until forty-eight hours prior to arriving at a U.S. port.³⁰ The combination of vessel manifest filing rules and the difficulty of confirming the contents of shipping containers meant that vessels bound for U.S. ports contained unknown and unverified contents and were subjected to infrequent physical inspections once they arrived, in the interest of facilitating trade flows.³¹

Overland imports into the United States by truck, train, and air did not suffer as much from the problem of lack of knowledge due to containerization. Rather, their problem was that transit distances and transit times to the U.S. border were relatively short in comparison to ocean cargo. Just-in-time delivery pressures could result in little time between a shipment's departure from its foreign point of origin and its arrival at the U.S. border point of entry, which could generate significant pressure to minimize border delays.³² In the battle between trade facilitation and inbound trade security, facilitation clearly had the upper hand.

C. U.S. International Trade Security Following September 11, 2001

U.S. inbound trade security measures clearly were due for major rethinking following the September 11, 2001, attacks. A primary theme in U.S. government post-9/11 discourse on national security matters has been the need for the United States

30. 19 C.F.R. § 4.8 (2001) (providing that vessels seeking entry must complete their Cargo Declaration forms at least forty-eight hours prior to arrival), *cited in* Clyne, *supra* note 1, at 1200; *see also* Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. 66,318, 66,319, 66,331–32 (Oct. 31, 2002) (codified at 19 C.F.R. § 4.7(b) (2006)) (amending the old 48-Hour Rule).

31. Mellor, *supra* note 1, at 341–43; Schoenbaum & Langston, *supra* note 1, at 1345–46.

32. *See* TRANSPORT CANADA, FINAL REPORT: THE CUMULATIVE IMPACT OF U.S. IMPORT COMPLIANCE PROGRAMS AT THE CANADA/U.S. LAND BORDER ON THE CANADIAN TRUCKING INDUSTRY 33–34, 39 (2005) [hereinafter TRANSPORT CANADA BORDER REPORT], *available at* <http://www.tc.gc.ca/pol/en/report/BorderStudy/Report.pdf> (discussing potentially significant delays of U.S. advance reporting and document submission requirements for imports from Canada to the United States); Allan J. Cocksedge, Speech, *The Smart Border: Movement of Goods—Transportation and Customs Aspects*, 29 CAN.-U.S. L.J. 141, 143–44 (2003) (explaining how just-in-time business practices are dependent on timely border processes).

to take a stronger defensive posture on a number of fronts. In the words of CBP Commissioner Bonner, after September 11, 2001, border security became a “top priority.”³³

Much of the recent debate over inbound trade security has focused on how to improve U.S. national security without causing disastrous reductions or delays in inbound trade flows.³⁴ On the commercial side of the equation, greater U.S. international trade has resulted in greater U.S. economic interdependence, so that interruptions or reductions in international trade can have enormously adverse effects on the U.S. economy.³⁵ Just-in-time inventory practices have exacerbated the effects of import delays by slowing or shutting down production lines.³⁶ On the security side of the equation, containerization and high trade volumes have made it difficult to verify the validity and safety of inbound shipments, as discussed above.³⁷ Consequently, any given shipping container imported into the United States could contain explosive devices, adulterated food products, chemical agents, or other materials for use in terrorist attacks; these harmful items might have been loaded into the container at its point of origin or added during transit. Add to this the fact that ocean-going and overland shipments generally could depart their foreign locations without manifest information being filed with the U.S. government, and the result was a series of import regulatory schemes deemed no longer acceptable.³⁸

33. *Port and Maritime Security Act Hearing*, *supra* note 3, at 14 (statement of U.S. Customs Comm’r Robert C. Bonner); *see also* Lee, *supra* note 1, at 132–36 (identifying programs implemented by Customs and Border Protection to address the security issue).

34. *See, e.g.*, MARITIME COMMERCE SECURITY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 3–4 (2005) [hereinafter MARITIME COMMERCE SECURITY PLAN], available at http://www.dhs.gov/xlibrary/assets/HSPD_MCSPlan.pdf (discussing the importance of avoiding port delays or shutdowns in the quest for improving maritime security). For a discussion of similar concerns with respect to U.S. exports, *see* Bowman, *supra* note 16, at 324–25.

35. For example, in 2002 U.S. West Coast ports were shut down after port employers locked out employees for ten days during a labor contract dispute. The closure delayed billions of dollars of imports and, to reopen the ports and avoid further gridlock, the Bush administration was forced to invoke the Taft–Hartley Act of 1947. *See* Bill Mongelluzzo, *West Coast Port Deal Will Bring Pay Hikes*, *New Technology*, J. COM., Nov. 24, 2002, Ocean Section, available at 2002 WLNR 1292539.

36. Julian Keeling, *JIT After Sept. 11*, J. COM., Oct. 1, 2001, Columns Section, available at 2001 WLNR 990301 (noting plant shutdowns caused by shipping delays following September 11, 2001); *see also* Robert C. Bonner, Lecture at The Heritage Foundation: Securing America’s Borders While Safeguarding Commerce (Sept. 12, 2003), available at <http://www.heritage.org/Research/HomelandDefense/HL796.cfm> (noting that when the U.S.–Canada border was “virtually shut down” after September 11, 2001, some U.S. automotive plants were forced to halt production within three days).

37. *See supra* notes 24–26 and accompanying text.

38. *See, e.g.*, Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg.

The U.S. government's response to this trade-facilitation-versus-national-security conundrum has multiple facets, including its programs to "push the border outward" for inbound shipments.³⁹ Despite the slogan-like quality of the phrase "push the border outward," these U.S. government cargo security programs in fact hold the possibility of furthering the twin goals

66,318, 66,319, 66,331–32 (Oct. 31, 2002) (codified at 19 C.F.R. § 4.7(b) (2006)).

39. Other facets include, for example, the creation of the Department of Homeland Security (DHS) as a single federal agency overseeing homeland security matters and the incorporation into DHS of portions of the former U.S. Customs Service (now CBP), the Immigration and Naturalization Service, and the U.S. Coast Guard; development of The National Strategy for Maritime Security to coordinate efforts to protect the maritime domain; more stringent registration requirements for incoming vessels, trains, trucks, and airplanes and their personnel; and heightened efforts to employ newer technologies such as biometrics for personnel screening purposes. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 § 101(a), 116 Stat. 2135, 2142 (2002) (to be codified at 6 U.S.C. § 111(a)) (creating the Department of Homeland Security); GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1–2 (2002), available at <http://www.dhs.gov/xlibrary/assets/book.pdf> (identifying the purposes and duties of the Department of Homeland Security); THE NATIONAL STRATEGY FOR MARITIME SECURITY 2, 7–8, 10, 13–14, 18–22 (2005), available at <http://www.whitehouse.gov/homeland/4844-nsms.pdf> (implementing a plan to avoid threats to maritime security that includes more robust border control and new biometric screening procedures); Dep't of Homeland Sec., History: Who Became Part of the Department?, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Apr. 25, 2007) (listing the agencies that merged into the Department of Homeland Security).

It is worth commenting briefly on the U.S. National Strategy for Maritime Security, as it refers to and relies in part on some of the programs discussed in this Article, such as CSI and C-TPAT. *See infra* discussion Part III (describing the security programs, particularly CSI and C-TPAT, implemented by CBP). In late 2004, President Bush ordered the development of a comprehensive maritime security program for the United States. *See* President George W. Bush, National Security Presidential Directive NSPD-41/Homeland Security Presidential Directive HSPD-13 1 (Dec. 21, 2004), available at <http://www.fas.org/irp/offdocs/nspd/nspd41.pdf>. The following year, The National Strategy for Cargo Security was issued, along with eight subject-specific plans for implementing this strategy. *See, e.g.,* INTERNATIONAL OUTREACH AND COORDINATION STRATEGY FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 4–7 & app. B (2005), available at <http://www.state.gov/documents/organization/64251.pdf> (articulating the strategic goals of the plan); MARITIME COMMERCE SECURITY PLAN, *supra* note 34, at 5 (stating that the goal of the plan is to "improve the security of the maritime supply chain"); THE MARITIME INFRASTRUCTURE RECOVERY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 1–2, 4 (2006), available at <http://www.ni2ciel.org/Reference/Download.pm/5207/Document.pdf> (noting that the objective of the plan is to facilitate the "restoration of cargo flow and passenger vessel activity after a national [transportation security incident]"); NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 1–7 (2005), available at http://www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf (explaining that the goal of the plan is to unify governmental agencies and to monitor specific areas of the maritime domain). The strategy and accompanying plans are available on the Department of Homeland Security's website at http://www.dhs.gov/xprevprot/programs/editorial_0597.shtm. Like the 2002 and 2006 National Security Strategies issued by the Bush administration, these documents provide an assessment of national security risks and a discussion of strategies and goals, focused of course on the maritime environment. Due to the fact that these documents address a broad range of non-border-related maritime matters and do not address nonmaritime border-related concerns, however, they are not the focus of this Article.

of trade facilitation and improved national security through the forward deployment of certain aspects or functions of the U.S. border. The following section provides a concise technical overview of the primary U.S. government initiatives aimed at pushing border functions outward for inbound cargo. These programs and their legal and commercial ramifications are then analyzed further in Parts IV through VI.

III. THINKING OUTSIDE THE BORDER: PUSHING THE BORDER OUTWARD

The core inbound U.S. national security programs described as efforts to “push the border outward” are administered by CBP at the Department of Homeland Security (DHS).⁴⁰ The CBP programs discussed below are part of a “multi-layer strategy” to intercept inbound terrorist shipments of items such as conventional weapons or weapons of mass destruction and to provide “Point of Origin Cargo Security.”⁴¹ Due to the regulatory and sometimes technical nature of these programs, a concise summary of each program’s intended effect is provided. While these programs are technically separate initiatives, they are expressly intended to interact with and be complementary of one another, and CBP has collectively referred to the programs as the “U.S. Cargo Security Strategy.”⁴²

Although these programs were all implemented by CBP under existing statutory authority, in the fall of 2006 some of these programs were codified pursuant to the Security and Accountability for Every Port Act of 2006 (SAFE Port Act).⁴³ As discussed below, this codification is significant in terms of cementing the long-term nature of these programs and the United States’ commitment to improving national security through measures that forward deploy certain border functions, but the act does little to alter the overall structure or operation of these programs.

A. *The Container Security Initiative for Ocean Cargo*

In order to address import cargo security concerns, in January 2002, the U.S. Customs Service (now CBP) launched the

40. Protecting Our Borders Against Terrorism, *supra* note 4.

41. FRITTELLI, *supra* note 26, at 1, 5–6, 17.

42. *CBP Holds the 5th Annual Trade Symposium 2004*, CUSTOMS & BORDER PROT. TODAY, Jan./Feb. 2005, <http://www.cbp.gov/xp/CustomsToday/2005/JanFeb/symposium.xml>.

43. SAFE Port Act, Pub. L. No. 109-347, §§ 205, 211, 120 Stat. 1884, 1906, 1909 (2006) (to be codified at 6 U.S.C. §§ 945, 961).

Container Security Initiative, or CSI.⁴⁴ As explained by the agency, “[t]he primary purpose of CSI is to protect the global trading system and the trade lanes between CSI ports and the U.S.”⁴⁵ CSI was initially undertaken pursuant to preexisting statutory authority, but the program was codified in 2006 pursuant to the SAFE Port Act of 2006.⁴⁶

CSI rests on four foundational elements: first, the use of intelligence and data concerning shipments “to identify [and target] containers that pose a potential risk for terrorism”; second, the “prescreen[ing]” of suspect containers, typically prior to departure from foreign ports; third, the use of technology (such as X-ray or radiation detection devices) to prescreen containers, so as to minimize delays caused by screening; and fourth, the use of tamper-resistant containers to ensure illicit items are not added to shipping containers during transit unbeknownst to the shipper or U.S. importer.⁴⁷ Government officials have expressly described CSI as a means of “extend[ing] the border for Customs purposes beyond the traditional port of entry” and thus helping protect against terrorist attacks.⁴⁸

44. See U.S. Customs & Border Prot., Container Security Initiative Fact Sheet (Sept. 30, 2006) [hereinafter CSI Fact Sheet], available at http://www.cbp.gov/linkhandler/gov/border_security/international_activities/csi/csi_fact_sheet.ctt/csi_fact_sheet.doc.

45. *Id.* CSI was modeled on an earlier U.S.–Canada pilot program called the Joint Targeting Initiative, which was established on a limited basis in 1999 between the United States and Canada to improve intergovernmental cooperation and prevent unlawful activities such as smuggling. Scholtens, *supra* note 27; see also SAFE Port Act, Pub. L. No. 109-347, § 205(a), 120 Stat. 1884, 1906 (2006) (to be codified at 6 U.S.C. § 945) (establishing that the CSI program will “identify and examine or search maritime containers that pose a security risk” prior to lading and shipment from foreign ports); Browning, *supra* note 1, at 151 (commenting on the economic relationship between Canada and the U.S.).

46. SAFE Port Act, Pub. L. No. 109-347, § 205(a), 120 Stat. 1884, 1906 (2006) (to be codified at 6 U.S.C. § 945).

47. See CSI Fact Sheet, *supra* note 44, at 1.

48. Browning, *supra* note 1, at 156; see also *Fiscal Year 2003 Budget Request Hearing*, *supra* note 7, at 204–07 (statement of U.S. Customs Comm’r Robert C. Bonner) (arguing that cargo security measures should start overseas rather than when the suspicious containers reach the United States); Bonner, *supra* note 36 (emphasizing the need to address security concerns before they reach U.S. ports); CSI Fact Sheet, *supra* note 44, at 1 (clarifying that CSI ensures that all suspicious containers are identified and secured at foreign ports before they are allowed to be sent to U.S. ports).

The scope and intent of CSI was presaged in congressional testimony by Stephen E. Flynn, a Senior Fellow at the Council on Foreign Relations, who asserted that U.S. government agencies needed to stop thinking of their missions as primarily domestic, with jurisdiction that “runs out at the water’s edge”; that the focus should be on megaports first; and that U.S. inspectors and investigators should “push . . . beyond the border itself into common bilateral or multilateral international inspection zones.” *Weak Links: Assessing the Vulnerability of U.S. Ports and Whether the Government Is Adequately Structured to Safeguard Them: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 61–63 (2001) [hereinafter *Weak Links Hearing*] (statement of

In order to effectuate CSI, the U.S. government has entered into bilateral agreements with foreign countries that directly trade with the United States or are major transshipment points for goods being shipped to the United States.⁴⁹ Pursuant to these agreements, the U.S. government is permitted to station CBP personnel at these foreign ports, and the foreign government has the right to station its customs officials at U.S. ports.⁵⁰ CBP personnel stationed abroad under CSI target shipping containers that are considered suspect and in need of further inspection.⁵¹ CBP personnel then request that foreign government personnel conduct inspections and enforcement actions as necessary. In other words, CBP personnel can access shipment information and act in an advisory capacity to identify shipments of concern, but the foreign host governments have the final say regarding whether, when, and how to inspect potentially problematic containers.⁵² For countries that station CSI customs personnel in the United States, a mirror image of these processes is supposed to take place for shipments from the United States to those countries.⁵³

Despite its bilateral and reciprocal form, to date the implementation of CSI has been heavily skewed in favor of U.S. interests. In fact, so far only Canada and Japan have stationed customs personnel in the United States under the CSI program.⁵⁴

Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations).

49. See SAFE Port Act, Pub. L. No. 109-347, § 205(d), 120 Stat. 1884, 1906 (2006) (to be codified at 6 U.S.C. § 945) (“The Secretary [of Homeland Security] . . . may enter into negotiations with the government of each foreign nation in which a seaport is designated under the Container Security Initiative to ensure full compliance with the requirements [of CSI].”); CSI Fact Sheet, *supra* note 44, at 1 (stating that CSI was limited to megaports but is now being extended by a recent World Customs Organization (WCO) resolution); see also Lee, *supra* note 1, at 124 (noting that the United States has bilateral agreements with various nations); Mellor, *supra* note 1, at 356 (identifying Canadian and European ports as CSI participants).

50. CSI Fact Sheet, *supra* note 44, at 2.

51. *Id.* at 1; U.S. GOV’T ACCOUNTABILITY OFFICE, HOMELAND SECURITY: KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED 8, 11 (2005) [hereinafter GAO 2005 KEY CARGO SECURITY REPORT], available at <http://www.gao.gov/new.items/d05466t.pdf> (statement of Richard M. Stana); U.S. GEN. ACCOUNTING OFFICE, CONTAINER SECURITY: EXPANSION OF KEY CUSTOMS PROGRAMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS 2 (2003) [hereinafter GAO 2003 CSI REPORT], available at <http://www.gao.gov/new.items/d03770.pdf>; see also SAFE Port Act, Pub. L. No. 109-347, § 205(h), 120 Stat. 1884, 1907 (2006) (to be codified at 6 U.S.C. § 945) (“The Secretary [of Homeland Security] shall develop a human capital management plan to determine adequate staffing levels in the United States and in foreign seaports including, as appropriate, the remote location of personnel in countries in which foreign seaports are designated under [CSI].”).

52. GAO 2003 CSI REPORT, *supra* note 51, at 9–10.

53. *Id.* at 9; CSI Fact Sheet, *supra* note 44, at 2.

54. CSI Fact Sheet, *supra* note 44, at 2.

In light of this, one foreign commentator has strongly suggested that CSI's reciprocity is far more form than substance.⁵⁵ Moreover, in light of the stakes involved, it can be expected that the United States will strongly encourage foreign CSI partner countries to comply with U.S. requests for stoppage and inspection of shipments bound for the United States. With few foreign customs personnel in the United States, however, there will be little pressure exerted in the opposite direction; in fact, it is an open question whether the United States would be as cooperative regarding requests for stoppage and inspection of outgoing shipments.⁵⁶ This subject is discussed further in Part V.

At the outset, the U.S. government focused on establishing CSI agreements with nations that had megaports with high volumes of containerized shipments to the United States.⁵⁷ CSI agreements for these twenty megaports have been obtained, and

55. Jau, *supra* note 1. Jau notes that while U.S.–Canada trade is “reciprocal in nature and volume,” U.S. trade with the rest of the world is “weighted unidirectionally toward the United States”—as the persistent U.S. trade deficit demonstrates. *Id.* The fact that CSI is modeled on the Joint Targeting Initiative, a U.S.–Canada program, could be viewed as an improper application of a bilateral model in a unilateral context. *See supra* note 45 (providing details on the program established between Canada and the United States). Legal and operational concerns raised by CSI are discussed *infra* in Part V.

56. In addition to the questionable reciprocity of CSI, there have been other problems with the implementation of the CSI program. One expert observer has criticized the small number of U.S. CBP personnel placed abroad and has asserted that such inadequate staffing undermines the effectiveness of the program. *The 9/11 Commission Report and Maritime Transportation Security: Hearing Before the Subcomm. on Coast Guard & Maritime Transportation of the H. Comm. on Transportation & Infrastructure*, 109th Cong. 39–41 (2004) (statement of Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations). In similar fashion, some CBP personnel stationed abroad under CSI reportedly have identified containers of concern to be inspected, only to find that the containers already had been shipped and were en route to the United States. Eric Lipton, *Loopholes Seen in U.S. Efforts to Secure Overseas Ports*, N.Y. TIMES, May 25, 2005, at A6. In other cases, containers were identified in time, but foreign government personnel declined to conduct the requested inspections. *Id.* The approach used by CBP to identify potentially problematic shipments also has come under fire. Press Release, U.S. Senate Comm. on Governmental Aff., Collins, Lieberman Concerned Container Security Targeting System Requires More Attention, Overseas Segment of Supply Chain Most Problematic (Aug. 4, 2005), available at http://www.senate.gov/~govt-aff/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=1102&Month=8&Year=2005. Still, CSI is in place in many foreign ports and has resulted in the forward deployment of cargo inspection functions from the U.S. port of entry to the foreign port of departure.

57. Romero, *supra* note 1, at 600; Jau, *supra* note 1. The twenty ports initially identified by CBP as megaports were responsible for approximately two-thirds (by value) of containerized shipments to the United States. Romero, *supra* note 1, at 600. These twenty ports were Hong Kong; Shanghai, China; Singapore; Kaohsiung, Taiwan; Rotterdam, The Netherlands; Pusan, Republic of Korea; Bremerhaven, Germany; Tokyo, Japan; Genoa, Italy; Yantian, China; Antwerp, Belgium; Nagoya, Japan; Le Havre, France; Hamburg, Germany; La Spezia, Italy; Felixstowe, United Kingdom; Algeciras, Spain; Kobe, Japan; Yokohama, Japan; and Laem Chabang, Thailand. Press Release, *supra* note 20.

U.S. efforts have turned to reaching CSI agreements covering other ports that ship to the United States.⁵⁸ As of September 2006, the United States had formal CSI agreements in place with more than twenty-five countries covering fifty foreign ports, and these numbers are almost certain to increase.⁵⁹ Another significant development in the expansion and implementation of CSI is that the United States has successfully obtained World Customs Organization (WCO), Group of Eight (G8), and European Union (EU) support for the CSI program.⁶⁰ As

58. See CSI Fact Sheet, *supra* note 44, at 2–3 (listing the fifty operational CSI ports and explaining that a recent WCO resolution will enable additional ports in 161 nations to develop programs paralleling CSI).

59. *Id.* at 2; Press Release, U.S. Customs & Border Prot., Container Security Initiative Reaches Gold: Fifty Seaports Now Targeting and Pre-Screening Cargo Destined for U.S. (Sept. 29, 2006), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2006_news_releases/102006/10032006.xml; Press Release, U.S. Customs & Border Prot., CBP Releases Outstanding 2006 Results (Oct. 30, 2006), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2006_news_releases/102006/10302006_6.xml; Press Release, U.S. Customs & Border Prot., Ports in CSI (Sept. 28, 2006), available at http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml; see also U.S. Customs & Border Prot., Ports in CSI (Sept. 28, 2006), available at http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml (listing foreign ports operating under the CSI program).

It is important to note that CSI is not the only CBP program for identifying potentially problematic containerized shipments. Other programs include the Sea Cargo Targeting Initiative (SCTI) and the Compliance Measurement Examination (CME) program. See McGrath & Morgan, *supra* note 1, at 247–49 (detailing the SCTI and CME plans); Press Release, U.S. Customs & Border Prot., U.S. Customs Implements Enhanced Anti-Terror Sea Cargo Targeting at All U.S. Seaports (Sept. 3, 2002), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/92002/09032002.xml (describing the goals of the two plans). Both of these programs, however, focus on identifying potentially problematic shipments and inspecting them at the U.S. port of destination, rather than abroad. SCTI is only used for shipments from non-CSI participating foreign ports, and thus can be viewed as a second-best or stop-gap measure in the absence of CSI. McGrath & Morgan, *supra* note 1, at 248. CME applies to all shipments, and can be viewed as part of a layered approach to import security: CSI abroad for containerized shipments, and CME at the U.S. port of destination. However, CSI is the inspection program that involves the forward deployment of certain border functions. *Id.* at 248–49.

60. CSI Fact Sheet, *supra* note 44, at 2; see also AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE UNITED STATES OF AMERICA ON INTENSIFYING AND BROADENING THE AGREEMENT ON CUSTOMS COOPERATION AND MUTUAL ASSISTANCE IN CUSTOMS MATTERS TO INCLUDE COOPERATION ON CONTAINER SECURITY AND RELATED MATTERS, 2004 O.J. (L 304) 34–35 [hereafter U.S.–EU CARGO SECURITY AGREEMENT], available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_304/l_30420040930en00340037.pdf (declaring support for CSI and opining that CSI should immediately be expanded to all ports); ENHANCE TRANSPORT SECURITY AND CONTROL OF MAN-PORTABLE AIR DEFENCE SYSTEMS (MANPADS): A G-8 ACTION PLAN § 4.2 (2003) [hereafter G-8 2003 ACTION PLAN], available at http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/enhance_transport_security_and_control_of_man-portable_air_defence_systems_-_manpads_-_a_g8_action_plan.html (emphasizing the G8's continued support of CSI and encouraging rapid expansion of CSI to other ports); Schoenbaum & Langston, *supra* note 1, at 1348 (commenting that the

discussed further in Parts V and VI, this support adds to the legitimacy of this program from a sovereignty and jurisdictional perspective, and also may help amplify CSI's long-term effect on structural aspects of global trade.

B. 24-Hour Advance Notification Rule for Ocean Cargo

Part of the logistical challenge in identifying potentially problematic shipments bound for the United States is obtaining complete and timely information about these shipments. Before September 11, 2001, an ocean-going vessel was not obligated to submit a manifest to the U.S. government declaring its cargo until forty-eight hours prior to arriving at its first U.S. port of call.⁶¹ In the shipping industry, it was common practice for vessel manifests to be prepared after a vessel's departure for the United States.⁶² From a commercial and practical perspective this approach made a good deal of sense: Only after a vessel had been loaded could its exact contents be determined, and just-in-time inventory and delivery pressures made a load first, document second approach attractive.⁶³

After the events of September 11, 2001, however, the U.S. government viewed this traditional state of affairs as unacceptable because vessels with undeclared cargo were en route to U.S. ports without a way for the U.S. government to verify the accuracy of manifests prior to arrival.⁶⁴ Accordingly, in

basic elements of CSI have been supported by the G8 and WCO); Randall Beisecker, *Securing and Facilitating Trade: Conflicting Goals under the World Customs Organization*, CENTER FOR NONPROLIFERATION STUDIES, Dec. 22, 2005, <http://cns.miiis.edu/pubs/week/051222.htm> (detailing the strategy adopted by the WCO); Press Release, U.S. Customs & Border Prot., World Customs Organization Endorses Plan to Secure and Improve the Flow of Global Trade (Dec. 9, 2004), *available at* http://www.cbp.gov/xp/cgov/newsroom/press_releases/archives/2004_press_releases/122004/12092004.xml (announcing that the WCO established a strategy that incorporates CSI); Eur. Comm'n, Taxation and Customs Union, Customs and Security, http://europa.eu.int/comm/taxation_customs/customs/policy_issues/customs_security/index_en.htm (last visited Mar. 11, 2007) (disclosing that the U.S. and the EU had an agreement to cooperate in implementing CSI); *infra* Part V.A.1 (reporting the support CSI has gained from other nations).

61. 19 C.F.R. § 4.8 (2001).

62. *See* Clyne, *supra* note 1, at 1200, 1206 (contrasting the new 24-Hour Rule with the prior standard that allowed vessels to wait to make cargo declarations until forty-eight hours before arriving at a U.S. port).

63. *See id.* at 1206 (noting that under the "just-in-time" method, "manifest[s] could be prepared en route to the United States based on the cargo actually loaded aboard the vessel," whereas under the 24-Hour Rule, shippers must provide documentation earlier, which increases "[s]torage capacity and costs, as well as the risk of loss or damage").

64. *See Container Security Hearing*, *supra* note 25, at 71 (statement of Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations) (testifying that prior to September 11, 2001, carriers could declare "in only the most general terms

August 2002, U.S. Customs (now CBP) Commissioner Bonner proposed regulations “requiring sea carriers [at foreign ports] to provide cargo manifests 24 hours prior to the lading of cargo for shipment [to the United States].”⁶⁵ This requirement, commonly known as the “24-Hour Rule,” became effective on December 2, 2002.⁶⁶ However, Customs did not begin actively enforcing the rule until May 2003, in large part to give shippers additional time to adjust to the rule.⁶⁷ Failure to provide all required information can result in CBP issuing a “No-Load” directive instructing the shipper not to load and ship the container, delays in unloading at the U.S. port, denial of entry to U.S. ports, and civil monetary penalties.⁶⁸ CBP recently proposed to require reporting of additional cargo-related information under the 24-Hour Rule, in conformance with the SAFE Port Act.⁶⁹

what the contents [of the vessel] were . . . and send it on its way to any city and town in the United States”).

65. Press Release, U.S. Customs & Border Prot., U.S. Customs to Require Advance Cargo Manifests from Sea Carriers to Protect Global Trade (Aug. 7, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/82002/08072002.xml.

66. Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. 66,318, 66,318–19, 66,331–32 (Oct. 31, 2002) (codified at 19 C.F.R. § 4.7(b) (2006)). Containers covered by the rule include both containers destined for the United States and containers being transshipped to other destinations via U.S. ports. 19 C.F.R. § 4.7 2006, *cited in* Schoenbaum & Langston, *supra* note 1, at 1348; *see also* Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. at 66,320 (explaining that the breadth of this rule will protect the flow of the global trading system in general).

67. *See* U.S. Dept. of State, Int’l Info. Programs, U.S. Expands Enforcement of Maritime Cargo Security Rules (May 2, 2003), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=May&x=20030502125528zemogb0.4553644> (announcing that CBP will expand enforcement of the 24-Hour Rule on May 4, 2003); *see also* Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. at 66,327 (acknowledging that at least a sixty-day phase-in period for implementation of the 24-Hour Rule is necessary in order to allow businesses enough time to comply).

68. Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. at 66,319–20; Press Release, U.S. Customs & Border Prot., Customs Issues “No-Load” Directives on the 24-Hour Rule (Feb. 13, 2003), *available at* http://www.customs.ustreas.gov/xp/cgov/newsroom/press_releases/archives/cbp_press_releases/022003/02132003.xml (announcing that the U.S. Customs Service had begun issuing “No-Load” directives to shippers who failed to comply with the 24-Hour Rule).

69. U.S. Customs & Border Prot., Fulfilling the Promise of the SAFE Port Act (Dec. 21, 2006), http://www.cbp.gov/xp/cgov/newsroom/full_text_articles/trade_prog_initiatives/adv_data_elements.xml (discussing the newly proposed data element requirements and how the act “requires CBP to obtain additional information for improved high-risk [shipment] targeting”); *see also* SAFE Port Act, Pub. L. No. 109-347, § 205(k)(1), 120 Stat. 1884, 1908 (2006) (to be codified at 6 U.S.C. § 945) (authorizing the issuance of “do not load” orders for high-risk cargo).

In terms of form, much of the 24-Hour Rule is procedural, in that it simply changes the timing of when manifest information must be submitted to the U.S. government. This alone is significant.⁷⁰ Yet the 24-Hour Rule also effects a fundamentally important substantive alteration in how the U.S. inbound cargo supply chain operates because, through this rule, the U.S. government can block the departure of shipments from foreign ports.⁷¹ Prior to the 24-Hour Rule, the U.S. government could prevent the entry of vessels at American ports, but it could not mandate whether a vessel in a foreign port could be loaded or depart.⁷² In essence, the 24-Hour Rule results in the forward deployment of key administrative functions for import shipments to the United States and thus extends U.S. effective control over critical aspects of foreign port activity. As noted further in Part V, advance reporting of shipment information has been endorsed by the WCO, G8, and EU as an important element of cargo security programs.⁷³

C. Advance Notification for Overland and Airborne Shipments

Advance notification of imports by truck, train, or air following September 11, 2001, was deemed desirable for the same security reasons as for ocean cargo,⁷⁴ but the reduced timeframes for overland and airborne cargo presented particular logistical problems. Twenty-four hour advance notice prior to loading (or even prior to arrival at the border) was considered an

70. Prior to the 24-Hour Rule, goods for a particular vessel could be shipped to the foreign port on a rolling basis and laden as they arrived, and the shipping manifest could be prepared after vessel departure. *See supra* text accompanying notes 61–62 (explaining the pre-September 11, 2001, custom of preparing a vessel manifest after vessel departure). Under the 24-Hour Rule, shippers now must first identify all vessel cargo, store it at the dock, prepare the manifest, and then wait a minimum of twenty-four hours before any lading may begin. 19 C.F.R. § 4.7(b)(2) (2006). This procedure adds significantly to the time and expense for shipments bound for the United States. *See* Clyne, *supra* note 1, at 1206 (predicting that the 24-Hour Rule will increase costs and delays). For further discussion of commercial concerns raised by the 24-Hour Rule, see *id.* at 1206–07.

71. *See* Press Release, *supra* note 68 (explaining that a “No-Load” directive under the 24-Hour Rule “means that U.S. Customs has instructed an ocean shipping line not to load a container at a foreign port for delivery to the U.S.”).

72. Amendment to the Ports and Waterways Safety Act of 1972, Pub. L. No. 95-474, § 4, 92 Stat. 1471, 1472–73 (codified as amended at 33 U.S.C. § 1223(b) (2000)).

73. *See infra* Part V.A.1.

74. Required Advance Electronic Presentation of Cargo Information, 68 Fed. Reg. 68,140, 68,140 (Dec. 5, 2003) (stating that advance cargo information requirements apply equally to “sea, air, rail, or truck” in an effort to “ensur[e] cargo safety and security and prevent[] smuggling”).

unacceptable burden on these more rapid forms of shipment.⁷⁵ Accordingly, CBP issued a final rule in 2003 requiring electronic submission of specified cargo information at least thirty minutes prior to arrival for shipments by truck and at least two hours in advance for shipments by rail.⁷⁶ For shipments by air from North America and portions of Central America, submission of cargo information is required prior to departure; whereas for all other destinations, submissions are required within four hours of arrival.⁷⁷ These modified advance notification requirements were intended to forward deploy the reporting requirement away from the U.S. border or point of arrival, while also taking into account the desire to minimize interruptions to inbound trade flows.⁷⁸

D. *The Customs–Trade Partnership Against Terrorism*

In November 2001, Customs launched a program called the “Customs–Trade Partnership Against Terrorism,” more commonly referred to by the awkward acronym “C-TPAT.”⁷⁹ C-TPAT is aimed at identifying and eliminating weaknesses in U.S. import supply chains such as poor security procedures and unvetted foreign suppliers and shippers.⁸⁰ Improved

75. See, e.g., Joseph L. Parks, Comment, *The United States–Canada Smart Border Action Plan: Life in the FAST Lane*, 10 LAW & BUS. REV. AM. 395, 399 (2004) (emphasizing the importance of mitigating border delays because “any impediment to cross-border truck traffic has serious economic consequences”). For example, a transborder shipment across Ambassador Bridge from Windsor, Ontario to Detroit, Michigan took an average time of 24.1 minutes prior to September 11, 2001. *Id.* at 397–98 (citing OFFICE OF FREIGHT MGMT. & OPERATIONS, U.S. DEP’T OF TRANSP., COMMERCIAL VEHICLE TRAVEL TIME AND DELAY AT U.S. BORDER CROSSINGS 2 (2002), http://www.ops.fhwa.dot.gov/freight/documents/travel_time_delay.pdf). Adding twenty-four hours of lead time to such shipments would increase the shipping cycle more than forty-eight fold.

76. Required Advance Electronic Presentation of Cargo Information, 68 Fed. Reg. at 68,173–74. Advance electronic cargo information submission was mandated by section 343 of the Trade Act of 2002, as modified by section 108 of the Maritime Transportation Security Act of 2002. See 19 U.S.C. § 2071 (Supp. III 2000).

77. 19 C.F.R. § 122.48a(b) (2006).

78. See Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. 66,318, 66,318, 66,328 (Oct. 31, 2002) (codified at 19 C.F.R. § 4.7(b) (2006)) (stating that advance manifest information is “urgently needed in order to enable Customs to evaluate the risk of smuggling weapons of mass destruction through the use of oceangoing cargo containers before goods are loaded on vessels for importation into the United States,” but assuring that “there is no reason to conclude that this final rule will cause congestion at U.S. ports”).

79. GAO 2003 CSI REPORT, *supra* note 51, at 1–3. For those encountering this acronym for the first time, invariably the first question asked is, “How is this pronounced?” Based on the author’s own experience, the proper pronunciation of C-TPAT is “Cee Tee Pat,” which is probably the most viable of a limited number of options.

80. See U.S. Customs & Border Prot., C-TPAT Validation Process Fact Sheet, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ctpat_validation/validat

supply chain security is intended to reduce the potential for smuggled weapons and other illicit goods, and the use of vetted supply chain actors is intended to reduce the need for delay-causing inspections.⁸¹

C-TPAT is structured as a voluntary “partnership” between CBP and the private sector that incentivizes U.S. importers to identify and ascertain, at their own expense,⁸² the veracity of all actors in their international supply chains.⁸³ Actors include shippers, wholesalers, intermediate consignees, and even the original vendor of each product.⁸⁴ C-TPAT

ion_fact_sheet.xml (last visited Apr. 1, 2007) (“The purpose of the validation is to ensure that the C-TPAT participant’s international supply chain security measures contained in the C-TPAT participant’s security profile have been implemented and are being followed . . .”); U.S. Customs & Border Prot., C-TPAT Importer Security Criteria (Mar. 25, 2005), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/ctpat_importer_criteria.xml [hereinafter C-TPAT Importer Security Criteria] (“C-TPAT recognizes the complexity of international supply chains and endorses the application and implementation of security measures based upon risk analysis.”); U.S. CUSTOMS & BORDER PROT., CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT): SECURITY CRITERIA FOR IMPORTERS IMPLEMENTATION PLAN 2–3 (2005), *available at* http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/implementation_plan.ctt/criteriaImplementation2.doc (outlining the three main components of the C-TPAT implementation plan).

81. See Schoenbaum & Langston, *supra* note 1, at 1347; *see also* Glick, *supra* note 1, at 632–33 (explaining how the C-TPAT program is designed to address cargo problems such as drug smuggling and tampered goods by increasing security measures with tools such as cameras, fences, GPS tracking, and more security personnel). For a discussion of possible scenarios involving the use of supply chains for terrorist attacks, see *Weak Links Hearing*, *supra* note 48, at 11–13 (statement of Stephen E. Flynn, Senior Fellow, National Security Studies, Council on Foreign Relations).

82. In this regard, C-TPAT is thematically similar to other efforts to modernize U.S. customs law by placing greater legal compliance responsibilities on the shoulders of the private sector. See CUSTOMS & BORDER PROT., SECURING THE GLOBAL SUPPLY CHAIN: CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) STRATEGIC PLAN 10 (2004) [hereinafter SECURING THE GLOBAL SUPPLY CHAIN], *available at* http://www.customs.ustreas.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf (introducing C-TPAT as a “crucial part” of CBP’s “multi-layered approach” to port security, which operates by “engaging the private sector to increase supply chain security”). C-TPAT is also similar to the self-compliance structure of U.S. export control laws. See, e.g., Bowman, *supra* note 16, at 333 (discussing how U.S. export law “shift[s] the burden for ensuring compliance with these regulations from the U.S. government to the exporter”).

83. Schoenbaum & Langston, *supra* note 1, at 1347.

84. See SECURING THE GLOBAL SUPPLY CHAIN, *supra* note 82, at 22 (“requir[ing] participants to engage and leverage *all* business partners within their supply chains” (emphasis added)); C-TPAT Importer Security Criteria, *supra* note 80 (explaining that C-TPAT includes supply chain actors from point of origin through point of distribution). Participation in C-TPAT initially was limited to U.S. importers, although later the program was expanded to include other international supply chain actors, such as customs brokers, freight forwarders, and nonvessel operating common carriers (NVOCCs). Press Release, U.S. Customs & Border Prot., Customs Set to Begin Phase 3 of Customs–Trade Partnership Against Terrorism (Aug. 21, 2002), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/82002/08212002.xml. These nonimporters primarily benefit from C-TPAT participation by

importers are expected to identify weak points in their supply chains and take measures to address these concerns, such as finding new vendors or carriers, compelling existing vendors to modify their operations or procedures, altering shipping routes, and employing tamper-proof cargo container seals.⁸⁵ By extending the application of C-TPAT principles backward along the full supply chain, U.S. government-supported security measures and principles are thus to be applied in circumstances where the United States previously had little influence or reach.⁸⁶ In CBP parlance, C-TPAT is a “layered, defense-in-depth strategy against terrorism.”⁸⁷

In return for participating in the C-TPAT program, U.S. importers gain the benefit of reduced U.S. import inspections and expedited customs processing.⁸⁸ Other C-TPAT participants, such as freight forwarders, shippers, and even manufacturers, benefit by being viewed as C-TPAT-compliant providers of supply chain services, which (at least in theory) places them at a competitive advantage to secure business from C-TPAT participants.⁸⁹ CBP recently issued separate

being “approved” suppliers of services for C-TPAT importers. *See infra* note 88 and accompanying text.

85. *See* SECURING THE GLOBAL SUPPLY CHAIN, *supra* note 82, at 26–27 (stating that C-TPAT members are expected to regularly audit their vendors and service providers to ensure adherence under C-TPAT guidelines). Thus, in a sense, C-TPAT is a U.S. government effort to get U.S. importers engaged in flow-charting or process-charting of their import supply chains, much in the same way that businesses prepare process charts to identify problems such as reporting gaps or redundancies in management structures or production processes.

86. *See id.* at 12 (recognizing that C-TPAT goes beyond the traditional reach of U.S. regulators).

87. *Id.* at 7.

88. *See* SAFE Port Act, Pub. L. No. 109-347, §§ 214(a), 215(b), 216(c), 120 Stat. 1884, 1910–11 (2006) (to be codified at 6 U.S.C. §§ 964(a), 965(b), 966(c)) (granting benefits to importers based on their level of participation in the C-TPAT program); *see also* Glick, *supra* note 1, at 634 (describing the “carrot-and-stick approach” Customs uses to convince companies to participate in C-TPAT program). These benefits are offered largely on the theory that C-TPAT shipments are more secure, although a report to Congress by the U.S. Government Accountability Office (GAO) raised questions about whether this theory holds up in application. *See* GAO 2005 KEY CARGO SECURITY REPORT, *supra* note 51, at 3–5 (“[W]e found several weaknesses that compromise CBP’s ability to provide an actual verification that members’ supply chain security measures are accurate and are being followed.”). The GAO (previously known as the “General Accounting Office”) also was critical of CBP’s implementation of both C-TPAT and CSI in 2003. *See id.* at 1 (“In July 2003, GAO reported that these programs had management challenges that limited their effectiveness.”); *see also* Lipton, *supra* note 56 (reporting flaws in the C-TPAT program).

89. *See* U.S. CUSTOMS & BORDER PROT., C-TPAT SECURITY GUIDELINES FOR AIR FREIGHT CONSOLIDATORS, OCEAN TRANSPORTATION INTERMEDIARIES AND NON-VESSEL OPERATING COMMON CARRIERS (NVOCC) (2006), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_guideline/guideline_air_freight.xml (detailing

guidelines for various types of C-TPAT participants such as carriers,⁹⁰ customs brokers,⁹¹ suppliers,⁹² and port operators.⁹³ CBP has also issued a “best practices” document to assist C-TPAT participants.⁹⁴ As implemented by CBP and codified by the SAFE Port Act, C-TPAT has three tiers of participation, each with different levels of expedited treatment and reduced inspections.⁹⁵ All C-TPAT participants are not equal, and to get the maximum reduction in customs processing, a party must be certified as qualifying for the highest C-TPAT level, Tier 3.⁹⁶

In other words, CBP has employed what one commentator aptly describes as a “carrot-and-stick approach” to encouraging “voluntary” C-TPAT participation.⁹⁷ This approach has been spectacularly successful: as of January 2006, C-TPAT had over 10,000 membership applications, up from only seven participants at the program’s inception three years earlier.⁹⁸ These participants included nearly ninety of the top hundred U.S. importers by volume and represented over 95% of U.S.

procedures that allow other segments of the supply chain to participate in the C-TPAT program).

90. See *id.*; U.S. CUSTOMS & BORDER PROT., C-TPAT SECURITY GUIDELINES FOR AIR CARRIERS (2006), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_guideline/guideline_air_carrier.xml; U.S. CUSTOMS & BORDER PROT., RAIL CARRIER MINIMUM-SECURITY CRITERIA (2006), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/sec_criteria_rail/rail_security_criteria.xml.

91. See U.S. CUSTOMS & BORDER PROT., CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) MINIMUM SECURITY CRITERIA: U.S. CUSTOMS BROKERS EXTENDED 1–7 (2007), available at http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/security_criteria/broker_sec_criteria_final.ctt/broker_sec_criteria_final.doc.

92. U.S. CUSTOMS & BORDER PROT., C-TPAT FOREIGN MANUFACTURER SECURITY CRITERIA (2006), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/security_criteria_foreign_manuf/foreign_mfc_security_criteria.xml.

93. U.S. CUSTOMS & BORDER PROT., C-TPAT SECURITY GUIDELINES FOR U.S. MARINE OR PORT TERMINAL OPERATORS (2006), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_guideline/guideline_port.xml.

94. See generally U.S. CUSTOMS & BORDER PROT., SUPPLY CHAIN SECURITY BEST PRACTICES CATALOG: CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) (2006) [hereinafter C-TPAT BEST PRACTICES CATALOG], available at http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_best_practices.ctt/ctpat_best_practices.pdf.

95. SAFE Port Act, Pub. L. No. 109-347, § 211(a), 120 Stat. 1884, 1909 (2006) (to be codified at 6 U.S.C. § 961).

96. See SAFE Port Act, Pub. L. No. 109-347, § 216, 120 Stat. 1884, 1910–11 (2006) (to be codified at 6 U.S.C. § 966). The C-TPAT tiers predate the SAFE Port Act. See C-TPAT BEST PRACTICES CATALOG, *supra* note 94, at 3 (describing the three tier C-TPAT program that began in May 2005).

97. See Glick, *supra* note 1, at 634.

98. C-TPAT BEST PRACTICES CATALOG, *supra* note 94, at iii.

containerized imports.⁹⁹ Such high levels of participation perhaps call into question whether C-TPAT is voluntary in form only.

In addition to promoting C-TPAT as a means of securing supply chains for U.S. imports, CBP also holds C-TPAT out as a model for securing supply chains worldwide.¹⁰⁰ CBP has sought, with considerable success, to “[i]nternationalize the core principles of C-TPAT through cooperation and coordination with the international community,” and has obtained EU and WCO support for these efforts.¹⁰¹ As with efforts to obtain multilateral support for CSI and the 24-Hour Rule, the internationalization of C-TPAT has significant legal and practical implications for the international trade landscape.

E. Free and Secure Trade Program for North America

Free and Secure Trade, or FAST, is a border initiative between the United States, Canada, and Mexico that is designed, like C-TPAT and CSI, to simultaneously facilitate trade and ensure security in light of the events of September 11, 2001.¹⁰² The focus of FAST is on North American supply chains, and in this regard it is intended to complement C-TPAT, which is global in scope.¹⁰³ Pursuant to FAST, the United States, Canada, and Mexico have agreed to harmonize and coordinate border processing procedures for truck and rail shipments among the three nations.¹⁰⁴

As with other U.S. border programs such as CSI, an expressly stated goal of FAST is to push activities related to security clearance away from the physical border. Specifically, point fifteen of FAST’s thirty-point action plan reads as follows:

99. SECURING THE GLOBAL SUPPLY CHAIN, *supra* note 82, at 13.

100. *See id.* at 8 (“[I]t is in the interest of the United States, and the protection of global trade more generally, to internationalize C-TPAT’s core principles to the extent possible.”).

101. *Id.*; *see also* Eur. Comm’n, *supra* note 60 (supporting the development of reciprocal security standards based on the C-TPAT program); Press Release, *supra* note 60 (announcing that the security standards adopted by the WCO incorporate key elements of C-TPAT); *see also infra* Part V.A.1 (discussing international support for American security initiatives).

102. U.S. CUSTOMS & BORDER PROTECTION, FAST BROCHURE 1 (2005) [hereinafter FAST BROCHURE], *available at* http://www.customs.ustreas.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/fast.ctt/FASTBrochure.doc.

103. *Id.*

104. *Id.* As with NAFTA, the genesis of the FAST program was a bilateral agreement between the United States and Canada. Donald Kerwin et al., *The Canada–U.S. Border: Balancing Trade, Security and Migrant Rights in the Post-9/11 Era*, 19 GEO. IMMIGR. L.J. 199, 225 (2004) (describing the original agreement between the United States and Canada).

“[FAST is intended to d]evelop an integrated approach to improve security and facilitate trade through away-from-the-border processing for truck/rail cargo (and crews)”¹⁰⁵ Like C-TPAT, participation in FAST by importers and shippers is technically voluntary, and the U.S. government employs a similar carrot-and-stick approach to encourage participation—namely, FAST participation offers reduced border processing times and fewer inspections of crossborder shipments at designated border crossings.¹⁰⁶

IV. POLITICAL GEOGRAPHY AND “PUSHING THE BORDER OUTWARD”

The programs previously discussed involve the transfer of 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. This occurs either by (1) moving functions traditionally associated with borders to sites outside the geographical United States (such as cargo inspection under CSI); (2) requiring the advance reporting of cargo information, with an eye toward preventing the foreign departure of potentially problematic shipments (such as the 24-Hour Rule) or at least more effectively identifying and stopping shipments prior to the border (such as FAST); or (3) extending de facto U.S. jurisdiction over foreign parties via a supply chain security program (such as C-TPAT).¹⁰⁷ In short, these programs represent an important shift in U.S. border functionality.

Certain works from the field of political geography have a great deal to offer in the analysis of these U.S. border initiatives. While there is some debate over the boundaries of that field, it does include, at least as a subset, the study of “the relationship between geographical factors and political entities.”¹⁰⁸ These works help both to highlight significant commonalities among these U.S. government programs and to place these programs in

105. Press Release, Off. of Homeland Sec., Specifics of Secure and Smart Border Action Plan (Jan. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020107.html>.

106. FAST BROCHURE, *supra* note 102, at 1–2; U.S. CUSTOMS & BORDER PROT., FAST REFERENCE GUIDE: ENHANCING THE SECURITY AND SAFETY OF TRANS-BORDER SHIPMENTS 1–2 (2005), available at http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/fast_ref_guide.ctt/fast_ref_guide.pdf.

107. See *supra* Part III (analyzing these different border-security programs, each of which acts outside the physical borders of the United States).

108. HANS W. WEIGERT ET AL., PRINCIPLES OF POLITICAL GEOGRAPHY 5 (1957); see also MARTIN JONES ET AL., AN INTRODUCTION TO POLITICAL GEOGRAPHY: SPACE, PLACE AND POLITICS 173 (2004).

a proper thematic context. This Article is, of course, not intended to provide a full overview of political geography; rather, it is meant to harness certain political geography writings and concepts for the purpose of better understanding and analyzing post-September 11, 2001, U.S. border security initiatives from a legal perspective.¹⁰⁹

For purposes of this Article, there are two lines of political geography inquiry that aid in analysis of current U.S. border initiatives—the “defensive borders” and the “border taxonomies” approaches.¹¹⁰ Each was developed in the early or mid-twentieth century during times of political upheaval and fluid national boundaries.¹¹¹ It is thus quite fitting that these theories are conceptually relevant to current U.S. efforts to redefine border functions in the face of the new security challenges posed by modern terrorism. These studies provide a useful framework for analyzing current U.S. efforts to “push the border outward.” This framework is useful because, in essence, current U.S. border security efforts are aimed at identifying border functions considered crucial to U.S. national security and performing them at points well-removed from the actual, physical border—in other words, forward deploying these traditional border features or functions.

A. *Political Geography Terminology*

Before discussing these lines of geographic inquiry, however, it is first useful to define some key terms. These definitions are especially important because political geography scholarship has not always used consistent terminology, with the predictable

109. Early- and mid-twentieth century political geography writings are most helpful for purposes of this Article because they focus largely on identifying, justifying, and describing the nature, functions, and establishment of national boundaries or borders. *See, e.g.*, WEIGERT ET AL., *supra* note 108, at 80. This focus should not be taken to suggest that there have been no substantive developments in the field of political geography since that time. Especially since the 1970s, there has been robust literature in this discipline on a variety of topics—one of which has been a debate over the discipline’s very scope. *See, e.g.*, KEVIN R. COX, *POLITICAL GEOGRAPHY: TERRITORY, STATE, AND SOCIETY* 1–2 (2002) (recommending a narrower, essentialist definition of political geography based on—and hence limited by—the “defining concepts” of “territory and territoriality”); JONES ET AL., *supra* note 108, at 2 (reviewing competing definitions of the field and advocating a broad definition of “political geography as a cluster of work within the social sciences that engages with the multiple intersections of ‘politics’ and ‘geography’”); JOHN RENNIE SHORT, *AN INTRODUCTION TO POLITICAL GEOGRAPHY* 1–2 (2d ed. 1993) (discussing the historical evolution of political geography’s scope). Cox’s definition is more consistent with earlier definitions of the field as “the relationship between geographical factors and political entities.” *See* WEIGERT ET AL., *supra* note 108, at 5.

110. *See infra* Part IV.B.

111. *See infra* text accompanying note 124.

effect of occasional confusion and implied distinctions where none exists.¹¹²

First, a perusal of the cited political geography texts reveals that they eschew the term “border” in favor of “boundary” (or “international boundary”).¹¹³ This Article, however, predominantly will use the term “border” to refer to the demarcation between sovereign nation-states.¹¹⁴ This usage is adopted in order to avoid confusion, since “border” is the term used by the U.S. government in discussing post-September 11, 2001, security efforts.¹¹⁵ In any event, the terms “border” and “boundary” are synonymous in ordinary parlance.¹¹⁶

Second, the term “frontier” has frequently suffered from poor definition in the field of political geography. Often it has been used interchangeably with the term “boundary,”¹¹⁷ while at other times it has denoted different types of transitional zones.¹¹⁸ For purposes of this Article, it is sufficient to distinguish between

112. See, e.g., J.R.V. PRESCOTT, *THE GEOGRAPHY OF FRONTIERS AND BOUNDARIES* 13 (1965) (describing the interchangeable use of the terms “frontier” and “boundary”); WEIGERT ET AL., *supra* note 108, at 7 (describing attempts at distinguishing between politics and political geography). A notable attempt to clarify political geography terminology by seeking to distinguish between the terms “boundary” and “frontier” is provided in Ladis K.D. Kristof, *The Nature of Frontiers and Boundaries*, 49 *ANNALS ASS'N AM. GEOGRAPHERS* 269, 269–70 (1959).

113. See, e.g., PRESCOTT, *supra* note 112, at 11.

114. See C.B. FAWCETT, *FRONTIERS: A STUDY IN POLITICAL GEOGRAPHY* 5 (1918) (“[T]he phrase ‘international boundary’ is so generally used to denote a boundary between sovereign states that it has been impossible to avoid using it in this sense . . .”).

115. See, e.g., FAST BROCHURE, *supra* note 102, at 1 (using the word “border” to describe the U.S. geographical boundaries with Mexico and Canada).

116. See *THE AMERICAN HERITAGE COLLEGE DICTIONARY* 166, 170 (4th ed. 2000) (defining the term “border” as “[t]he line or frontier area separating political divisions or geographic regions” and similarly defining the term “boundary” as “[s]omething indicating a border or limit” or “[a] border or limit so indicated”).

117. Lord Curzon of Kedleston, Viceroy of India & British Foreign Sec’y, *Romanes Lecture on the Subject of Frontiers* (1907), available at <http://www.dur.ac.uk/resources/ibru/resources/links/curzon.pdf> (dividing frontiers into two main groups: artificial frontiers, consisting of real or imaginary lines, and natural frontiers, which include boundary regions such as oceans or deserts); see also S. WHITTEMORE BOGGS, *INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS* 22 (1940) (defining a “boundary” as a line and a “frontier” as a region or zone); FAWCETT, *supra* note 114, at 6 (noting that Lord Curzon failed to differentiate between the terms); PRESCOTT, *supra* note 112, at 13 (criticizing interchangeable use of these terms by other commentators).

118. For example, distinctions are sometimes made between “frontiers of separation” and “frontiers of intercourse or pressure.” See PRESCOTT, *supra* note 112, at 15–17 (presenting various views of frontiers and distinguishing between the frontier of separation, which acts as a military division between countries, and a frontier of intercourse, which is the region between political states that functions as a meeting place where “international rights are determined and obligations assumed”); see also FAWCETT, *supra* note 114, at 30 (recognizing separation and intercourse as the two prime functions of borders).

borders (or boundaries) and frontiers by noting that “‘frontier’ denotes an area, and ‘boundary’ a line.”¹¹⁹

Third, the term “buffer state” has been used to convey multiple concepts in political geography.¹²⁰ For present purposes, the most appropriate definitions of a buffer state are a state “located in the path of an enemy advance,”¹²¹ and, alternatively, a state whose “territory separates those of two or more other states, thus preventing direct contact.”¹²² One political geographer correctly noted at the outset of World War II that buffer states are not strictly boundaries, but they do “require consideration somewhat analogous” to boundaries because they have some of the same effects.¹²³

B. Two Lines of Political Geography Inquiry: Defensive Borders and Border Taxonomies

With these definitions in mind, it is useful to apply two particular lines of political geography inquiry to current U.S. efforts to enhance cargo security by “pushing the border outward.”

1. *Lord Curzon of Kedleston and the Passes to India.* In 1907, Lord George Nathaniel Curzon—British Viceroy of India and later British Foreign Minister—became one of the first commentators to attempt to establish a taxonomy of border types.¹²⁴ In his Romanes Lecture at the University of Oxford that

119. FAWCETT, *supra* note 114, at 5–6; PRESCOTT, *supra* note 112, at 15 (noting that Fawcett drew “a clear distinction between the[] zonal characteristics and the linear nature of boundaries”); *see also* BOGGS, *supra* note 117, at 22 (adopting Fawcett’s distinction between a boundary, which constitutes a line defined by points in a “treaty, arbitral award, or boundary commission report,” and a frontier, which constitutes “a region or zone, having width as well as length”). According to Fawcett, political “[f]rontiers are thus essentially transition areas—zones in which the characters and influences of two or more different regions or states come together” to a greater or lesser extent. FAWCETT, *supra* note 114, at 24. In similar fashion, Kristof characterized boundaries (borders) as “inner-oriented” and frontiers as “outer-oriented.” Kristof, *supra* note 112, at 271–72.

120. STEPHEN B. JONES, *BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS* 17 (1945).

121. *Id.* In the early- and mid-twentieth century, Belgium was commonly cited as a prime example of a buffer state between Germany and France. *See, e.g.*, 3 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 45 (Edwin R.A. Seligman & Alvin Johnson eds., 1930) (“Belgium presents the clearest and most familiar example of a buffer state. . .”); JASPER H. STEMBRIDGE, *THE WORLD: A GENERAL REGIONAL GEOGRAPHY* 198 (2nd ed. 1953) (also referring to Belgium as a “buffer state”).

122. *See* JONES, *supra* note 120, at 17.

123. BOGGS, *supra* note 117, at 27.

124. *See* Curzon, *supra* note 117. For biographical information on Lord Curzon of Kedleston, *see* Encyclopedia Britannica Online, George Nathaniel Curzon, Marquess

year, Lord Curzon drew upon his experiences in India to analyze the nature of borders and frontiers.¹²⁵ Much of his lecture was devoted to distinguishing between what he called “natural” borders, such as oceans, deserts, or mountain ranges, and “artificial” borders, such as frontiers or buffer zones.¹²⁶ In so doing, he concentrated heavily on the defensive aspects of frontiers and borders.

In particular, Lord Curzon spoke of the natural advantages of having oceans as frontiers, because they constituted a physical space difficult to cross, as well as the benefits of using mountain ranges as boundaries, because they offered defensive advantages and limited passes through which enemy forces could approach. In essence, his view was that the security of territorial holdings could be best achieved by using natural features as borders, by maintaining a broad perimeter, and by concentrating border security efforts at defensive pressure points.¹²⁷

The natural-versus-artificial border dichotomy set forth by Lord Curzon largely has been abandoned, and in fact his analysis contained the seeds of its own destruction.¹²⁸ He acknowledged, for example, that oceans were both barriers and avenues of commerce, and that technological advances such as the locomotive could render deserts useless as frontiers.¹²⁹

Yet his focus on defensive aspects of borders and frontiers continues to translate well by analogy to U.S. efforts to secure its borders against terrorism. Modern U.S. measures that require advance cargo reporting and inspection do establish a security perimeter—in the sense that there is advance notice of what is being imported into the United States, how it is being imported, and by whom—so that any additional security measures can be taken in advance of the shipment’s arrival at the actual U.S. border.¹³⁰ Furthermore, the establishment of U.S. personnel at key foreign ports (through CSI) and private sector efforts (through C-TPAT) to ensure supply chain security through these

Curzon, <http://www.britannica.com/eb/article-9028300> (last visited Mar. 31, 2007).

125. See Curzon, *supra* note 117 (listing, among other experiences, the organization and administration of five Boundary Commissions during his tenure as Viceroy of India).

126. *Id.*

127. *Id.* (discussing the different security aspects of natural frontiers).

128. JONES, *supra* note 120, at 14–16 (pointing out the flaws in Lord Curzon’s reasoning about the strengths and weaknesses of natural boundaries).

129. Curzon, *supra* note 117 (“It is true that in one aspect the sea may be regarded as a connecting link by the artificial aid of navigation, much in the same way as a land Frontier may be crossed by a railroad or pierced by a tunnel.”); JONES, *supra* note 120, at 14–16.

130. See *supra* Part III.B (detailing the 24-Hour Rule).

foreign ports is conceptually similar to concentration of defensive efforts at mountain passes because, in both cases, defensive efforts and resources are devoted to monitoring and restricting passage through a finite set of vulnerable transit nodes.

In other words, Lord Curzon's analysis of borders, with its concentration on defensive concerns, transcends the time period in which his comments were made. His observations on the defensive functions of borders, when combined with later efforts to develop border taxonomies and lists of border functions, help provide cogent insight into modern U.S. efforts to improve national security through the forward deployment of cargo security functions.¹³¹

2. *Border Taxonomies and Border Functions.* Various political geographers in the early twentieth century sought to develop a working taxonomy of border types, as well as their respective characteristics and advantages. Subsequent commentators worked to objectively identify and describe proper border functions. These two approaches, while distinct, are in many ways complementary and are therefore discussed together here.

International borders have been discussed by political geography scholars in evolutionary terms—namely, as shifting over time from less-defined tribal boundaries to more established frontiers and thence to clearly demarcated borders.¹³² In the words of one commentator, the general evolution of international borders had led to an end product of “sharply defined lines, fixed by nations like fences between their respective properties.”¹³³ Mid-twentieth century American political geographers worked to objectively identify and discuss the appropriate functions of distinct national borders,¹³⁴ with principle border functions

131. In fact, despite general abandonment of the natural versus artificial border dichotomy, the importance of Curzon's discussion of the strategic functions of borders has been acknowledged. See PRESCOTT, *supra* note 112, at 12–14 (discussing later writers' uses of Lord Curzon's classifications and functions of borders); see also JONES, *supra* note 120, at 8–9.

132. See, e.g., FAWCETT, *supra* note 114, at 92–93 (observing a “tendency towards precision of boundary lines” in history); WEIGERT ET AL., *supra* note 108, at 79–80 (noting that frontier zones developed into boundary lines in part due to the expansion of the Roman republic, which used boundary lines to demarcate city-states); Curzon, *supra* note 117 (relating the evolution of borders to a decrease in unsettled lands and an increase in population, military power, and forms of transportation).

133. BOGGS, *supra* note 117, at 6.

134. See, e.g., JONES, *supra* note 120, at 15; BOGGS, *supra* note 117, at 21–22 (“[P]rinciples should be formulated with reference to the types of geographic boundaries which are adapted to different sets of boundary functions.”). American political geographers might have been more focused on mechanics of border operations because

including the administration of customs laws and the prevention of smuggling and other illegal imports.¹³⁵ The implicit assumption in these works was that these functions would occur at or near the physical border.¹³⁶

U.S. import cargo security measures following September 11, 2001, suggest that an important countertrend is underway from a cargo security perspective. Prior to September 11, 2001, border functions involving imports fit the above model and occurred at or near the physical border, if they occurred at all. Functionally, this approach was consistent with having borders that were “sharply defined lines” or “fences.”¹³⁷ Under post-September 11, 2001, programs such as C-TPAT and CSI, problematic cargo now may be identified well in advance of arrival at the physical U.S. border and can be singled out for inspection at foreign ports. Under the 24-Hour Rule, vessels in foreign ports can be denied authority to load goods bound for the United States. Non-ocean shipments must report their arrival in advance and can be denied entry to the United States.¹³⁸

From a national security/cargo security perspective, then, the United States has gone back in time in terms of border function and conception. Historically, the movement toward borders as “sharply defined lines” was viewed as the logical—indeed, the inevitable—evolutionary outcome.¹³⁹ The post-September 11, 2001, U.S. conception of the border in the cargo context, however, quickly has devolved into something far more akin to ill-defined frontiers than to fences. Alternatively, this atavistic trend can be conceptualized as the use of foreign countries as “buffer states” that are “located in the path of an enemy advance” or whose territory separates the United States from the harmful activities of terrorists, thus preventing these unwanted shipments from having “direct contact” with the U.S.

they lived on a continent with few border disputes, as opposed to their European colleagues, who tended to focus more on conceptual issues. *See* BOGGS, *supra* note 117, at 72, 112, 132 (theorizing that boundaries operate differently in Europe than in America because European boundaries have been constantly altered and are often not based on geological factors).

135. *See generally* BOGGS, *supra* note 117, at 10 (noting that in terms of things, boundaries function for the collection of duties and taxes, the prevention of illegal movement of goods, and the control of cross border flow of money and persons); JONES, *supra* note 120, at 12.

136. *See, e.g.*, BOGGS, *supra* note 117, at 10 (defining an international boundary as consisting of a wall or partition between the states).

137. *Id.* at 6.

138. *See supra* Part III (detailing post-September 11, 2001, programs).

139. BOGGS, *supra* note 117, at 6–7.

homeland.¹⁴⁰ In this way, the United States can allow risky cargo inspection activities to occur not at the actual U.S. border, but rather abroad in “buffer states.” Thus, these foreign states bear all the security risk involved in these inspections, while the benefit of increased cargo security is shared between the United States and these foreign countries.

This core-versus-periphery analysis has an interesting flip side, of course, because the CSI program is bilateral in form, and other countries are taking steps similar to CSI, C-TPAT, and the other programs discussed above under a multilateral WCO framework.¹⁴¹ One therefore could view the United States as a buffer state for those trading partners that have based customs inspectors at U.S. ports (currently only Canada and Japan)¹⁴² or that have imposed supply chain requirements which affect portions of the supply chain internal to the United States. Not surprisingly, this mirror-image conception of these programs has not featured prominently in U.S. government descriptions of these programs.¹⁴³ In fact, one might question how willing the United States is to have these programs operate in a truly bilateral or reciprocal fashion, at least in terms of the programs’ restrictive or cost-imposing effects on domestic U.S. activity. For example, a recent study funded by the government of Canada concluded that the Canadian trucking industry has borne significant costs in complying with post-September 11, 2001, U.S. border security programs but has received little benefit from voluntary participation in trade-facilitating aspects of these U.S. programs (in terms of reduced inspection and border delay times).¹⁴⁴ It is not far-fetched to posit that if foreign border security programs—those mirroring CSI, C-TPAT, and the other programs discussed above—were found to impose significant compliance costs on outbound U.S. trade, the United States

140. JONES, *supra* note 120, at 14.

141. See *supra* note 60 and accompanying text (discussing EU, G8, and WCO implementation of programs); see also INDUSTRY CANADA: LOGISTICS, BORDER COMPLIANCE CERTIFICATION TOOL KIT 4 (2004), available at [http://strategis.ic.gc.ca/epic/site/dsib-logi.nsf/vwapj/BORDER_COMPLIANCE_CERTIFICATION_Toolkit.pdf/\\$FILE/BORDER_COMPLIANCE_CERTIFICATION_Toolkit.pdf](http://strategis.ic.gc.ca/epic/site/dsib-logi.nsf/vwapj/BORDER_COMPLIANCE_CERTIFICATION_Toolkit.pdf/$FILE/BORDER_COMPLIANCE_CERTIFICATION_Toolkit.pdf) (summarizing Canada’s implementation of U.S. cooperative border security programs).

142. CSI Fact Sheet, *supra* note 44, at 2; see also *Container Security Initiative Expands Operations in Japan*, THE INFORMATION WARFARE SITE, Aug. 5, 2004, <http://www.iwar.org.uk/news-archive/2004/08-05.htm> (reporting that Japanese customs officers are stationed at Los Angeles and Long Beach, while Canadian customs officers are stationed at Newark and Seattle).

143. See, e.g., Press Release, Dep’t of Homeland Sec., Fact Sheet: Securing U.S. Ports (Feb. 22, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0865.shtm.

144. TRANSPORT CANADA BORDER REPORT, *supra* note 32, at 33–37.

might seek to have these programs adjusted or minimized in order to reduce the domestic U.S. impact, while still keeping its mirror-image cargo security programs fully in place. Such scenarios thus could raise questions concerning the legitimacy and legality of these U.S. programs, as discussed in the next section.

V. CONSIDERATIONS OF LEGALITY

The zeal with which the U.S. government has pursued its various cargo security programs to “push the border outward” has resulted in the United States having further extended its practical control and effective jurisdictional reach over cargo imports outward from the United States and into foreign jurisdictions. Such forward deployment of border functions has raised concerns regarding both these programs’ legality under international law and their practical effect.¹⁴⁵ This section addresses these concerns, with particular emphasis on the multilateral versus bilateral (or unilateral) aspects of these programs.

As an initial matter, it must be pointed out that the validity of these programs can be seen as resting on the consent of U.S. trading partners and supply chain participants. Consent plays a significant role in the legitimacy of U.S. efforts regardless of whether any extraterritorial jurisdiction exercised by the United States under these programs is characterized as prescriptive jurisdiction (i.e., via implementation of cargo security requirements),¹⁴⁶ enforcement jurisdiction (i.e., the ability to compel compliance or cooperation with these requirements),¹⁴⁷ adjudicatory jurisdiction (i.e., the authority to certify or decertify participants in cargo security programs such as C-TPAT),¹⁴⁸ or some combination of the three. This foundation in consent is also true regardless of whether the underlying international law principle for extraterritorial prescriptive jurisdiction is the protective principle, subjective territorial jurisdiction, passive personality jurisdiction, or even (although currently unlikely) universal jurisdiction.¹⁴⁹ Accordingly, this Article focuses on

145. See, e.g., Romero, *supra* note 1, at 601–04 (exploring the effects of CSI on state sovereignty).

146. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

147. See *id.* § 431.

148. See *id.* § 421.

149. See *id.* §§ 402, 404; see also I.A. SHEARER, STARKE’S INTERNATIONAL LAW 183–212 (11th ed. 1994).

consent as the key factor in justifying extraterritorial jurisdiction under these programs, as opposed to trying to fit extraterritorial jurisdiction into one or more of the traditional forms or principles of jurisdiction.

With this in mind, it can be seen that multilateral consent to these U.S. cargo security programs is a strong current justification for their extraterritorial application, but consent is not an infallible justification. It is entirely possible that multilateral consent could be withdrawn, in whole or in part, by U.S. trading partners in response to perceived U.S. overreaching. Fortunately, there are other justifications for these programs that appear far more resistant to such objections. Interestingly, the strongest legal justification for these programs' extraterritorial effect and their infringement on foreign sovereignty appears to be the *implicit* consent to these programs by U.S. foreign trading partners or supply chain participants. This rather counter-intuitive conclusion is explored at the end of this section.

A. *Multilateral Considerations*

1. *The Growth in Multilateral Support for U.S. Cargo Security Programs.* When CSI, C-TPAT, and the other programs discussed above were first launched, concerns were raised about their legality or validity under international law, with particular emphasis on how CSI and its sibling programs might interfere with "traditional notions of sovereignty" and jurisdiction.¹⁵⁰ These concerns were grounded, in large part, in the traditional notion of Westphalian state sovereignty and the role of states as unitary actors.¹⁵¹ While there are currently challenges to the view of nation-states as unitary, it remains a foundational element of the current international order, including state sovereignty and exercise of jurisdiction. Accordingly, analysis of these cargo security programs from a unitary nation-state perspective is an important part of exploring possible legal justifications for these programs.¹⁵²

150. Romero, *supra* note 1, at 601–02; see also LUKAS, *supra* note 1, at 11 (asserting that some nations "are concerned about CSI's impact on national sovereignty and are anxious to avoid appearing subservient to the 'American Empire'"); Jau, *supra* note 1 (commenting on international concerns about CSI, such as "fears over encroachment of sovereignty").

151. An underlying premise of states as unitary actors is that such a system promotes global order by reducing the number of actors on the global stage to a more manageable number. See Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 870–73 (2004).

152. Cf. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW*

Two primary aspects of Westphalian sovereignty relevant to current U.S. efforts to “push the border outward” are the ability of states to enter into agreements with one another and their ability to regulate inbound and outbound flows of commercial activity.¹⁵³ Early in the life of the CSI program, concerns were expressed that while CSI agreements were structured as bilateral, consensual agreements, they nonetheless were weighted heavily in favor of U.S. interests and could be considered nonconsensual surrenders of sovereignty by a series of weaker states to a much stronger United States.¹⁵⁴ In contract law terms, this concern might be styled as one over contracts of adhesion or contracts between presumptively rational actors with highly unequal bargaining power.¹⁵⁵ States in fact can be viewed as market actors that, in their relations with one another, agree to relinquish certain aspects of power or sovereignty in exchange for other benefits (in this case, improved cargo security).¹⁵⁶ However, if a state has little or no discretion over a particular agreement, that might bring the consensual nature of the agreement—and perhaps its validity—into question.

With respect to the second feature, concerns have been expressed that U.S. cargo security programs unilaterally imposed by the United States, such as the C-TPAT program or the 24-Hour Rule and its “Do Not Load” orders, might impermissibly intrude on commercial activities in foreign states.¹⁵⁷ This concern

4–5 (2005) (employing “state-centered rational choice theory” to analyze state actions within the international law framework).

153. See, e.g., 1 OPPENHEIM’S INTERNATIONAL LAW § 595 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (describing the capacity of each sovereign state to make treaties). On a related note, in his book *Sovereignty: Organised Hypocrisy*, Stephen Krasner outlines four aspects or dimensions of nation-state sovereignty—two of which are “Westphalian sovereignty” (defined in his book as the ability of states to exclude others from their internal authority structures) and “interdependence sovereignty” (which he defines as a nation-state’s ability to control and restrict what crosses its borders). STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 1–2 (1999). Such a distinction is not necessary for purposes of this Article, since both types of sovereignty are generally based on having the unitary state regulate or restrict certain types of interference with the state’s activities.

154. See Romero, *supra* note 1, at 601–02 (observing that U.S. foreign policy can have the effect of forcing states to “surrender bits of their sovereignty through bilateral agreements and treaties”); Jau, *supra* note 1 (indicating that some countries are concerned that CSI agreements will grant the United States too much power over domestic port operations).

155. See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 1.3 (5th ed. 2003).

156. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 13–14 (1999) (noting that power is a common good traded in the international market).

157. See Romero, *supra* note 1, at 601–03.

is largely driven by the notion that control and influence over ordinary internal commercial activities primarily should be the province of the state in which the activity occurs—something often considered an essential element of Westphalian or territorial sovereignty.¹⁵⁸

In the few years since their inception, CSI and its related programs have gained substantial multilateral support through the EU, G8, and WCO,¹⁵⁹ and this support can be seen as substantially reducing doubt over the legitimacy and propriety of these U.S. cargo security programs in their current incarnations. As stated by one observer, such support essentially constitutes the “internationaliz[ation]” of U.S. cargo security policy.¹⁶⁰ In particular, a U.S.–EU cargo security agreement expressly “[s]upport[s] the objectives of the [U.S.] Container Security Initiative” and advocates the expansion of CSI to all EU ports.¹⁶¹ This agreement also encourages U.S. reciprocity by “promoting comparable [cargo security] standards in the relevant U.S. ports,” backs the joint development of “minimum standards” for cargo risk management, and establishes a working group of U.S. and EU customs personnel to propose recommendations in such matters.¹⁶² A recent European Commission Regulation requires the implementation of cargo security programs similar to those of the United States, although differences remain between the two sets of programs.¹⁶³ In like fashion, G8 members have pledged to “work[] together to reinforce container security arrangements generally,” to develop “joint standards and guidelines for electronic transmission of customs data for cargo” (to facilitate

158. See Dinh, *supra* note 151, at 871–72 (noting that “Westphalian sovereignty” is characterized by territorially-divided, independent, total sovereign authority).

159. See *supra* notes 60 & 101 and accompanying text (noting the international support for the CSI and C-TPAT programs).

160. Beisecker, *supra* note 60.

161. U.S.–EU CARGO SECURITY AGREEMENT, *supra* note 60, at 34–35.

162. *Id.* at 35.

163. See Commission Regulation 1875/2006 Amending Regulation (EEC) No 2454/93 Laying Down Provisions for the Implementation of Council Regulation (EEC) No 2913/92 Establishing the Community Customs Code, 2006 O.J. (L 360) 64 (EC), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_360/l_36020061219en00640125.pdf (implementing EU cargo security programs and provisions); see also EUR. COMM’N, TAXATION AND CUSTOMS UNION, SUPPLY CHAIN SECURITY: EU CUSTOMS’ ROLE IN THE FIGHT AGAINST TERRORISM (2006), available at http://ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/customs/customs_security_en.pdf (discussing EU counterpart programs to the U.S. programs discussed in this Article); EU–U.S. JCCC WORKING GROUP ON MUTUAL RECOGNITION, TERMS OF REFERENCE (2007), available at http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/customs_security/TOR_MR_en.pdf (discussing efforts toward mutual U.S.–EU recognition of parties authorized to participate in the U.S. C-TPAT program and its EU counterpart, the “Authorised Economic Operator” program).

preshipment reporting such as under the U.S. 24-Hour Rule), and to encourage further expansion of the CSI program.¹⁶⁴

Similarly, the WCO has adopted the *Framework of Standards to Secure and Facilitate Global Trade*, which rests on several key principles aimed at harmonizing customs reporting and risk assessment procedures in order to maximize inspection capability and lower transaction costs and delays.¹⁶⁵ One of these principles is that a country “should conduct outbound security inspection of high-risk containers and cargo at the reasonable request of the importing country.”¹⁶⁶ A second principle is that advance reporting of imports should be required, much along the lines of the U.S. 24-Hour Rule.¹⁶⁷ A third WCO *Framework* principle advocates the development of government–private sector “partnership[s]” along the lines of C-TPAT in order to promote supply chain security.¹⁶⁸ To date, a substantial number of WCO member states have submitted declarations of intent to implement the WCO *Framework* through their domestic laws,¹⁶⁹ and the WCO has taken steps to facilitate further intergovernmental development of trade security principles and their implementation at the national level.¹⁷⁰

Regardless of the form of these EU, G8, and WCO statements (i.e., binding agreements or nonbinding statements of support or consensus), such broad multilateral support and consensus for these U.S. programs suggest that these countries do not currently consider these U.S. cargo security programs to impermissibly infringe on their sovereignty or to be jurisdictional

164. G-8 2003 ACTION PLAN, *supra* note 60, §§ 4.1–4.2.

165. WORLD CUSTOMS ORGANIZATION, FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE 11 (2005), *available at* http://europa.eu.int/comm/taxation_customs/resources/documents/customs/policy_issues/customs_security/normes_WCO_en.pdf.

166. *Id.*

167. *See id.* at 10.

168. *Id.* at 11.

169. *See* Beisecker, *supra* note 60 (reporting that “52 WCO members (including the EU) immediately submitted declarations of their intent to implement the Framework”).

170. *See* WORLD CUSTOMS ORG., AUTHORIZED ECONOMIC OPERATORS 5–6 (2006), *available at* [http://www.ifcba.org/UserFiles/File/SP0218E1\(2\).doc](http://www.ifcba.org/UserFiles/File/SP0218E1(2).doc) (explaining the concept of Authorized Economic Operators—entities involved in global supply chain activities—to be relied upon by national governments); WORLD CUSTOMS ORG., RESOLUTION OF THE CUSTOMS CO-OPERATION COUNCIL ON THE FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE 2–3 (2006), *available at* http://www.wcoomd.org/ie/EN/Topics_Issues/FacilitationCustomsProcedures/Resolution%20E%20June%202006.pdf (resolving that the WCO “shall ensure that assistance and guidance are provided to enable interested Members to participate in pilot projects to implement the SAFE Framework of Standards” and that the “Authorized Economic Operator standards are [officially] adopted” by the WCO).

overreaching by the United States. This support is significant, because the countries involved represent the United States' primary trading partners.¹⁷¹ Circular though it may be, such significant multilateral agreement or consensus concerning these programs can be viewed as legitimizing the programs' extraterritorial application or effect.

Such multilateral consensus also could be viewed as the emergence of an international cargo security regime under which participating countries consensually agree to the extraterritorial application of each other's cargo security rules, within certain agreed-upon parameters. As such, mutual cooperation in cargo security matters might be seen as a "cooperative . . . extraterritoriality" regime, pursuant to which countries agree to extraterritorial application of other nations' laws within their jurisdictions to an agreed-upon extent.¹⁷² A stable system of interconnected or harmonized cargo security rules could perhaps be seen as a cooperative effort to "institutionalize and 'mutualize' extraterritorial[]" jurisdiction in cargo security matters.¹⁷³

2. *Similarities to Foreign Embassy and Consular Activities.*

Lending further support to the legitimacy of post-9/11 U.S. cargo security programs is the fact that the forward deployment of cargo inspection activities, at the expense of local state sovereignty, is similar to certain activities of U.S. embassies and consulates abroad. In particular, U.S. embassy and consular personnel stationed abroad regularly process visa applications for foreign persons seeking U.S. entry,¹⁷⁴ and the performance of these functions abroad can be seen to enhance U.S. security, because potential visa recipients remain outside the United States and away from actual U.S. borders until they have been vetted for security and other concerns.¹⁷⁵

In the case of both visa processing and cargo review and inspection, U.S. government personnel are thus engaged in

171. See U.S. Census Bureau, Foreign Trade Statistics, Top Trading Partners—Total Trade, Imports, Exports, January–December 2005, <http://www.census.gov/foreign-trade/statistics/highlights/top/top0512.html> (last visited Mar. 16, 2007).

172. See Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 *LAW & CONTEMP. PROBS.* 263, 266–68 (2005).

173. *Id.* at 268.

174. See 1 *OPPENHEIM'S INTERNATIONAL LAW*, *supra* note 153, § 486. General information concerning current U.S. policies and procedures for visa processing is available online at the U.S. Department of State's website, <http://www.unitedstatesvisas.gov>.

175. U.S. DEP'T OF STATE, OBTAINING A U.S. VISA 1–3 (2007), <http://www.unitedstatesvisas.gov/pdfs/gettingavisa.02.03.pdf>.

border- and security-related screening functions that, but for the forward deployment of these screening activities, would take place within the United States or at its borders.¹⁷⁶ In the case of CSI, U.S. personnel are actually stationed abroad, like their U.S. consular counterparts.¹⁷⁷ The performance of visa review and issuance activities abroad is not considered controversial or in violation of international law principles, and the same argument can be made by analogy with respect to cargo screening activities performed abroad.¹⁷⁸

Stated differently, and perhaps more succinctly, the United States has for some years engaged in the forward deployment of visa processing functions, with little objection or consternation from its international trading partners. Forward deployment of cargo screening and security measures can be seen as the extension of this same function from the realm of visitor and immigrant screening, where it is already well-established, to that of U.S. inbound cargo screening, which traditionally has not been performed abroad.

3. *Potential Difficulties with the Multilateral Support Justification for U.S. Cargo Security Programs.* As this discussion makes clear, the United States has sought to sidestep objections to its cargo security programs by advocating their adoption as multilateral programs.¹⁷⁹ Yet one might question whether the United States means all that it says about the multilateral nature of these cargo security programs. If the United States, as a dominant actor in world trade, seeks to obligate its trading partners to engage in certain cargo security measures while not necessarily binding itself to similar action, this could undermine the long-term, multilateral support justification for these programs.

176. See *Combating Terrorism: Visas Still Vulnerable: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 112th Cong. 38 (2005) (statement of Tony Edson, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs) (stating that the U.S. Department of State “has made significant and rapid changes to the visa process and entry screening requirements since September 11, 2001, in an effort to ‘push out’ our border security beyond the United States to the maximum extent possible”).

177. CSI Fact Sheet, *supra* note 44, at 2.

178. Cf. Michael S. Teitelbaum, *The Role of the State in International Migration*, BROWN J. WORLD AFF., Winter 2002, at 157, 162 (noting that most nations actively engage in both direct and indirect immigration screening).

179. See *supra* notes 60 & 101 and accompanying text (noting that the United States has successfully sought support for the CSI and C-TPAT programs from international organizations such as the G8, WCO, and EU).

That is, if push comes to shove, will the United States honor the multilateral aspects of these programs when it is not in the United States' interests to do so? The United States generally has honored the aforementioned diplomatic and consular commitments.¹⁸⁰ Will the same occur in the cargo security context, or will the United States insist that other nations abide by their commitments under these programs while not reciprocally honoring its own? Alternatively, will the United States apply ostensibly equal standards to itself and its trading partners, but interpret its trading partners' obligations more strictly than its own obligations? Just how "comparable" will U.S. cargo security measures be in comparison to those required for EU ports under CSI?¹⁸¹ "Comparable" does not mean "identical," and there certainly is room to maneuver or to debate what is and is not comparable. It might be, for example, the U.S. government's position—official or otherwise—that U.S. outbound shipments are less likely to suffer from the same security dangers of inbound shipments, and the government might be less willing to impede them.

Political or legal realist arguments thus can be made that, despite all official pronouncements of multilateral support for these U.S.-initiated cargo security programs, the countries involved know there is a double standard at play, and that other countries are expected to fully honor their commitments even if the United States chooses not to do so. To the extent that this is the case, it could weaken the multilateral justification for these cargo security programs.

The point of this Article is not to enter directly into the debate over realist views of international law.¹⁸² Rather, the purpose here is to explore possible legal justifications for these

180. See *supra* Part V.A.2.

181. See *supra* notes 54–56 and accompanying text (questioning the level of cooperation between U.S. and foreign CSI partners and its effect on security measures in foreign ports).

182. The role and nature of political and legal realism in international law has been discussed at length by a variety of other commentators, and is indeed a central theme of discourse in international law and relations scholarship. See, e.g., MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 216–17 (2005) (arguing that the social dynamic of international law cannot be fully explained by legal realism); GOLDSMITH & POSNER, *supra* note 152, at 10–13 (arguing that state behavior in complying with international law is driven by coincidence of interest, bilateral cooperation, coercion, or coordination); KRASNER, *supra* note 153, at 53 (claiming that neorealism cannot explain the Westphalian model because it is inherently inconsistent); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207–09 (1993) (discussing how legal realists have challenged international lawyers "to establish the 'relevance' of international law").

U.S. cargo security programs and the programs' implications for global trade. Multilateral support is certainly significant—and perhaps sufficient—legal support for these programs, and multilateral approval is undoubtedly desirable, both from legal and political perspectives. Yet multilateralism is not unassailable as a legal justification for these programs. It therefore is worth exploring bilateral or unilateral legal bases for justifying the extraterritorial effect or application of these U.S.-led cargo security programs. To the extent any bilateral or unilateral justifications provide a stronger basis of legality, they may be preferable.

B. Bilateral and Unilateral Considerations

Assume for the sake of argument that official multilateral support for these U.S. cargo security programs fades.¹⁸³ Does this bring the legal validity of these programs into question? What if multilateral opposition arises due to U.S. insistence on regulating its inbound cargo security programs more strictly than U.S. outbound cargo? This situation might occur if the United States refuses to let CSI member states, such as the United Arab Emirates (UAE) or Malaysia, station customs personnel in the United States, even though these countries have permitted the stationing of U.S. personnel in their ports.¹⁸⁴ Opposition to Middle Eastern personnel or companies being involved in U.S. port security matters is anything but hypothetical, as the demise of the Dubai Ports World deal in March 2006 clearly illustrates.¹⁸⁵ Similarly, the United States might permit UAE and Malaysian government personnel to be stationed at U.S. ports under CSI, but might regularly deny their

183. While the recent trend has been in favor of multilateral support, there are undercurrents of discontent. Despite the EU support for the U.S. cargo security programs discussed in this Article, trade industry articles have reported some strong objections to the process. See, e.g., Justin Stares, *EU Pushes Through 24-Hour Cargo Rule Despite Protests*, LLOYD'S LIST INT'L, Oct. 31, 2006, available at 2006 WLNR 18817572 (reporting that the EU "pushed through the Brussels version of the US 24-hour rule despite continuing industry concerns"); Justin Stares, *Industry Alarm over Brussels Changes to Customs Code*, LLOYD'S LIST INT'L, July 25, 2006, available at 2006 WLNR 12764206 (reporting industry concerns over administrative burdens of EU cargo security programs, such as an EU 24-Hour Rule program for advance cargo notification and the EU's "Authorised Economic Operator" program).

184. See CSI Fact Sheet, *supra* note 44, at 2 (listing Malaysia and United Arab Emirates as port locations where U.S. personnel operate).

185. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006, at A1 (reporting that Congress successfully pressured Dubai Ports World, a "state-owned Dubai Company seeking to manage some terminal operations at six American ports," into backing out of the port management arrangement).

requests to inspect outbound cargo, thus effectively quarantining them from U.S. port security matters.¹⁸⁶ Multilateral opposition also might arise if, under C-TPAT, the United States were to strongly object to foreign countries' efforts to influence certain U.S. outbound supply chain activities, but still insist on changes to foreign supply chains bound for the United States.¹⁸⁷ Such insistence on full foreign cooperation, combined with limited or no U.S. reciprocity, could reduce or eliminate multilateral support for these programs and any future U.S. cargo security programs.

If multilateral support for U.S. cargo security programs in fact were to wane, it seems highly unlikely that the United States would shutter these programs or forgo implementation of new cargo security measures with extraterritorial effects. After all, the driving force behind these cargo security programs is a unilateral desire to protect the United States, and in fact that is how the U.S. government repeatedly describes these programs—as efforts to “push the border outward,” not as efforts to “reciprocally monitor border traffic.”¹⁸⁸ This language certainly gives some credence to a realist view of these programs. It also means that having alternative legal justifications for these programs and any future extensions or expansions of them is of paramount importance to the United States. As explained below, strong bilateral or unilateral arguments can be made for the legality of CSI, C-TPAT, and the other cargo security programs discussed above, on the basis of express or implied consent of the foreign states or parties involved.

1. *Express Consent.* Aside from any widespread multilateral support, some of the current U.S. programs designed to “push the border outward” can be viewed individually as voluntary bilateral agreements expressly entered into by the United States and its foreign trading partners. Such bilateral agreements between the United States and individual foreign countries are in fact the original basis for the CSI program.¹⁸⁹ If the agreements are truly voluntary (a view that can be

186. See *supra* text accompanying notes 49–53 (explaining that while CSI allows the importing country to request inspection, the host country decides whether or not to perform the inspection).

187. See *supra* notes 81–87 and accompanying text (explaining how C-TPAT has an unprecedented reach over the full supply chain).

188. See *supra* notes 3–12 and accompanying text (discussing the government's widespread use of the phrase “push the border outward”).

189. See *supra* Part III.A; see also Romero, *supra* note 1, at 599–602.

questioned),¹⁹⁰ then these foreign countries have willingly ceded certain aspects of sovereignty and have agreed to the extended exercise of U.S. jurisdiction, in return for potentially greater mutual trade security.¹⁹¹ Thus, the argument goes, any cession of sovereignty or greater assertion of U.S. jurisdiction is consensual and nonproblematic.

From a nonmultilateral perspective, U.S. cargo security programs that have been expressly consented to by foreign states are similar in important respects to U.S. deployments abroad of military personnel pursuant to “Status of Forces” Agreements (SOFAs) between the United States and foreign host countries. Since World War II, the United States has negotiated and signed separate SOFAs and related leases with a number of nations to enable the establishment of U.S. military bases in those foreign countries.¹⁹² The establishment of these bases has been for the purpose of U.S. national security and defense, and by definition these bases have been forward deployments of U.S. government personnel and military functionality. The SOFAs themselves are comprehensive agreements that expressly curtail host country jurisdiction over U.S. base personnel and limit host country sovereignty rights over U.S. base territory, much in the same way that embassies and consulates (and their personnel) are largely inviolable.¹⁹³ The benefit of SOFAs to the United States historically has been the establishment of a forward line of defense or the use of foreign countries as buffer states, in particular against communist encroachments during the Cold

190. See *supra* Parts III.D–E (discussing the U.S. “carrot-and-stick” approach to encourage participation in C-TPAT and FAST).

191. See Dunoff & Trachtman, *supra* note 156, at 13–14 (discussing the willingness of some nations to relinquish autonomy in return for other benefits).

192. See U.S. MILITARY FORCES IN EUROPE: THE EARLY YEARS, 1945–1970, at 90–94 (Simon W. Duke & Wolfgang Krieger eds., 1993) (discussing the development of Status of Forces Agreements (SOFAs) after World War II, including the North American Trade Organization (NATO) SOFA); Brigadier Gen. C. Claude Teagarden, *Status of Forces Agreements: An International and Domestic Obligation to Return Military Personnel from the United States to Foreign Countries for Criminal Prosecution and Confinement*, 26 A.F. L. REV. 21, 21–22 & n.3 (1987) (explaining the birth of SOFAs and listing the thirteen countries that are parties to the NATO SOFA); Jaime M. Gher, Comment, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to Be Learned from the United States–Japan Agreement*, 37 U.S.F. L. REV. 227, 232–34 (2002) (discussing the NATO SOFA); Steven G. Hemmert, Note, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT’L L.J. 215, 221–27 (1999) (same).

193. See Teagarden, *supra* note 192, at 22–23 (discussing the host nation’s limited criminal jurisdiction over NATO SOFA army bases); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 358–68 (5th ed. 1998) (describing consular relations with host states); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 153, §§ 499–509, 549–51 (cataloging the “immunities and privileges of diplomatic agents”).

War era.¹⁹⁴ In the post-Cold War era U.S. foreign bases may be used more for preemptive actions and small-scale military operations than for large-scale defensive deployments, but there is little question that the United States will continue to maintain substantial forward deployment of military forces via SOFAs.¹⁹⁵ The benefit to foreign host countries generally takes the form of military protection, U.S. goodwill, and the economic infusion of military personnel and dependents into the local economy.¹⁹⁶ In similar fashion to SOFAs, U.S. CSI agreements with foreign host countries are bilateral arrangements that expressly permit U.S. personnel to operate in foreign ports in their official capacities.

The U.S. assertion of express consent as a justification for cargo security programs that “push the border outward” is also similar to the express consent justification sometimes advanced by the United States for its extraterritorial export controls. The United States has long claimed broad extraterritorial jurisdiction through its export control laws.¹⁹⁷ In particular, under these laws the United States currently asserts jurisdiction over goods, software, and technology (collectively, “items”) exported from the United States, as well as items located outside the United States that are of U.S. origin or contain greater than *de minimis* U.S.

194. Alyssa K. Dragnich, Recent Development, *Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty*, 4 CHI. J. INT'L L. 571, 571–72 (2003); Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 23.

195. Dragnich, *supra* note 194, at 572 (noting that America has continued to utilize SOFAs by stationing approximately 365,000 military personnel overseas); see also Michael T. Klare & Daniel Volman, *Africa's Oil and American National Security*, 103 CURRENT HIST. 226, 231 (2004) (commenting on American forward deployment into Africa to protect petroleum reserves).

196. John W. Egan, Comment, *The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT'L L. REV. 291, 306 (2006).

197. See Bowman, *supra* note 16, at 328 (noting that U.S. export control laws are “complex” and “broad in scope”); see also DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 53–55 (1982) (discussing the factors that led the United States to “the direct and unilateral extraterritorial application of its economic [export-control] laws”); Kenneth W. Abbott, *Defining The Extraterritorial Reach of American Export Controls: Congress as Catalyst*, 17 CORNELL INT'L L.J. 79, 90–91 (1984) (discussing U.S. trading partner objections to U.S. extraterritorial export controls); Cecil Hunt, *The Jurisdictional Reach of Export Controls*, 26 COLUM. J. TRANSNAT'L L. 19, 19–20 (1987) (discussing why the United States has long claimed the right to “control the disposition abroad of goods or technical data of U.S. origin”); Stanley J. Marcuss & D. Stephen Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?*, 2 INT'L TAX & BUS. LAW. 1, 12 (1984) (“It is clear from the re-export provisions of the [U.S. Export Administration R]egulations that the [U.S.] Commerce Department claims the authority to control [extraterritorial] re-exports retroactively as well as prospectively.”).

content.¹⁹⁸ Thus, the United States claims extraterritorial jurisdiction over transactions abroad that involve U.S. origin items or items with certain percentages of U.S. content, regardless of whether these transactions have any other nexus with the United States or U.S. commerce.

A comparison of some of the U.S. inbound cargo security programs discussed in this Article and outbound U.S. export controls reveals extraterritoriality that is sometimes justified by express consent of the foreign parties involved. Similar to C-TPAT, but in contrast to CSI,¹⁹⁹ when express consent is given in the U.S. export context it is given by the individual actors (that is, purchasers), as opposed to given by governments of the countries in question.²⁰⁰ If a foreign purchaser desires U.S. goods, for example, the United States sometimes places restrictive conditions on the export and reexport of the goods—that is, the United States may expressly permit a particular export only upon the condition that the items in question not be used subsequently for certain undesired purposes and not be reexported to certain destinations. In such cases, express consent to these extraterritorial restrictions is requested *ex ante*.²⁰¹ In like fashion, some U.S. cargo security initiatives discussed in this Article—in particular C-TPAT, which requires participants to register for participation in the program—can be seen as requiring prior express consent to their new-found extraterritorial reach.²⁰²

198. See Bowman, *supra* note 16, at 333–36. The *de minimis* threshold typically is either 10% or 25% U.S. content by value, although in some cases U.S. jurisdiction is even claimed for items with 0% U.S. content by value. *Id.* at 336–37.

199. See *supra* Part III.A, D.

200. Such statements of express consent take the form of “written assurances”—written statements from foreign customers to U.S. exporters pledging adherence to U.S. export controls, including reexport restrictions. See 15 C.F.R. § 732.3(f) (2006) (discussing “written assurances” required for export licenses or license exceptions under the U.S. Export Administration Regulations); 15 C.F.R. § 740.6 (2006) (explaining the use of “written assurances” in qualifying for export license exceptions for certain high-end technology and software); see also Kenneth W. Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, LAW & CONTEMP. PROBS., Summer 1987, at 117, 129 (noting that the United States “imposes restrictive conditions on [foreign] purchasers at the time of original sale,” sometimes in the form of “written assurances,” and that these can be viewed as U.S. attempts to obtain foreign purchasers’ express consent to extraterritorial U.S. export controls); Abbott, *supra* note 197, at 95–96 (describing the historical background and implementation of written assurances).

201. See 15 C.F.R. §§ 732.3(f), 740.6 (2006). Whether this express consent rationale is actually followed in practice, however, is more questionable. See Abbott, *supra* note 200, at 130 (discussing U.S. export control “written assurances” and noting that “[t]he United States has not always acted in ways that are consistent” with this rationale, given that prior notice of such conditions is not always provided).

202. See *supra* Part III.D.

Of course, the express agreement justification for U.S. cargo security programs can be countered by the contract of adhesion concerns discussed above.²⁰³ The United States will be the dominant actor in many bilateral cargo security agreements with its trading partners, and it may be able to coerce or cajole terms that are “voluntary” or “bilateral” in form only. In fact, as noted previously in this Article, such a concern was one of the earliest objections raised to the CSI program.²⁰⁴ With respect to the C-TPAT program, if one looks past any state-to-state expressions of support for C-TPAT and instead concentrates on the underlying voluntary “partnership” agreements between the U.S. government and private companies involved in inbound U.S. trade, the lack of parity between the parties could be used to call the express agreement justification even further into question.

This is not to suggest that the legal justification of express agreement is not valid, especially to the extent that there is rough parity between the United States and its foreign trading partners. In this regard, it is worth noting that the United States is increasingly dependent on inbound trade for its economic health and in recent decades has run a trade deficit in which U.S. imports significantly exceed exports.²⁰⁵ The United States might appreciate its foreign trading partners’ concerns with these programs and, in some cases, might even seek to address these concerns rather than ignore them and insist always on its own terms for inbound cargo security.

Rather, the purpose here is to explore justifications for these U.S. cargo security programs and the weaknesses of these justifications, with a view toward identifying which justifications are less susceptible to challenge, and thus preferable. Express consent does offer support, but it is not unassailable as a legal justification for U.S. cargo security programs with extraterritorial and potentially sovereignty-infringing effects. As the next section shows, perhaps the best legal justification for the extraterritorial reach of these U.S. cargo security programs is based on the notion of implicit consent to these programs by U.S. trading partners and private actors involved in the U.S. inbound supply chain.

203. See *supra* notes 154–56 and accompanying text.

204. See Jau, *supra* note 1 (raising concerns that the CSI program is a unilateral encroachment of sovereignty).

205. U.S. DEPT OF COMMERCE, CENSUS BUREAU, BUREAU OF ECONOMIC ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES: ANNUAL REVISION FOR 2004 1 (2005) [hereinafter ANNUAL REVISION FOR 2004], available at <http://www.bea.gov/bea/newsrelarchive/2005/trad1305.pdf> (reporting trade deficits in fiscal years 2002 through 2004 exceeding US \$420 billion per year in the areas of goods and services).

2. *Implicit Consent.* Implicit consent has been discussed as a possible basis of validity under international law for extraterritorial U.S. export control laws, but, as explained below, it suffers from significant shortcomings in the export context. These same shortcomings are not present, however, in the inbound trade context. In addition, implicit consent has the added advantage in the cargo security environment of not relying for its validity on notions of multilateral consensus or parity of the parties. Rather, it is best thought of as unilateral in nature.

As noted above, the United States has long claimed broad extraterritorial jurisdiction through its export control laws over foreign reexports of U.S. origin goods, software, and technology.²⁰⁶ One justification advanced for such expansive jurisdictional claims is that foreign parties dealing in items of U.S. origin or content have implicitly, as opposed to explicitly, agreed to U.S. extraterritorial jurisdiction over these items.²⁰⁷ Stated differently,

206. See *supra* Part V.B.1.

207. See Abbott, *supra* note 200, at 129–31 (noting that the United States takes the position that foreign purchasers can implicitly consent to U.S. extraterritorial export controls); Stanley J. Marcuss & Eric L. Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 478–81 (1981) (discussing the possibility of implicit consent to U.S. export control law as a justification for extraterritorial jurisdiction); Janet Lunine, Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663, 667–68 (1986) (describing extraterritorial jurisdiction premised on consent by virtue of contracting with U.S. suppliers); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1317–18 & n.42 (1985) (characterizing the implicit claim that jurisdiction follows the good as “preposterous”); see also ROSENTHAL & KNIGHTON, *supra* note 197, at 54–55 (summarizing the United States’ claim of extraterritorial jurisdiction as “seem[ing] to be that because the goods or technology are of US origin, US law can continue to govern their disposal to others, even after they have left the United States, or passed through the hands of more than one buyer: i.e., that US law runs with the goods”).

It is interesting to note that at least one commentator discussed “implicit” consent of foreign parties in the guise of explicit consent. See Comment, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 375–76 (1984) (“Reexport controls and technology controls both rely upon less controversial justifications for the exercise of jurisdiction [because] the parties consent in their licensing agreement to certain conditions on their future use.”). Given the date of that article, however, this characterization made some sense. Prior to 1995, the U.S. Export Administration Regulations, promulgated pursuant to the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401–2420 (2000)), were structured as a general *ban* on exports unless an express U.S. government license was granted for the export. In 1996, this structure was turned on its head: the regulations were changed to generally *permit* exports without a license, except for specifically controlled items and particular circumstances. See Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. 12,714, 12,714 (Mar. 25, 1996) (interim rule) (“No license or other authorization would be required for any transaction under BXA [Bureau of Export Administration] jurisdiction unless the regulations affirmatively state the requirement. (Existing regulations state that all exports are prohibited unless an applicable general license has been established

extraterritorial U.S. jurisdiction might be seen as having been implicitly consented to perhaps even *after the fact*, due to the U.S. origin of the items or a percentage of the items' content, on the basis that the foreign party knew or should have known of the items' U.S. origin or content. This argument is certainly creative, but it is fundamentally flawed in the export context, as some observers have noted.²⁰⁸ Specifically, implicit *ex post facto* acceptance seems directly contrary to the notion of consent, because "consent" in the form of dealing with U.S. origin or U.S. content items might be assumed prior to any actual knowledge or real reason to know of U.S. jurisdiction. Moreover, U.S. jurisdiction over a transaction that is already completed cannot (by definition) be avoided by declining to participate in the completed transaction, which again is contrary to the notion of voluntary consent. Thus, a foreign actor would be deemed to have consented implicitly to U.S. jurisdiction even if that party fully (but erroneously) was convinced that the item involved was not of U.S. origin or content.²⁰⁹ Such a justification seems forced at best and disingenuous at worst.

or a validated license or other authorization has been granted by BXA.)"). Thus, at least as a matter of form, one might say that, prior to 1995, foreign parties obtaining U.S.-origin or U.S.-content items would have been more likely to know these items were controlled by the United States for reexport purposes. That would have meant the parties could be considered to have consented to such control upon dealing with these items. *See* Marcuss & Richard, *supra*, at 477–78 (noting that foreign exporters were notified of the U.S. jurisdictional element prior to completing the transaction and therefore voluntarily subjected themselves to U.S. jurisdiction).

This distinction is an illusory one, however. Even prior to the 1995 regulatory change, the U.S. government regularly granted general or blanket export licenses for certain items of lesser concern, without the need for exporters (or reexporters) to apply to the U.S. government for a specific license. *See* Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. at 12,714. Thus, absent such specific license requirements, foreign parties might not discover, until after the fact, that they had been dealing in items over which the United States claimed jurisdictional control—which in effect would make the consent implicit, not explicit.

The point to take away from this sidebar discussion is that for decades now U.S. export control laws have been based on the notion of implicit consent, regardless of how justifications for these laws may have been cast.

208. *See, e.g.*, ROSENTHAL & KNIGHTON, *supra* note 197, at 54 (discussing how the United States attempts to control reexports simply because the good originated in the United States); Marcuss & Richard, *supra* note 207, at 478–79 (discussing how not every export control is justified because not every export has an effect on national security); Note, *supra* note 207, at 1317–18 (asserting that the United States' attempts to establish jurisdiction through "written assurances" do not validate retroactive imposition of restrictions); Abbott, *supra* note 200, at 130–31 (noting that "the validity of consent, express or implied, turns on adequate notice," which is not provided when the United States retroactively imposes reexport restrictions on items *after* they have been exported from the United States).

209. *See* ROSENTHAL & KNIGHTON, *supra* note 197, at 54–55 (discussing the U.S. position that its law "runs with the goods" produced within the United States).

Such problems do not arise, however, in the converse situation presented by U.S. inbound cargo security programs. The U.S. influence exerted by these programs is not *after departure* of goods from the United States under some national security or foreign policy justification, but rather is *prior to arrival* of the goods at the U.S. border. For example, parties wishing to import into the United States (or to be involved in the U.S.-bound supply chain) necessarily will know that C-TPAT participation, while not strictly mandatory, is strongly preferred and in fact all but necessary in order to avoid being placed at a competitive disadvantage vis-à-vis other participants in the import supply chain.²¹⁰ In other words, these parties will have the opportunity to agree, through their actions, to be bound by the rules of this and other U.S. cargo security programs, or to decline to be bound and experience import delays or loss of business. This choice may not present equally attractive options, but it is, strictly speaking, a choice. Provided that participation rules are applied objectively and nondiscriminatorily, these programs should be able to withstand any claims that they are restrictive trade barriers in violation of WTO rules.²¹¹

Similarly, the justification of implicit consent nicely sidesteps the question of whether a lack of reciprocity, or bilateral (or multilateral) support for CSI and related programs, undermines the validity of these programs. From an implicit consent point of view, these U.S. cargo security programs can be seen to impose *ex ante* conditions on importation into the United States. Under this view, whether these conditions are applied reciprocally or not is largely immaterial. Either the conditions are acceptable, in which case they are complied with by foreign states and parties, or they are not, and importation into the United States is declined or subjected to more restrictive clearance standards.

210. See Glick, *supra* note 1, at 634 (discussing the “carrot-and-stick approach” used to encourage companies to participate in C-TPAT).

211. See BHALA, *supra* note 13, at 537–38 (“[A] trade measure that violates GATT [General Agreement on Tariffs and Trade] is permissible if that measure is needed to ensure [that an acceptable domestic] rule is obeyed.”); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1208–09 (1987) (recognizing the “broad exceptions that can be invoked to justify the use of import controls for foreign policy purposes” under the GATT).

For an argument that CSI violates the United States’ obligations under the GATT, see Florestal, *supra* note 2, at 432, which argues that CSI violates Article I of GATT and does not fall under Article XXI’s national security exception due to CSI’s lack of a “development dimension.” See also Mellor, *supra* note 1, at 394–95 (suggesting that maritime security regimes like CSI might violate GATT Article V’s freedom of transit provisions).

Thus, foreign parties and countries doing business with the United States or with a supply chain that supplies the United States have an opportunity, at least in principle, to agree—explicitly or by acquiescence—to abide by U.S. cargo security programs prior to completing the importation transaction in question. Parties are not forced to participate in U.S.-bound supply chains, and so in that sense a consensual choice remains—although in practice, participation may be compelled to an extent, given the economic clout and purchasing power of the United States.

One perhaps could object to the implicit consent justification by noting that a particular supply chain may supply multiple customers in various countries, and that some of these countries do not require supply chain security measures similar to those required by the United States.²¹² A supplier therefore might be forced to adopt additional and possibly costly security measures for all shipments to all destinations, in order to satisfy U.S. requirements for the portion of the shipments bound for the United States.²¹³ Yet the fact remains that a participant in a supply chain serving the United States knows this fact *ex ante* and has the ability to decide whether to consent to U.S. jurisdiction or control in advance of participation. The United States is setting the conditions for entry, and parties can choose to accept or reject these unilateral terms. The opportunity cost of not participating may be greater as a result of additional lost business in other locations, but the decision remains *ex ante* in nature. On the other hand, one might ask whether, given the United States' significant economic dependence on imports,²¹⁴ a refusal by significant suppliers to ship goods to the United States due to excessive supply chain security requirements might lead to U.S. modification of these restrictions.

212. See Romero, *supra* note 1, at 603–04.

213. For further discussion of the cost implications of U.S. post-September 11, 2001, cargo security measures, see Jennifer M. Ferrara, Comment, *Regulation Consolidation: How Recent United States Customs and Securities and Exchange Commission Pronouncements Will Cause a Sea of Change*, 30 TUL. MAR. L.J. 335, 350–51 (2006) (observing that “[l]arge public companies are arguably better equipped to employ the requirements and are better able to manage the implementation costs resulting from C-TPAT [while] [s]maller companies may not be in the position financially to accomplish such lofty goals in their security programs,” and noting that “[i]n order to remain competitive in the United States . . . smaller companies may be forced to comply with C-TPAT-recommended practices” (citing UNCTAD SECRETARIAT, U.N. CONF. ON TRADE & DEV., CONTAINER SECURITY: MAJOR INITIATIVES AND RELATED INTERNATIONAL DEVELOPMENTS 20–21 (2004), available at http://www.unctad.org/en/docs/sdtetlb20041_en.pdf)).

214. See ANNUAL REVISION FOR 2004, *supra* note 205, at 1 (reporting that the U.S. trade deficit was over \$600 billion in 2004).

Implicit acceptance of the U.S. cargo security programs discussed in this Article thus appears to be a viable legal justification for these programs and their forward deployment of U.S. jurisdiction and potential interference with the domestic sovereignty of U.S. foreign trading partners. Regardless of whether these cargo security agreements truly enjoy multilateral support or whether any agreements under these programs are bilateral in form or in substance, the fact remains that states and parties wishing to import into the United States do have an *ex ante* choice between either complying with the requirements of these U.S. cargo security programs or forgoing importation into the United States. Again, this assumes that these programs are not intended to act as trade barriers. The continuation of imports into the United States by these parties and states, despite the existence of this choice, can be viewed as implicit, prior consent to be bound by the requirements of these U.S. cargo security programs.

VI. SHORT- AND LONG-TERM EFFECTS OF “PUSHING THE BORDER OUTWARD”

So far, this Article has described U.S. cargo security programs framed as efforts to “push the border outward,” used twentieth century political geography writings as a conceptual framework for these programs, and discussed possible legal justifications for these U.S. cargo security initiatives. In addition, it is important to consider how these current (and possible future) cargo security programs are likely to alter the international trade landscape. Although such an exercise is by definition speculative, the implications of these cargo security programs are enormous and far-reaching, and the changes at which they hint suggest the possible direction of future U.S. and global cargo security and trade policy.

A. *Short-Term Effects*

A significant short-term effect of current U.S. efforts to “push the border outward” for cargo security purposes is the extension of U.S. influence and jurisdiction over certain foreign port operations and overseas supply chain activities. In the near future this extension likely will remain largely unilateral, regardless of whether the programs involved are styled as multilateral, bilateral, or unilateral. Specifically, through CSI—which was originally structured as a bilateral program and has

taken on multilateral characteristics since its inception²¹⁵—the United States has placed customs personnel abroad, but to date few nations have reciprocally stationed their customs personnel in the United States.²¹⁶ Similarly, C-TPAT has extended U.S. influence over foreign supply chains inbound to the United States, but to date it seems that there has been little overt foreign influence over U.S. outbound supply chain security. In like fashion, U.S. programs such as FAST, the 24-Hour Rule, and the other advance notification programs discussed above unilaterally mandate changes to foreign supply chain activities, with no corresponding changes to U.S. outbound security measures.²¹⁷

Thus, as discussed previously, the United States' current effort to forward deploy inbound cargo security border functions is, in effect, an atavistic disaggregation of U.S. border functions. In terms of cargo security functions, U.S. borders have reverted from being “sharply defined lines, fixed by nations like fences between their respective properties” to being more akin to frontiers.²¹⁸ This approach is entirely consistent with the defensive rhetoric of these programs and their focus on U.S. national security.²¹⁹

It is also important to bear in mind that the U.S. cargo security programs discussed in this Article represent U.S. efforts to exert increased influence or control over activities previously not heavily regulated by the United States. These cargo security programs have resulted in both forward deployment of U.S. border functions and the assertion of additional U.S. jurisdiction over inbound cargo activities. This observation is consistent with the view of governments as entities that expand their power and control into new areas over which they previously had little or no influence.²²⁰ Such new spheres can include new physical domains (such as colonies or new territories), new industries, new spheres of commerce or communication (such as the Internet), or new areas of social concern (such as the rise of federal environmental

215. See *supra* Part III.A.

216. See *supra* notes 54–56 and accompanying text (commenting on the lack of reciprocity under the CSI program).

217. See *supra* Part III.B, C, E.

218. See BOGGS, *supra* note 117, at 6.

219. See *supra* notes 3–12 and accompanying text.

220. See generally ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 6–19 (1987) (discussing several theories that purport to explain the expansion of government power and concluding that, although none of the theories offers a comprehensive explanation of government growth, each may provide at least some insight into the complex process of government enlargement).

protection efforts in the 1960s and 1970s).²²¹ As new spheres of economic activity or concern emerge over time, governments may seek to extend their influence over those spheres when such control is deemed in the national interest.²²² In the case of cargo security, little advantage was seen in an expansion of U.S. governmental control over these activities until after the September 11, 2001, attacks; after that date, the U.S. government energetically sought to exert greater control in this area.²²³

As a result, at least in the short term the United States has rectified what might be perceived as a jurisdictional imbalance between inbound and outbound commercial activity. The U.S. assertion of greater control over inbound cargo security matters now more closely matches its longstanding extraterritorial claims of control and jurisdiction over outbound cargo.²²⁴

B. Long-Term Effects

The short-term effects of current U.S. efforts to “push the border outward” are certainly interesting. Even more striking, however, are the potential long-term effects of these programs on the pattern and conduct of international trade in goods. If multilateral support for these programs falters, then the long-term prognosis may well look like an extension of the short term, largely unilateral nature of these programs. If multilateral support for and participation in CSI, C-TPAT, and related cargo security programs continue, however, the long-term effects promise to be quite different.

1. *Increased Harmonization of Global Cargo Security Measures and Reduced Cargo Security Transaction Costs.* First, if multilateral support and participation continue, this trend could be seen as the first surge in a new wave of international harmonization in cargo security. Similar to commercial efforts beginning in the 1950s to physically harmonize international cargo shipments through containerization,²²⁵ the adoption of common standards for cargo security would increase interjurisdictional transparency for cargo security requirements

221. Cf., e.g., JERRY EVERARD, VIRTUAL STATES: THE INTERNET AND THE BOUNDARIES OF THE NATION-STATE 5–8 (2000) (discussing various spheres of state activity and influence).

222. *Id.*

223. See *supra* Part II.B–C.

224. See *supra* text accompanying notes 197–98.

225. See Mellor, *supra* note 1, at 347–48.

and reduce transaction costs pertaining to cargo security. This transparency would arise because participating countries would adopt consistent (and possibly identical) cargo security requirements for shipments. The set of applicable cargo security standards among participating countries thus would be reduced from multiple sets of nonharmonized rules to a single, generally harmonized set of rules. This harmonization would reduce both the cost of gathering information regarding transactions (the information concerning applicable cargo security measures) as well as the cost of complying with these measures (through a single set of cargo security procedures for multiple countries).

In other words, the cost of complying with national cargo security rules can be seen as both a barrier to entry and a fixed cost. A country's inbound cargo security rules act as barriers to entry if they prevent parties from engaging in cargo trade with that country. To the extent a party does engage in cargo trade with that country, however, the cost of compliance is largely a fixed cost because the same level of knowledge and compliance is required regardless of the number of shipments undertaken. Harmonizing various countries' cargo security rules would not reduce the *initial* informational cost of complying with a single country's cargo security rules, but it would reduce (or even largely eliminate) the *cumulative* cost of complying with the harmonized cargo security rules of additional countries employing similar rules. In that manner, harmonized cargo security rules would be less of a barrier to entry. By the same token, a party that seeks to expand its cargo trading activities from one participating country to another would experience little in the way of additional fixed costs related to cargo security compliance.²²⁶ The benefits of such transparency and reduced costs in fact are quite similar to the benefits of harmonization and increased transparency in U.S. state commercial laws brought about through the incorporation of the Uniform Commercial Code into U.S. state legal codes, which has helped facilitate the growth in U.S. interstate commerce in recent decades.²²⁷

Such multilateralization of cargo security measures also would follow in the footsteps of previous efforts to harmonize

226. There of course would be additional variable costs, such as documentation costs per transaction, cargo handling fees per transaction, or the cost of additional personnel to handle higher shipment volumes, but that is a separate matter.

227. See Dom Calabrese et al., *Karl Llewellyn's Letters to Emma Cortsvet Llewellyn from the Fall 1941 Meeting of the National Conference of Commissioners on Uniform State Laws*, 27 CONN. L. REV. 523, 526-27 (1995) (recalling the uncertainty caused by inconsistent state commercial laws before states adopted the UCC).

U.S. international trade laws with those of its major trading partners. For example, the 1979 Tokyo Round of the General Agreement on Tariffs and Trade produced the Customs Valuation Code, which took a substantially different approach to the valuation of imported merchandise than the traditional U.S. method of customs valuation.²²⁸ The United States and its WTO trading partners have implemented the Customs Valuation Code into their national laws, so that while interpretation and application of its provisions certainly can vary from country to country, there is at least a common textual basis for customs valuation among these trading partners.²²⁹ Similarly, in 1988 the United States abandoned its traditional customs classification scheme, the Tariff Schedule of the United States (TSUS), in favor of the Harmonized Commodity, Description and Coding System, which was developed by the Brussels-based Customs Cooperation Council and was already in use by most U.S. trading partners.²³⁰ Similar harmonization has occurred with respect to the U.S. export classification scheme (the United States adopted the internationally harmonized scheme in 1995),²³¹ as well as antidumping and countervailing duty laws (which are internationally harmonized to an extent through WTO auspices).²³² In addition, the United States and many of its trading partners have reached agreements on a consensual basis on related matters, such as nonproliferation export control measures to be implemented voluntarily into participating nations' domestic laws.²³³ Such voluntary harmonization can be expected to reduce some of the transaction costs of complying with international trade laws, as companies engaged in transborder transactions will be more able to adopt regional or even global procedures for cargo trade instead of crafting unique procedures or policies for separate countries.

2. *Multilateral Disaggregation of Border Functionality for Cargo Security Purposes.* If multilateralization of cargo security proves to be meaningful, and not in terms of form only, the long-term effect of programs such as CSI and C-TPAT could be to establish an overlapping network of thematically similar and generally harmonized cargo security controls and standards

228. FOLSOM ET AL., *supra* note 14, § 11.3.

229. *Id.*

230. *Id.*

231. See Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. 12,714, 12,714–16 (Mar. 25, 1996) (interim rule).

232. FOLSOM ET AL., *supra* note 14, §§ 6.3–4, 7.2–3.

233. See Bowman, *supra* note 16, at 345–47.

among the world's most significant trading partners. The resulting multilateral disaggregation of cargo security border functions could be nothing short of revolutionary for the conduct of international trade. Actual physical or legal borders would not change as a result of such multilateralization (and indeed they have not in the current unilateral disaggregation of border functions by the United States), but multilateral disaggregation could permanently alter the functionality of national borders from a cargo security perspective. That is, the locations where a country's cargo security functions would be performed for inbound and outbound cargo traffic would become far less precisely mirrored by the location of the country's actual borders. A number of each country's inbound cargo security functions could be carried out abroad by its officials located in foreign countries. Similarly, a country's outbound cargo functions could be performed prior to export by foreign government personnel located within the country, and possibly in conjunction with local country personnel, as under CSI's current structure.

In other words, cargo security measures traditionally associated with the border would be spread across a spectrum spanning the country of export and the country of import. As state functions become less tied to state borders—with U.S. customs agents stationed abroad and with a "global" U.S. tax base—one could question whether actual, physical borders would become less important in certain respects, at least regarding the functioning of international business and trade in goods. This conclusion would be fully consistent with the debate over "virtual states" versus the traditional structure and roles of the nation-state.²³⁴

3. *Fewer Distinctions Between Domestic and International Transactions in Goods.* Such a blurring or graying of the border—making borders function for cargo security purposes as overlapping frontiers or buffer zones—would erase many current distinctions between international and domestic transactions in goods. In a truly multilateral cargo security environment, a program such as CSI would affect not just shipments to the United States, but also shipments from the United States to elsewhere—and in fact would have significant potential to affect

234. See, e.g., EVERARD, *supra* note 221, at 3 (asking whether the prominence of international markets is "wither[ing] away" the traditional nation-state or whether the nation-state is merely morphing into something "a little different"); Richard Rosecrance, *The Rise of the Virtual State*, FOREIGN AFF., July–Aug. 1996, at 45, 48–54 (tracing the developing international nature of corporations that "has led to the emerging phenomenon of the virtual state").

foreign port operations generally. In addition, programs such as C-TPAT would have an effect not just on internationally bound shipments, but also on in-country transactions, as procedures and standards become adopted consistently across supply chain operations. In other words, international transactions would become less distinguishable from domestic ones, at least in terms of legal obligations and cargo security procedures.

Thus, as harmonization of international cargo security measures would work to lower transaction costs for international cargo shipments, the new application of these same cargo security requirements to domestic transactions could make domestic cargo shipments more complex, and thus potentially more costly. That is, it can be posited that in many countries, domestic cargo shipments from one internal point to another are currently subjected to fewer cargo security requirements than international cargo, simply because these internal shipments are considered safer. This difference exists in the United States: CSI, C-TPAT, and the other programs discussed in this Article are aimed not at domestic shipments, but rather at inbound shipments from abroad.²³⁵

If international cargo security measures were to influence or apply to wholly domestic shipments, however, this procedure would change. In short, it would raise the transaction-costs bar in domestic transactions. The overall impact, then, would be a simultaneous lowering of transaction costs in international cargo shipments (due to harmonization) and a raising of transaction costs in domestic shipments (due to new requirements).²³⁶ In the short term this change could have negative domestic impact, but in the longer term it could well mean that domestic and international transactions in goods would converge more than ever in terms of their requirements and procedures. Moreover, as more and more “domestic” companies have to (or choose to) comply with these international cargo security programs in order to remain competitive in their domestic markets, they might be more prepared for the entry into international trade, if they so choose.²³⁷ International trade transactions generally are seen as more expensive and complicated than domestic business transactions, with the differences being both in degree and in kind. Yet if domestic companies engaged in cargo transport were

235. See *supra* Part III.

236. See Ferrara, *supra* note 213, at 345 (predicting that, due to industry consolidation, “major industry players” will begin to require business partners to implement similar standards as those subjected to Sarbanes–Oxley and C-TPAT).

237. *Id.* at 349.

already versed in and compliant with many of the requirements for international shipments, the differences in degree and in kind pertaining to cargo security largely would disappear.

In this fashion, a traditional barrier to international trade might be eliminated, or at least significantly reduced. Its reduction or elimination, however, would not come about by lessening its prevalence, but rather by having it *added* to the domestic commercial landscape of the United States and other countries. Companies that wish to continue doing business in goods would adopt and adapt to these cargo security requirements. This choice likely would entail some additional cost, as already noted, but those domestic concerns that did adjust to and use these new cargo security measures would be rendered more ready to engage in international commerce in goods.

To draw an analogy, one might view borders as walls that act to hinder international transactions. Inside the walls the terrain is lower, so that only those companies or individuals with enough experience, resources, or sophistication can climb the wall and engage in international trade. If the ground inside the wall is filled in, however, the formerly high wall becomes more akin to a knee wall. At the risk of turning analogy into pun, those inside the wall who do not adjust to the new terrain get buried, while those who do adjust can step across the wall with far less effort. This perhaps is the larger view of modern international trade in goods, with smaller entities and even individuals increasingly able to compete in the global marketplace with large multinational enterprises.

Typically, the story is one of improvements in technology or simplifications to governmental regulations flattening the competitive field or reducing transaction cost barriers to entry.²³⁸

238. See *supra* Part V.B.1 (discussing the harmonization of customs laws); see also ASIA-PACIFIC ECONOMIC COOPERATION FORUM, BLUEPRINT: APEC SUB-COMMITTEE ON CUSTOMS PROCEDURES 5 (2005), available at http://www.apec.org/apec/apec_groups/committees/committee_on_trade/sub-committee_on_customs.html (follow “2005 SCCP Blueprint - Towards One Community: Meet the Challenge, Make the Change” hyperlink) (discussing the committee’s primary goal of simplifying and harmonizing APEC member customs procedures); Anne Hubbard, *Initiative Promotes Paperless Environment*, U.S. CUSTOMS TODAY, Jan. 2002, http://www.cbp.gov/xp/CustomsToday/2002/January/custoday_ia.xml (describing how the standardization of data required by G7 customs and the common names and definitions for products will facilitate communication); Asian Dev. Bank, Governance, Fin. and Trade Div., *Harmonization and Simplification of Customs Documentation and Procedures 1* (Working Paper No. 1, 2003), available at http://www.adb.org/Documents/Events/2003/CCC/Second_Mtg/wp_01.pdf (noting already-existent harmonization of customs procedures and documentation among Asian nations and EU member states). In addition, see THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 345–50 (2005), which discusses

In the case of cargo security, however, domestic actors could be faced with additional regulatory requirements for cargo security—yet paradoxically, the long-term effect of multilateralization of cargo security measures might be to promote international trade, irrespective of the additional transaction costs that these measures entail.

VII. CONCLUSION

This Article has addressed questions about the scope and nature of U.S. inbound cargo security measures following September 11, 2001. The events underlying these cargo security measures read like a series of unanticipated consequences. First, the advent of containerized shipping and GATT-induced trade liberalization helped fuel exponential growth in international trade following World War II. Then, combined with the rise of just-in-time inventory systems, these developments led to an unambiguous (although tacit) U.S. preference for trade efficiency over trade security, as global economic interdependence increased. The United States was, in a sense, a victim of its own success.

The weaknesses of this system became a matter of significant concern and debate following the attacks of September 11, 2001, and the United States established programs to “push the border outward” as a means to simultaneously maintain trade flows and improve cargo security.²³⁹ These forward deployment measures have effectively led to expanded U.S. regulation of inbound cargo activities, an area over which the United States previously had exercised little extraterritorial control or jurisdiction.²⁴⁰ These forward deployment measures, however, have raised concerns over infringement on the sovereignty and jurisdiction of U.S. trading partners.²⁴¹ The United States thus has found itself at something of an odd impasse—namely, facing a jurisdictional issue caused by the very internationalization the United States had sought to create.

Fortunately, the United States thus far has been able to obtain substantial official multilateral support for its inbound cargo security programs, and this support has added to the programs’ legitimacy.²⁴² However, it is possible that multilateral

technological advances allowing smaller entities to participate in international business activities.

239. See *supra* notes 3–12 and accompanying text.

240. See *supra* text accompanying note 145.

241. See *supra* notes 215–17 and accompanying text.

242. See *supra* Part V.A.

support for these programs could falter, at least to an extent. In the absence of full multilateral support, the strongest justification for these programs is that of implied consent to these programs by U.S. trading partners—a justification that works even on a unilateral basis. Given the modern American penchant for unilateralism, it is worth having such a unilateral legal justification for these programs in hand.

In contrast, if these U.S. cargo security programs retain their current multilateral support, they could lead to the establishment of an overlapping network of harmonized national cargo security programs that disaggregate border functions relating to cargo and effectively apply to both international and domestic cargo shipments. The result in that case could be a convergence of domestic and international cargo security practices and requirements, which would help further reduce the domestic-versus-foreign distinction in an already increasingly interdependent and international trade-driven world. If that occurs, it would be one more step toward increasing the *de facto* economic integration and interdependency of the world's major trading partners, at a time when their will to cooperatively address joint political problems sometimes seems less than clear. Perhaps, then, the best approach would be to maintain some semblance of multilateral support for these cargo security programs and to let the resulting integration and harmonization make its positive mark on the patterns of global trade.