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# Prevention of Maritime Terrorism: The Container Security Initiative

Jessica Romero \*

The United States has shifted away from reactive counterterrorism law enforcement methods towards more proactive techniques to fight international terrorism. This shift is a result of the changing nature of the terrorist threat overseas, against which the US has now employed preventative diplomatic, economic, military, and legal strategies. The Container Security Initiative (“CSI”) is a Bureau of Customs and Border Protection (“US Customs”)<sup>1</sup> program designed to prevent containerized shipping—the primary means of transporting goods in global trade—from being exploited by terrorists.<sup>2</sup> CSI is an excellent illustration of contemporary evolving preventative legal strategies in the international arena. Under CSI, US Customs has entered into bilateral agreements with foreign governments to identify high-risk cargo containers and prescreen those containers for terrorist weapons at the port of departure instead of at the port of arrival.<sup>3</sup> This Development addresses the changing nature of international terrorism, specifically in the context of maritime activity, and its impact on law enforcement agencies and other nontraditional antiterrorism actors such as the maritime shipping industry. The focus of this Development is on the rationales underlying the formation of CSI, its evolving status in international law, and the criticisms leveled against it. More specifically, Part III

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<sup>1</sup> The Department of Homeland Security’s Bureau of Customs and Border Protection is the federal agency with the principal responsibility for inspecting cargo that commercial ships bring into US ports. See Customs and Border Protection website, available online at <<http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml>> (visited Oct 5, 2003). Prior to the establishment of Customs and Border Protection, customs and immigration functions at US borders were conducted separately by the Department of Treasury’s US Customs Service and the Department of Justice’s Immigration and Naturalization Service.

<sup>2</sup> *Foreign Press Center Briefing with Robert Bonner, Commissioner, U.S. Customs Service: U.S. Customs Service and Counterterrorism Effort at Home and Abroad*, Fed News Serv State Dept Briefing (Jan 14, 2003).

<sup>3</sup> Id.

examines CSI's potential infringement upon traditional notions of sovereignty and implications for global trade.

## I. MARITIME TERRORISM AND SECURITY

Historically, international law on piracy and maritime terrorism was reactive, as opposed to preventative, in nature. In the past, the focus in the international community in this area was limited to the exertion of jurisdiction once a terrorist attack had occurred. The 1985 hijacking of the *Achille Lauro*, for example, drew worldwide attention to the issue and prompted the International Maritime Organization ("IMO") to respond with the *Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* ("SUA Convention").<sup>4</sup> The Convention defines seven different types of offenses and seeks to ensure that states will either prosecute or extradite those responsible for terrorist acts at sea.<sup>5</sup>

In defining maritime terrorism for prevention purposes, one activity of great concern is another suicide bombing carried out via vessels filled with explosives, such as the attack on the *USS Cole*. That particular maritime attack killed seventeen and wounded thirty-nine American sailors during a prearranged fuel stop in the Yemenese port of Aden on October 12, 2000.<sup>6</sup> Similarly, in October 2002, a small fishing craft packed with explosives rammed into the French supertanker *Limburg* twelve miles off the coast of Yemen. That blast ripped a hole in the supertanker, crippling the ship, and causing a fire and the release of 50,000 barrels of crude oil into the sea, as well as the death of a crew member and the injury of twelve others.<sup>7</sup> The impact and costs of these types of attacks must be considered not only in terms of human lives and injuries, but also in terms of the dire political, economic, and strategic consequences for American vessels in international waters, particularly the Persian Gulf and the Red Sea, which carry approximately one-third of all global trade in oil.

The sophisticated structure of international terrorist organizations such as al Qaeda compound the challenges faced by states in identifying and classifying different forms of maritime terrorism. For example, there are growing concerns over reports of al Qaeda's involvement in piracy against ships carrying radioactive materials in the Malacca Straits.<sup>8</sup> What distinguishes this form of

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<sup>4</sup> IMO Doc No SUA/CON/15 (1988), reprinted in 27 ILM 668 (1988).

<sup>5</sup> See id arts 3(1), 10(1).

<sup>6</sup> Yonah Alexander and Tyler Richardson, *Maritime Terrorism Phase Next?*, Wash Times B3 (Oct 20, 2002).

<sup>7</sup> Id.

<sup>8</sup> *Al-Qaeda Pirates Radioactive Cargo in Malacca: Report*, Xinhua Gen News Serv (July 22, 2002); K.C. Vijayan, *Shipping Firms Urged to Shore up Security; Expert Calls for Compliance with New Maritime Rules to Fight Growing Piracy and Terror Threat in Malacca Straits*, Straits Times (Singapore) (Jan 24, 2003).

piracy as a terrorist act is the presence of hazardous materials, which can be used to build weapons of mass destruction. The current international conventions on piracy, addressing only jurisdiction and prosecution, fail to address prevention and concerns over the possible uses and conveyance of the hijacked cargo.<sup>9</sup>

The focus of this Development is on the threat posed by the traditionally self-regulated transportation system of cargo containers.<sup>10</sup> As the United States assessed its vulnerability in the wake of the September 11, 2001, attacks, a recognition of the systemic challenges inherent in the global movement of shipping containers followed. The US has 88,633 miles of coastline<sup>11</sup> and about 361 ports through which an estimated 75 percent of all US international trade, by tonnage, flows.<sup>12</sup> From the US perspective, the inspection of shipping containers after they have arrived at the port of entry is of little value in preventing the smuggling of weapons of mass destruction.<sup>13</sup> Any effort to improve the secure movement of shipping containers from one nation to another requires more accurate information regarding where and how the container was loaded and secured at the port of origin, as well as its status while in transit. In light of the transnational character of the challenge presented, any nation's effort to reach that level of transparency necessarily requires multilateral engagement.

## II. CONTAINER SECURITY INITIATIVE

In an attempt to strengthen national security, the United States has been pushing out its borders through CSI.<sup>14</sup> The CSI concept was pioneered between Canada and the United States with regard to cargo containers arriving by sea to Canada and in transshipment to the US through Canadian ports and vice versa.

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<sup>9</sup> See Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 Am U Intl L Rev 341, 376–87 (2002).

<sup>10</sup> These are forty or twenty-foot-long steel boxes used to ship cargo. They are designed for intermodal use and can be transferred from ship to train or truck and vice versa. The movement of containers in and out of ports of entry is measured in TEUs or “twenty-foot equivalent units.” Most containers being shipped internationally are forty feet long, or two TEUs. See *id* at 343 n 3, 345 n 14.

<sup>11</sup> See Michael J. Merriam, *United States Maritime Drug Trafficking Search and Seizure Policy: An Erosion of United States Constitutional and International Law Principles*, 19 Suffolk Transnatl L Rev 441 (1996).

<sup>12</sup> Alexander and Richardson, *Maritime Terrorism Phase Next?*, Wash Times at B3 (cited in note 6). See also US Department of Transportation website, available online at <<http://www.dot.gov/affairs/bts0403.htm>> (visited Oct 5, 2003).

<sup>13</sup> Gil Klein, *War on Drugs on the Wane? US Redeploying Its Resources to Fend Off Terrorist Attacks*, Richmond Times-Dispatch A1 (June 9, 2002). Until September 11, the Coast Guard devoted about 1 percent of its time to protecting ports, but since then it has jumped to nearly 60 percent.

<sup>14</sup> See *Foreign Press Center Briefing with Robert Bonner, Commissioner, U.S. Customs Service*, Fed News Serv State Dept Briefing (cited in note 2).

So far, it has been hailed as “a critical tool for safeguarding the global economy against the terrorist threat as well as better safeguarding . . . seaports . . . against terrorist exploitation.”<sup>15</sup> CSI allows US Customs officers to be present at foreign ports in order to prescreen container boxes bound for the US. These Customs officers are stationed at foreign ports on a pilot basis for six months and will prescreen, either through X-ray or other inspection technology, high-risk containers at the port of departure rather than arrival.<sup>16</sup> CSI’s initial focus has been on the top twenty foreign ports, which account for 68 percent of all shipments into the US. All of these ports are located in North America, Europe, and Asia.<sup>17</sup> To date, nineteen of the top twenty ports have entered into CSI pacts with US Customs, including a recent agreement with Thailand signed June 11, 2003.<sup>18</sup>

CSI is a reciprocal agreement, allowing signatories to send their Customs staff to major US container ports. Currently, as part of the CSI program, Canada and Japan have stationed Customs personnel in three major US ports.<sup>19</sup> Abroad, the US and other signatory nations will exchange information and work together closely to ensure the identification, screening, and sealing of high-risk containers at the earliest possible opportunity. US Customs officials will not undertake actual physical inspections of containers themselves or control personnel selection or port operations. Leaving those tasks to home nation customs officers, CSI deals strictly with law enforcement activity relating to X-ray or other inspection technology. Customs targets containers for inspection based on factors such as manifest data, port of last call, and shipping line. In order to give inspectors the data and time they need to prescreen containers, Customs recently issued a new rule requiring that information about an ocean shipment be transmitted to Customs twenty-four hours before the cargo is loaded at a foreign port onto a US-bound vessel.<sup>20</sup> Previously, ocean carriers did not submit this information until the shipment arrived at a US port.

CSI provides many advantages over Mutual Legal Assistance Treaties (“MLATs”), which assist in the prosecution of criminal activity through cooperation among the contracting nations. Unlike MLATs, bilateral agreements under CSI seek preventative assistance against the threat of terrorist activity, and its terms are carried out directly by US Customs agents in foreign countries,

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<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Rossella Brevetti, *Customs: CSI to Expand Sea Cargo Prescreening to Middle East Ports, Malaysia, Ridge Says*, BNA, Daily Rep for Execs A16 (June 13, 2003).

<sup>18</sup> Id. Other countries participating in CSI with the United States are the Netherlands, France, Belgium, Germany, Italy, the UK, Singapore, Japan, and China, as well as the Hong Kong Special Administrative Region.

<sup>19</sup> Roger Hailey, *Customs Team from Japan to Set Up in LA*, Lloyd’s List 3 (Apr 14, 2003).

<sup>20</sup> 19 CFR § 4.7(b)(2) (2003).

rather than through designated parties. Trimming the role of foreign agents greatly enhances reliability and accountability of the security process and personnel involved. CSI also provides a more expeditious means for establishing mutual assistance mechanisms, since CSI measures are not subject to Senate ratification.<sup>21</sup> There are no dual criminality requirements under CSI, as opposed to MLATs. Furthermore, CSI agreements are subject-specific, explicitly addressing concerns specific to maritime container transport security. In contrast, MLATs are general agreements applicable in many other contexts, often overbroad and not sufficiently detailed to address the current threats posed by terrorism generally, much less in the maritime context.<sup>22</sup> Finally, given the strong link between maritime security and international trade, foreign governments have substantial economic interests in ensuring the expeditious treatment of their exports by US customs.

So far, CSI has been advanced as a successful example of international cooperation in law enforcement and terrorism prevention. Proponents claim it lowers the dangers of arbitrary antiterrorist measures, while minimizing the amount of inspection and possible delays associated with Customs inspection on entering cargo through close communication between the two countries.<sup>23</sup> The global threat posed by terrorism in this context is very substantial. After the terrorist attacks of September 11, all US airports and several major maritime ports closed their operations for days.<sup>24</sup> As the world's largest trading nation, these closings sent shockwaves throughout the global economy. A terrorist attack on major ports would similarly come at an incredibly high cost, as struggling governments would be forced not only to cope with the immediate and long-term economic, political, and social consequences of the attack but also to implement costly new security systems.<sup>25</sup> Even landlocked countries less dependent on sea containers would suffer from the sagging world economy.

### III. STATUS OF CSI IN INTERNATIONAL LAW

It should come as no surprise that the United States's unilateral approach to maritime cargo security has raised concerns regarding the erosion of state

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<sup>21</sup> Although the domestic implications of CSI are beyond the scope of this Development, it is important to note that while completely reciprocal, agreements under CSI have not been submitted to the Senate for ratification, severely limiting congressional oversight.

<sup>22</sup> For a general discussion of MLATs, see Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 *Houston L Rev* 307 (2002).

<sup>23</sup> See *Foreign Press Center Briefing with Robert Bonner, Commissioner, U.S. Customs Service*, Fed News Serv State Dept Briefing (cited in note 2).

<sup>24</sup> Peter Walkenhorst and Noral Dihel, *Trade Impacts of the Terrorist Attacks of 11 September 2001: A Quantitative Assessment* 2, 3, available online at <[http://www.diw.de/deutsch/service/veranstaltungen/ws\\_consequences/docs/diw\\_ws\\_consequences200206\\_walkenhorst.pdf](http://www.diw.de/deutsch/service/veranstaltungen/ws_consequences/docs/diw_ws_consequences200206_walkenhorst.pdf)> (visited Oct 5, 2003).

<sup>25</sup> *Id.*

sovereignty. Notions that increases in transnational flows have undermined state sovereignty are not novel, as these are the same concerns raised by economic globalization, transportation and communication advances, and the spread of international human rights. In the past, US foreign policy has been criticized for increasingly presenting states with strong incentives to consensually surrender bits of their sovereignty through bilateral agreements and treaties.<sup>26</sup> In the case of CSI, it is the fashioning of bilateral security arrangements, which result in advantageous treatment of exports and cargo by US Customs, that offends the sensitivities of some states and holds out the prospect of infringing on their traditional notions of national sovereignty.<sup>27</sup>

The very concept of sovereignty remains confused and controversial in the international sphere, much beyond the maritime security context. As an institutional structure for organizing political life and an international legal principle, sovereignty can be understood in many ways. Political scientist Stephen Krasner has conceptualized several of these understandings, three of which are central to this discussion. The first is Westphalian sovereignty, which refers to the exclusion of external actors from the domestic authority configurations of a state. The second is interdependence sovereignty, which refers to the ability of public authorities to actually control domestic and transborder movements. The third is domestic sovereignty, which refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity.<sup>28</sup> Underlying these three forms of sovereignty is the fundamental distinction between state authority and control. As defined by Krasner, authority involves a mutually recognized right for an actor to engage in specific kinds of activities, while control can be achieved without the use of mutual recognition of authority at all.<sup>29</sup>

The unique and transnational nature of terrorism precipitated the United States's unilateral approach to addressing maritime security concerns. Unlike the majority of pre-September 11 international agreements relating to terrorism, which call for states to cede Westphalian and interdependence sovereignty to international governmental organizations traditionally accountable (in some degree) to the international community, CSI involves the direct presence and

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<sup>26</sup> See Joseph E. Kramek, Comment, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U Miami Inter-Am L Rev 121, 146 (2000).

<sup>27</sup> See Edward Alden, *US in Efforts to Make Cargo Shipping Safer: Terrorism Fears Have Prompted an Overhaul of International Container Trade Security*, Fin Times 12 (May 22, 2002); Russell Barling, *SAR Must Embrace Security Plan for Right Reasons*, S China Morning Post 5 (Hong Kong) (June 11, 2002); Alan M. Field, *Pushing Out the Borders*, J Comm 8A (Apr 28, 2003).

<sup>28</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 9–25 (Princeton 1999); Stephen D. Krasner, *Globalization and Sovereignty*, in David A. Smith, Dorothy J. Solinger, and Steven C. Topik, eds, *States and Sovereignty in the Global Economy* 35 (Routledge 1999).

<sup>29</sup> Krasner, *Sovereignty: Organized Hypocrisy* at 10 (cited in note 28).

active participation of US law enforcement agents within foreign states' territorial boundaries. While a loss of interdependence sovereignty does not necessarily imply a loss of domestic sovereignty,<sup>30</sup> it may undermine domestic sovereignty both in terms of authority and control. To many, a cession of sovereignty that abrogates fundamentally domestic sovereign functions, such as law enforcement, to agents of a foreign state fundamentally undermines domestic authority and control.<sup>31</sup>

The structure of domestic policy authority and the extent of control over activities within and across territorial boundaries are not necessarily related to the exclusion of external actors. Notions of state sovereignty, however, have historically resulted in heavy reliance on domestic forces and served as a barrier to more integrated international enforcement agencies and law enforcement.<sup>32</sup> Under international law, the government of one country cannot conduct activities in the territory of another country unless acting with its consent.<sup>33</sup> But global interdependence as a result of international trade is a defining characteristic of the modern world and may come at the cost of modifying traditional notions of state-centered sovereignty and consent. In light of the urgency for increased security in the maritime cargo context, as well as the reciprocal nature of these agreements, foreign heads of state are unlikely to refuse entry into security agreements, whether national, regional, or global, that will maintain favorable trade conditions with the US, notwithstanding territory-based notions of sovereignty.

The strong link between maritime security and international trade, specifically concerns over trade diversion and competitive distortions among ports, tests the extent to which the US should pursue a unilateral, as opposed to multilateral, approach to secure maritime trade lanes. Thus far, the US strategy through CSI has been to raise standards by working within the maritime transportation industry and local port authorities, while pressuring major trading partners to consent to the harmonization of international law enforcement strategies, resources, and support systems.<sup>34</sup> CSI's ripple effects have not gone unnoticed by critics in the international trade community. For example, in January 2003, the European Commission ("EC") initiated infringement proceedings against four member countries (Germany, France, the Netherlands, and Belgium) for signing on to CSI, claiming those agreements create a

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<sup>30</sup> Id at 12–13.

<sup>31</sup> See Kang Siew Li, *Worries of Losses from US Screening Initiative*, Bus Times (Malaysia) 1 (Aug 12, 2002).

<sup>32</sup> See generally Patricia A. McKeon, Note, *An International Criminal Court: Balancing the Principle of Sovereignty against the Demands for International Justice*, 12 St John's J Legal Commen 535 (1997).

<sup>33</sup> See id at 543–44.

<sup>34</sup> See Barling, *SAR Must Embrace Security Plan for Right Reasons*, S China Morning Post at 5 (cited in note 27).



competitive disadvantage for those European ports not participating in the initiative.<sup>35</sup> Meanwhile, no Latin American ports are included in the US Customs' list of top megaports for expedited cargo, and some analysts fear that the region may lose its competitive advantage of proximity compared to emerging markets in Asia.<sup>36</sup> In contrast, a multilateral approach may involve working with the IMO or the World Customs Organization ("WCO"), organizations already striving to implement new international regulations for the shipping industry.<sup>37</sup> However, the threat and transnational nature of terrorism present unique challenges to multilateral approaches to securing the maritime shipping industry. Any response to such threats demands swiftness and reliability, which are infrequently associated with many international institutions. Furthermore, the authority of these international institutions is limited, as individual governments must enforce the standards and conventions developed by these institutions in order for them to have any real authority.

#### IV. CONCLUSION

CSI is in the early stages of its development. As such, it is very difficult to fully assess its significance in the internationalization of law enforcement and multinational crime prevention. Meanwhile, the Department of Commerce has initiated "CSI Phase II," under which the US expects to implement the CSI program in many "other foreign ports . . . that ship a significant volume of cargo

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<sup>35</sup> Under its rules, the EC argued, individual members are not allowed to make such deals and the same trade preferences must apply to all fifteen members and not be negotiated individually. The Commission feels that security concerns would be addressed in a more effective manner by a pan-European measure, as it would ensure coherent and convergent actions of EU administrations which are jointly in charge of managing the external trade of the EU through its single customs territory. Gregory Crouch, *Europe Acts against U.S. Effort on Ports*, NY Times W1 (Jan 28, 2003).

<sup>36</sup> Central America and the Caribbean are less than a week away on vessel compared to three weeks for China, but the time advantage could be erased if lax security in these ports means major inspection delays upon entry. Mike Zellner, *Securing a Shipping Sea Change*, Latin Trade (Apr 2003).

<sup>37</sup> At its December 2002 conference, the IMO adopted a new chapter to the Safety of Life at Sea ("SOLAS") Convention, entitled the International Ship and Port Facility Security ("ISPS") Code, available online at <<http://www.imo.org/home.asp>> (visited Oct 5, 2003). The code contains both mandates and voluntary measures to implement the new regulations. Meanwhile, the WCO has been working towards simplifying and harmonizing customs procedures to improve the efficiency of cross-border trade. In June 2002, the WCO created a task force of fifty countries and twenty-five organizations, which drafted a Resolution on Security and Facilitation of the International Supply Chain. In June 2003, the process culminated in the WCO approving a new International Convention on Mutual Administrative Assistance in Customs Matters, a WCO Data Model, and related guidelines. See World Customs Organization, Press Release, *WCO Council Approves Several Initiatives to Improve the Security and Facilitation of the International Trade Supply Chain* (July 4, 2003), available online at <<http://www.wcoomd.org/ie/En/Press/councile2003.html>> (visited Oct 5, 2003) (including links to the relevant documents).

to the U.S. and that have the infrastructure and detection technology to support the CSI program.”<sup>38</sup> This suggests two conclusions: first, these types of bilateral agreements will continue to flourish regardless of whether they compromise traditional concepts of national sovereignty, in light of the strong economic and security interests at stake. Although sovereignty remains a robust international legal principle, exercising a powerful influence on state behavior in many areas, it is frequently violated when nations find it in their achievable interests to do so.<sup>39</sup> Sovereignty cannot be counted on as a check on national behavior when large economic interests are at stake, as is the case for international security agreements with important repercussions on international trade. Second, the prevention of terrorism may increasingly be accomplished by states’ delegation of traditionally sovereign functions—such as export inspections—to foreign states with greater resources and technologies, instead of cooperation through multilateral or international organizations.

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<sup>38</sup> See Robert C. Bonner, *What's Next on Our Agenda*, J Commerce 37 (Apr 14, 2003) (stating that to get a head start on CSI Phase II, the US has already signed CSI agreements with Malaysia and Sweden).

<sup>39</sup> See generally Krasner, *Globalization and Sovereignty* at 49 (cited in note 28).

