

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

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Abstract

Following the September 11, 2001, terrorist attacks, the U.S. government implemented a number of inbound cargo security programs it described as “pushing the border outward” or “expanding [the U.S.] perimeter of security.” Are these statements rhetorical flourish, or do these programs materially affect international cargo trade? This article argues that far from being mundane or rhetorical, these cargo security programs are 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 make U.S. regulation of inbound trade significantly more extraterritorial. These changes affect not only U.S. national security, but also the very patterns and growth of international trade in goods.

In order to fully explore this thesis, this article first summarizes these programs and analyzes them through the lens of early- and mid-twentieth century political geography, which is useful for evaluating the defensive rhetoric and actual structure of these programs. The jurisdictional and sovereignty aspects of these forward deployment efforts are then examined, with particular emphasis on efforts to multilateralize these cargo security programs. This article concludes that the extraterritorial aspects of these programs can be legally justified on a number of grounds. Multilateral support or consensus is the most readily apparent of these rationales, but even absent such multilateral support these programs can be defended on other bases, including that of unilateral, implied consent to these programs by U.S. trading partners and importers.

The article concludes by addressing the impact of these programs on global trade. In particular, these cargo security programs can be seen as permanently transforming U.S. inbound trade regulation from a primarily domestic regime to one for which extraterritoriality is a central feature. In the short term, this shift has led to greater U.S. control or influence over foreign commercial and regulatory activities, which is of course significant. In the long term, however, the effect of these programs will depend upon whether they become truly 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 full multilateralization occurs, however, these programs could reduce or erase many of the current distinctions between domestic cargo shipments and international cargo shipments, as foreign regulatory regimes directly affect both international and U.S. domestic cargo shipments. As discussed in more detail in the article, such multilateral interconnectivity would significantly alter the nature of international trade in cargo.

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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 under-developed in the legal literature. Post-9/11 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, to date there has not been enough broad, thematic discussion of these programs or their important legal and practical implications. It is therefore the aim of this article to think outside the box—or border—to rectify this shortcoming.

¹ Legal scholarship on the subject of U.S. cargo security includes Thomas J. Schoenbaum & Jessica C. Langston, *All Hands Evolution: Port Security in the Wake of September 11th*, 77 TUL. L. REV. 1333 (2003) (discussing establishment of the U.S. government's Container Security Initiative, Customs-Trade Partnership Against Terrorism program, and 24 Hour Rule, discussed *infra* in Part III); Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications*, 77 TUL. L. REV. 1183 (2003) (reviewing post-9/11 security efforts for ocean-going cargo); 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, 376-87 (2002) (noting, in discussing the U.S. Container Security Initiative, 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," and briefly discussing sovereignty concerns raised by the initiative); Matthew T. McGrath & Cortney O'Toole Morgan, *International Legal Developments in Review: 2002, Business Regulation, Customs Law*, 37 INT'L LAW. 245 (2003) (generally summarizing U.S. customs law developments, including efforts to "push the border outward"); Douglas M. Browning, *The Smart Border: Movement of Goods—Transportation and Customs Aspects*, 29 CAN.-U.S. L.J. 151 (2003) (briefly discussing U.S. government "effort[s] to balance trade and security interests and . . . ways to extend the border"); Leslie Alan Glick, *Terrorism: The Legal Implications of the Response to September 11, 2001*, 35 CORNELL INT'L L.J. 627 (2002) (summarizing 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 the Container Security Initiative); and Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHI. J. INT'L L. 597 (2003) (summarizing development of the U.S. Container Security Initiative and briefly discussing sovereignty concerns raised by this program).

Other scholarship on this topic from outside the legal academy provides useful discussion but also falls somewhat short thematically. See, e.g., AARON LUKAS, PROTECTION WITHOUT PROTECTIONISM: RECONCILING TRADE AND HOMELAND SECURITY (CATO Institute Center for Trade Policy Studies 2004) (discussing the tension between trade and homeland security in economic terms and briefly touching on sovereignty issues), available at <http://www.freetrade.org/pubs/pas/tpa-027.pdf>; Irvin Lin Fang Jau, *Not Yet All Aboard . . . But Already All at Sea Over the Container Security Initiative*, J. HOMELAND SEC'Y (Nov. 2002) (properly identifying sovereignty-related concerns raised by post-9/11 U.S. border security initiatives and concluding that cooperative efforts are required for success), available at <http://www.homelandsecurity.org/journal/Articles/Jau.html>.

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 “pushing the border outward.”² Robert C. Bonner, the former commissioner of Customs and Border Protection (“CBP”), the federal agency charged with primary implementation and oversight of these programs, has characterized them as efforts “to expand our [U.S.] perimeter of security away from our national boundaries and towards foreign points of departure.”³ 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.⁴ The phrase “pushing the border outward” (or some close variant) has appeared in multiple CBP statements and publications,⁵ and it also has appeared in

² See, e.g., *Hearing on Security at U.S. Seaports*, Senate Committee on Commerce, Science, and Transportation (Feb. 19, 2002) (Statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb192002.xml. Customs and Border Protection is the successor agency to the U.S. Customs Service. See U.S. Customs and Border Protection, *Protecting Our Borders Against Terrorism*, available at <http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml>.

³ *Hearing on Security at U.S. Seaports*, Senate Committee on Commerce, Science, and Transportation (Feb. 19, 2002) (Statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb192002.xml.

⁴ A recent search on the legal database Lexis uncovered only one U.S. law review article that used the term “homeland security” without referencing the September 11, 2001, attacks or terrorism, and even it was a fall 2001 publication. See Katherine Swartz, *Justifying Government as the Backstop in Health Insurance Markets*, 2 YALE J. HEALTH POL'Y L. & ETHICS 89, 102 (2001) (generally discussing funding issues for national security or homeland security versus other government programs such as insurance) (search on Lexis, Dec. 30, 2005, US Law Reviews and Journals, Combined, “homeland w/3 security and ‘national security’”).

⁵ See *Hearing on U.S. Customs FY 2003 Budget Request*, House Appropriations Committee Subcommittee on Treasury, Postal Services, and General Government (Feb. 27, 2002) (noting that Customs is “fostering initiatives that ‘push the border outwards’ and extend our national security perimeter”) (Statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.customs.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb272002.xml; *Hearing on Security at U.S. Seaports*, U.S. Senate Committee on Commerce, Science, and Transportation (Feb. 19, 2002) (“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.’”) (Statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.customs.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb192002.xml; U.S.

congressional testimony by U.S. Coast Guard personnel and in Congressional Research Service reports on national security law matters.⁶ President George W. Bush drew upon the related theme of forward deployment during the 2004 presidential election.⁷ 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 same thing.⁸ The *9/11 Commission Report* backs

Bureau of Customs and Border Protection, PERFORMANCE AND ANNUAL REPORT 2004 13 (listing an ongoing Customs and Border Protection goal of "continued implementation of proven programs" such as the Container Security initiative that have been characterized as efforts to forward deploy the U.S. border), *available at* http://www.cbp.gov/linkhandler/cgov/toolbox/publications/admin/cbp_annual.ctt/cbp_annual.pdf; U.S. Bureau of Customs and Border Protection, PERFORMANCE AND ANNUAL REPORT 2003 2 ("Pushing our zone of security outward through joint initiatives with foreign governments such as the Container Security Initiative") (on file with the author). *See also* Leslie Woolf, *Global Terrorism Three Years Later*, CUSTOMS AND BORDER PROTECTION TODAY (Sept. 2004), *available at* <http://www.cbp.gov/xp/CustomsToday/2004/Sep/global.xml>; McGrath & Morgan, *supra* note 1, at 247.

⁶ *See Coast Guard and NOAA FY Budget Requests*, Hearing Before the Subcommittee on Oceans, Fisheries and Coast Guard, Senate Committee on Commerce, Science and Transportation, 108th Cong. (Mar. 12, 2003) ("Homeland Security necessitates pushing America's maritime borders outward, away from ports and waterways so layered, maritime security operations can be implemented") (Statement of Admiral Thomas H. Collins, Commandant, U.S. Coast Guard), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=659&wit_id=1756; *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, House of Representatives, 108th Cong. (May 18, 2004) ("This hearing . . . will also examine new initiatives and proposals that might help 'push the border out' in combating alien smuggling on all levels. . . .") (statement of Rep. Lee), *available at* http://commdocs.house.gov/committees/judiciary/hju93716.000/hju93716_0.HTM; Lisa M. Seghetti *et al.*, *CRS Report for Congress—Border and Transportation Security: Possible New Directions and Policy Options*, RL 32840, 5-11 (Mar. 29, 2005) (discussing U.S. government programs and policies to "push[] the border outwards to intercept unwanted people or goods before they reach the United States"), *available at* <http://www.fas.org/sgp/crs/homsec/RL32840.pdf>; William H. Robinson *et al.*, *CRS Report for Congress—Border and Transportation Security: Possible New Directions and Policy Options*, RL 32841, 5 (Mar. 29, 2005); *available at* <http://www.fas.org/sgp/crs/homsec/RL32841.pdf>; Customs and Border Protection, *Fact Sheet: U.S. Customs and Border Protection Actions Taken Since 9/11*, *available at* http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/09172004.xml.

⁷ *See* George W. Bush, *President's Remarks on Homeland Security in New Jersey*, Evesham Recreation Center, Burlington County, 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. So, . . . we must pursue a comprehensive strategy against terror. The best way to prevent attacks is to stay on the offense against the enemy overseas.")

⁸ THE NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (Sept. 2002), *available at* <http://www.whitehouse.gov/nsc/nss.html>. This language in the 2002 National Security Strategy in fact appeared in the context of asserting the right of self defense via pre-emptive military strike, but it is not unreasonable to read the

this conceptual approach by recommending that foreign visitor screening be done abroad, and noting that “[t]he further away from our borders that screening occurs, the more security benefits we gain.”⁹

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 restate 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

greater (pre-emptive military strike) to include the lesser (employing non-military measures to counter terrorist threats). In any event, the language of the 2002 National Security Strategy was intentionally non-specific.

The administration’s revised National Security Strategy of March 2006 is even more non-specific, and speaks broadly (and rather definitionally) of protecting America by preventing terrorist attacks “before they occur . . . using a broad range of tools.” THE NAT’L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12 (Mar. 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 non-military measures to prevent terrorist attacks, such as those discussed in this article.

⁹ See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 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 United States 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. See *Goodbye, Dubai*, L.A. TIMES B12 (Mar. 10, 2006); *US Economic Barriers; Bush Must Set Out a Stronger Case Against Protectionism*, FIN. TIMES, Leader 14 (Mar. 13, 2006); Jonathan Weisman, *Arab Firm Offers to Delay Deal on Seaports*, WASH. POST A01 (Feb. 24, 2006).

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.

In order to fully develop and explore this thesis, this article is structured as follows. First, Part II of the article 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, and 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 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 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—which, 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 and the advent of containerized cargo and “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 transactions 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 of course have a dampening effect on trade. In response, certain aspects of the modern global marketplace are the result of efforts, both regulatory and purely commercial, to reduce transactions costs and promote international trade.

Since the 1940s the members of the General Agreement on Tariffs and Trade (GATT) (now the World Trade Organization, or WTO) have worked to reduce customs duty levels and other barriers to international trade, thus making international trade more economically viable.¹⁰ WTO trade statistics show that in goods alone, world trade levels have increased approximately 70-fold since 1960, not accounting for inflation.¹¹ In the United States, international trade levels have increased exponentially over the past several decades.¹²

Another effort to reduce transactions costs in international trade has been the widespread

¹⁰ See generally RALPH H. FOLSOM *ET AL.*, INTERNATIONAL BUSINESS TRANSACTIONS 267-70 (2d. ed. 2001).

¹¹ Specifically, excluding the effects of inflation, worldwide import levels have increased from US\$137,000 million in 1960 to US\$9,495,000 million in 2004, and worldwide export levels have grown from US\$130,000 million in 1960 to US\$9,153,000 million in 2004. See World Trade Organization, Statistics Database, available at <http://stat.wto.org/Home/WSDBHome.aspx?Language> (data available on the WTO “Time Series” searchable database).

¹² According to the U.S. Department of Commerce, U.S. Census Bureau, U.S. imports of goods rose from approximately US\$15,000 million in 1960 to US\$1,473,000 million in 2004, an increase of nearly 10,000% (not accounting for inflation). U.S. Census Bureau, Foreign Trade Statistics: U.S. Trade in Goods and Services—Balance of Payments (BOP) Basis, available at <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>. In like fashion, U.S. exports of goods increased from approximately US\$20,000 million in 1960 to US\$808,000 million 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 GEORGETOWN J. INT’L L. 319, 320-22 nn. 7 & 9 (2004).

use of containerized ocean cargo, which began in the 1950s.¹³ Prior to containerization, international cargo shipments were characterized by “break-bulk” cargo handling: goods destined for foreign markets were packed piecemeal onto trucks or railway cars for domestic transport to a seaport, where these goods would be unpacked, laden onto ocean-going vessels, and repacked.¹⁴ The same process would occur in reverse at the foreign port. With containerized shipping, by contrast, goods could be loaded onto a container at a centralized warehouse and be transported to the seaport, where the sealed container could be laden onto a sea-going vessel without unpacking and repacking. Containerized shipments thus required less handling, which significantly reduced shipping costs, loading time, and cargo breakage.¹⁵ It has been estimated that approximately 90 percent of current global trade in goods uses shipping containers.¹⁶

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. This freeing up of capital and resources previously devoted to inventory has contributed significantly to international economic growth over the past decade.¹⁷ Thus, the triumvirate of reduced customs duties and other trade barriers, containerized shipping, and just-

¹³ See Mellor, *supra* note 1, at 347-48.

¹⁴ See Mellor, *supra* note 1, at 347.

¹⁵ See Mellor, *supra* note 1, at 348.

¹⁶ Press Release, U.S. Customs Service, U.S. Customs Container Security Initiative Forging Ahead (Aug. 12, 2002), available at <http://www.usconsulate.org.hk/pas/pr/2002/081201.htm>; 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).

¹⁷ Mellor, *supra* note 1, at 352.

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.

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 “mega-ports”—ports such as Singapore and Bremerhaven, Germany that serve as transshipment hubs for large portions of ocean-going trade¹⁸—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.¹⁹ Shipments by sea and land regularly arrived in the United States with little advance information regarding their contents or source.²⁰

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.²¹ Trade security concerns did not

¹⁸ See Press Release, U.S. Customs Container Security Initiative Forging Ahead, Aug. 8, 2002, *available at* <http://www.usconsulate.org.hk/pas/pr/2002/081201.htm>. The U.S. Customs Service (now CBP) has used the term “mega-port” 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., John G. Fox, *Sea Change in Shipping*, U.S. Naval Institute Proceedings, May 2001, at 62, 65 (cited in Mellor, *supra* note 1, at 348), and Tex. S. Interim Comm. on Natural Res. Rep., 77th Leg., at 35-36 (2000) (cited in Mellor, *supra* note 1, at 348).

¹⁹ Mellor, *supra* note 1, at 348-349; Stephen E. Flynn, *The Fragile State of Container Security* (2003), *available at* http://www.cfr.org/pub5730/stephen_e_flynn/the_fragile_state_of_container_security.php (testimony before U.S. Senate Governmental Affairs Committee);

²⁰ Mellor, *supra* note 1, at 341-344; John F. Fritelli, *Port and Maritime Security: Background and Issues for Congress*, CONG. RES. SERV. 12 (Dec. 5, 2003), *available at* <http://www.fas.org/sgp/crs/homsec/RL31733.pdf>.

²¹ See Maritime Transportation Security Act of 2002, 46 U.S.C. § 70101 *et seq.*, § 101(14) (PL 107-295) (congressional finding that a 1999 study of port crimes emphasized drug smuggling as one of the most prevalent

gain significant political traction, largely because historically there had been relatively few high-profile security problems with them.²² 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 two percent of sea-going cargo containers arriving at U.S. ports were being inspected.²³

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 information regarding

port crimes); Stephen E. Flynn, *The Fragile State of Container Security*, *supra* note 19 (testimony before U.S. Senate Governmental Affairs Committee); *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. R. 147 (Nov. 2001-Feb. 2002) (discussing preemption of the "war on drugs" by the post-9/11 "war on terrorism"); Robert C. Bonner, Statement, *Speech before the Center for Strategic and International Studies (CSIS)* (Washington, DC, Jan. 17, 2002), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/jan172002.xml (noting significant public concern following 9/11 over the fact that "Customs manages to inspect only about 2% of the total volume of trade entering the country each year"); Ronn Ronck, Customs Trade Symposium Highlights Agency Priorities, *U.S. Customs Today* (Jan. 2001), available at http://www.cbp.gov/xp/CustomsToday/2001/January/custoday_tradesymp.xml (discussing Customs' pre-9/11 focus on facilitating trade flows via automation).

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), available at <http://www.cbp.gov/custoday/may2000/anticoun.htm>; *It's Your Skin—Teaming Up Against Counterfeiters*, *U.S. Customs Today* (Aug. 2001), available at http://www.cbp.gov/xp/CustomsToday/2001/August/custoday_skin.xml (discussing safety hazards posed by counterfeit goods); *Customs and UL Fight Counterfeiting Threats to Public Safety*, *U.S. Customs Today* (Jan. 2001), available at http://www.cbp.gov/xp/CustomsToday/2001/August/custoday_safety.xml (same).

²² 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* Agreement on Preshipment Inspection, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement; Kenneth P. Kansa, *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 (1999); *How to Reduce the Cost and Delays of Preshipment Inspections*, *Managing Exports* (Feb. 2001), available in Lexis, News & Business, Marketing & Industry file.

²³ Mellor, *supra* note 1, at 341-343; Schoenbaum & Langston, *supra* note 1, at 1345-1346.

inbound shipments, (b) conducted few inbound shipment inspections, and (c) eschewed security efforts in favor of trade facilitation. For sea-going cargo, for example, vessels arriving at U.S. ports did not have to file vessel manifests describing their contents until 48 hours prior to arriving at a U.S. port.²⁴ 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 once shipments arrived they were subjected to infrequent physical inspections, in the interest of facilitating trade flows.²⁵ Overland imports into the United States by truck and train and imports by 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.²⁶ 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

²⁴ Clyne, *supra* note 1, at 1200-1201. See also Preliminary Entry, 19 C.F.R. § 4.8 (2001); Boarding of Vessels in the United States, 65 Fed. Reg. 2868 (Jan. 19, 2000); 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. 66318 (Oct. 31, 2002) (implementing changes to section 4.8 of the Customs Regulations).

²⁵ Mellor, *supra* note 1, at 341-343; Schoenbaum & Langston, *supra* note 1, at 1345-1346.

²⁶ See Allan J. Cocksedge, *The Smart Border: Movement of Goods—Transportation and Customs Aspects*, 29 CAN.-U.S. L.J. 141, 143-144 (2003); 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 (May 24, 2005), available at <http://www.tc.gc.ca/pol/en/report/BorderStudy/Main.htm> (discussing potentially significant delays of U.S. advance reporting and document submission requirements for imports from Canada to the United States) [hereinafter TRANSPORT CANADA BORDER REPORT].

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 to take a stronger defensive posture on a number of fronts, and this emphasis has played out in a variety of ways. Thus, in the words of CBP Commissioner Bonner, after September 11, 2001, border security became a “top priority.”²⁷

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.²⁸ 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.²⁹ Just-in-time inventory practices have exacerbated the effects of import delays by slowing or shutting down production lines.³⁰ On the security side of the equation, containerization and high trade volumes have made it difficult to

²⁷ *Hearing on Security at U.S. Seaports*, Senate Committee on Commerce, Science, and Transportation (Feb. 19, 2002) (Statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb192002.xml. See also Lee, *supra* note 1, at 134-141.

²⁸ See, e.g., MARITIME COMMERCE SECURITY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 3-4 (2005) (discussing importance of avoiding port delays or shutdowns in the quest for improving maritime security), available at http://www.dhs.gov/interweb/assetlibrary/HSPD_MCSPPlan.pdf. For a discussion of similar concerns with respect to U.S. exports, see Bowman, *supra* note 12 at 319.

²⁹ For example, in 2002 U.S. west coast ports were shut down after port employers locked out employees for 10 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. COMM., Ocean Section (Nov. 24, 2002).

³⁰ Julian Keeling, *JIT After 9/11*, J. COMM. 86 (Oct. 1, 2001) (noting plant shutdowns caused by shipping delays following September 11, 2001). See also Robert C. Bonner, *Securing America's Borders While Safeguarding Commerce*, Heritage Lecture #796, Sept. 12, 2003 (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), available at <http://www.heritage.org/Research/HomelandDefense/HL796.cfm>.

verify the validity and safety of inbound shipments, as discussed above.³¹ 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, which 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.

The U.S. government response to this trade facilitation-versus-national security conundrum has multiple facets, including its programs to “push the border outward” for inbound shipments.³² Despite the slogan-like quality of the phrase “push the border outward,” these U.S.

³¹ See *supra* text accompanying notes 18-20.

³² 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), Immigration and Naturalization Service, and 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, 116 Stat. 2135 (2002); THE NATIONAL STRATEGY FOR MARITIME SECURITY (2005); George W. Bush, The Department of Homeland Security (June 2002), *available at* <http://www.dhs.gov/interweb/assetlibrary/book.pdf>; Department of Homeland Security, History: Who Became Part of the Department?, *available at* http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0133.xml.

It is worth commenting briefly on the United States’ National Strategy for Maritime Security, since it refers to and relies in part on some of the programs discussed in this article, such as CSI and C-TPAT. See discussion in Part III *infra*. In late 2004, President Bush ordered the development of a comprehensive maritime security program for the United States. See National Security Presidential Directive NSPD-41/Homeland Security Presidential Directive HSPD-13 (Dec. 21, 2004). The following year, The National Strategy for Cargo Security was issued, along with eight subject-specific plans for implementing this strategy. See, e.g., MARITIME COMMERCE SECURITY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY (2005); NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 6, 13 (2005); MARITIME COMMERCE SECURITY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 11 (2005); THE MARITIME INFRASTRUCTURE RECOVERY PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY 11 (2005); INTERNATIONAL OUTREACH AND COORDINATION STRATEGY FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY App. B (2005). The strategy and accompanying plans are available on the Department of Homeland Security’s website at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0597.xml. 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, only focused of course on the maritime environment. Due to

government cargo security programs in fact do hold the possibility of furthering the twin goals 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). The CBP programs discussed below are part of has been described as 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.”³³ 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.”³⁴

It should be noted that there currently are efforts on Capitol Hill to codify some of these

the fact that they address a broad range of non-border-related maritime matters and do not address non-maritime border-related concerns, however, they are not the focus of this article.

³³ Fritelli, *supra* note 20, at 18.

³⁴ *CBP Holds the 5th Annual Trade Symposium 2004*, available at www.cbp.gov/xp/CustomsToday/2005/JanFeb/symposium.xml.

programs, which to date have been carried out under existing regulatory authority granted to CBP. Enactment of this legislation—the Safe Ports Act of 2006 passed by the House of Representatives in May 2006 and the GreenLane Maritime Cargo Security Act of 2006 under consideration in the Senate—would have little, if any, effect on the overall structure or operation of these programs, but such codification would further demonstrate the United States’ commitment to improving national security through measures that forward deploy certain border functions.³⁵

A. The Container Security Initiative (CSI) for Ocean Cargo

In order to address import cargo security concerns, in January 2002 the U.S. Customs Service (now CBP) launched the Container Security Initiative, or CSI.³⁶ The primary goal of CSI is “to protect the global trading system and the trade lanes between CSI ports and the U.S.”³⁷

CSI rests on four foundational elements: first, the use of intelligence and data concerning shipments “to identify and target containers that post a risk for terrorism”; second, the “pre-screening” of suspect containers, typically prior to departure from foreign ports; third, the use of technology (such as X-ray or radiation detection devices) to pre-screen containers, so as to

³⁵ See Safe Ports Act of 2006, H.R. 4964, 109th Cong. (2006); GreenLane Maritime Cargo Security Act of 2006, S. 2458, 109th Cong. (2006).

³⁶ See U.S. Customs and Border Protection, CSI Fact Sheet, *available at* http://www.customs.ustras.gov/linkhandler/cgov/border_security/international_activities/csi/csi_fact_sheet.ctt/csi_fact_sheet.doc [hereinafter CSI Fact Sheet].

³⁷ *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 inter-governmental cooperation and prevent unlawful activities such as smuggling. See Browning, *supra* note 1, at 151; Rob Scholtens, *Customs Cooperation Results in a Major Hashish Seizure*, U.S. Customs Today (May 2000), *available at* <http://www.cbp.gov/custoday/may2000/anticoun.htm>.

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.³⁸ In describing CSI's purpose and effect, 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.³⁹

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.⁴⁰ Each bilateral agreement is reciprocal in form. 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. CBP personnel stationed abroad under CSI target shipping containers that are considered suspect and in need of further inspection.⁴¹ CBP personnel then request that foreign government

³⁸ See CSI Fact Sheet, *supra* note 36.

³⁹ Browning, *supra* note 1, at 151; see also Robert C. Bonner, Securing America's Border While Safeguarding Commerce, Heritage Foundation Lecture Series (Aug. 20, 2003) available at <http://www.heritage.org/Research/HomelandDefense/HL796.cfm>; Hearing on U.S. Customs FY 2003 Budget Requests, House Appropriations Committee Subcommittee on Treasury, Postal Services, and General Government (Feb. 27, 2002) (statement of U.S. Customs Commissioner Robert C. Bonner), available at http://www.customs.ustreas.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/feb272002.xml; CSI Fact Sheet, *supra* note 36.

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 mega-ports first; and that U.S. inspectors and investigators should "push[ed] beyond the border itself into common bilateral or multilateral inspection zones." Hearing on "Weak Links: Assessing the Vulnerability of U.S. Ports and Whether the Government is Adequately Structured to Safeguard Them," Senate Committee on Governmental Affairs (Dec. 6, 2001) (statement of Stephen E. Flynn).

⁴⁰ CSI Fact Sheet, *supra* note 36; Lee, *supra* note 1, at 123; Mellor, *supra* note 1, at 341.

⁴¹ CSI Fact Sheet, *supra* note 36; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HOMELAND SECURITY: KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED (2005) (GAO-05-466T), available at <http://www.gao.gov/docsearch/featured/homelandsecurity.html> (statement of Richard M. Stana) [hereinafter GAO 2003 KEY CARGO SECURITY REPORT]; U.S. GENERAL ACCOUNTING OFFICE, CONTAINER SECURITY INITIATIVE:

personnel undertake to conduct inspections and enforcement actions as necessary. In other words, CBP personnel have access to 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.⁴² 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.⁴³

Despite its bilateral 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.⁴⁴ In light of this, one foreign commentator has strongly suggested that CSI's reciprocity is far more form than substance.⁴⁵ 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, and in fact it is an open question whether the United States would be as cooperative regarding requests for stoppage and

EXPANSION OF KEY CUSTOMS PROGRAMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS 2, 9 (2003) (GAO-03-770), available at <http://www.gao.gov/docsearch/featured/homelandsecurity.html> [hereinafter GAO 2003 CSI REPORT].

⁴² CSI Fact Sheet, *supra* note 36; GAO 2003 CSI REPORT, *supra* note 41, at 2, 9.

⁴³ CSI Fact Sheet, *supra* note 36; GAO 2003 CSI REPORT, *supra* note 41, at 2, 9; Lee, *supra* note 1, at 123.

⁴⁴ CSI Fact Sheet, *supra* note 36.

⁴⁵ 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 unilaterally 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 37. Legal and operational concerns raised by CSI are discussed in Part V *infra*.

inspection of outgoing shipments.⁴⁶ This subject is discussed further in Part V below.

At the outset, the U.S. government focused on establishing CSI agreements with nations that had “mega-ports” with high volumes of containerized shipments to the United States.⁴⁷ CSI agreements for these twenty mega-ports have been obtained, and U.S. efforts have turned to reaching CSI agreements covering other ports that ship to the United States.⁴⁸ As of June 2006, the United States had formal CSI agreements in place with more than 20 countries covering more than 40 foreign ports.⁴⁹ A significant further development in the expansion and development of

⁴⁶ 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. Stephen E. Flynn, *The Ongoing Neglect of Maritime Transportation Security*, (Aug. 24, 1004), *available at* http://www.cfr.org/publication/7314/ongoing_neglect_of_maritime_transportation_security.html (written testimony before the Subcommittee on Coast Guard and Maritime Transportation, House Committee on Transportation and Infrastructure). In similar fashion, in some instances 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. In other cases, containers were identified in time, but foreign government personnel declined to conduct the requested inspections. Eric Lipton, *Loopholes Seen in U.S. Efforts to Secure Ports*, N.Y. TIMES, May 25, 2005. The approach used by CBP to identify potentially problematic shipments also has come under fire. Toby Eckert, *Senators Say Cargo Security Still Lagging*, COPLEY NEWS SERV. (Aug. 5, 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.

⁴⁷ Romero, *supra* note 1, at 600 (2003); Jau, *supra* note 1, at 3. The 20 ports initially identified by CBP as mega-ports were responsible for approximately two-thirds (by value) of containerized shipments to the United States. Romero, *supra* note 1, at 600. These 20 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. See Press Release, U.S. Customs Container Security Initiative Forging Ahead (Aug. 8, 2002), *available at* <http://www.usconsulate.org.hk/pas/pr/2002/081201.htm>.

⁴⁸ See CSI Fact Sheet, *supra* note 36.

⁴⁹ *Id.*; Press Release, U.S. Customs and Border Protection, Container Security Initiative Coming to Jamaica (June 20, 2006), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/06202006_2.xml; Press Release, U.S. Customs and Border Protection, U.S. Customs and Border Protection Strengthening Port Security: Salalah, Oman Becomes 43rd Container Security Initiative Port (Mar. 7, 2006), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/032006/03072006_3.xml.

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 245; Press Release, U.S. Customs and Border Protection, U.S. Customs Implements Enhanced Anti-Terror Sea Cargo Targeting at All U.S.

CSI is that the United States has successfully obtained WCO, G-8 and European Union support for the CSI program.⁵⁰ As discussed further in Parts V and VI below, this 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 48 hours prior to arriving at its first U.S. port of call.⁵¹ In the shipping industry it therefore was common practice for vessel manifests to be prepared after

Seaports (Sept. 30, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/press_releases/archives/legacy/2002/92002/09032002.xml. 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. 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. McGrath & Morgan, *supra*.

⁵⁰ See CSI Fact Sheet, *supra* note 36; European Commission, Taxation and Customs Union Directorate-General, Customs and Security, *available at* http://europa.eu.int/comm/taxation_customs/customs/policy_issues/customs_security/index_en.htm; 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, O.J. L.304/34 (Apr. 24, 2004), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_304/l_30420040930en00340037.pdf; 2003 G-8 Summit, Enhance Transport Security and Control of Man-Portable Air Defence Systems (MANPADS): A G8 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 [hereinafter G-8 2003 Action Plan]; Press Release, U.S. Customs and Border Protection, 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; Randall Beisecker, *Securing and Facilitating Trade: Conflicting Goals under the World Customs Organization*, CENTER FOR NONPROLIFERATION STUDIES (Dec. 22, 2005), *available at* <http://cns.miis.edu/pubs/week/051222.htm>; Schoenbaum & Langston, *supra* note 1, at 1348. See also *infra* Part V.A.1.

⁵¹ Preliminary Entry, 19 C.F.R. § 4.8 (2001).

a vessel's departure for the United States.⁵² 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.

After the events of September 11, 2001, however, the U.S. government viewed this traditional state of affairs as unacceptable, since it meant that vessels with undeclared cargo were on the high seas en route to U.S. ports, and there was no way for the U.S. government to verify the accuracy of any manifests prior to arrival. Accordingly, in 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]."⁵³ This requirement, commonly known as the "24 Hour Rule," became effective on December 2, 2002,⁵⁴ although Customs did not begin actively enforcing the rule until May 2003, in large part to give shippers additional time to adjust to the rule.⁵⁵ Failure to provide all

⁵² 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. 66318, 66319 (Oct. 31, 2002) (to be codified, *inter alia*, at 19 C.F.R. § 4.8); Schoenbaum & Langston, *supra* note 1, at 1333; Clyne, *supra* note 1, at 1183.

⁵³ 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 66319; Press Release, U.S. Customs and Border Protection, 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.

⁵⁴ 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 66319. Containers covered by the rule include both containers destined for the United States and containers being transhipped to other destinations via U.S. ports. *Id.* at 66320; Schoenbaum & Langston, *supra* note 1, at 1333. See also U.S. Bureau of Customs and Border Protection, *Frequently Asked Questions: 24-Hour Advance Vessel Manifest Rule* (April 16, 2004), available at http://www.cbp.gov/linkhandler/cgov/import/carriers/24hour_rule/24hour_faq.ctt/24hour_faq.doc.

⁵⁵ U.S. Bureau of Customs and Border Protection, *CBP Expands Enforcement of the 24-Hour Rule* (May 1, 2003), available at http://www.cbp.gov/linkhandler/cgov/import/carriers/24hour_rule/cbp_24hr.ctt/cbp_24hr.doc; U.S. Bureau of Customs and Border Protection, *Frequently Asked Questions: 24-Hour Advance Vessel Manifest Rule*

information required can result in CBP issuing a “No-Load” directive instructing the shipper not to load and ship the container; in delays in unloading at the U.S. port; in denial of entry to U.S. ports; and in civil monetary penalties.⁵⁶

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.⁵⁷ 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 United States government can block the departure of shipments from foreign ports. Prior to the 24 Hour Rule, the U.S. government could turn back shipments at the U.S. port, but it could not mandate whether a vessel in a foreign port could be loaded or depart. In essence, then, 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. jurisdiction or effective control over critical aspects of foreign port activity. As noted further in Part V of this article, advance reporting of shipment information has been endorsed by the WCO, G-8, and European Union as an important element

(Apr. 16, 2004), available at

http://www.cbp.gov/linkhandler/cgov/import/carriers/24hour_rule/24hour_faq.ctt/24hour_faq.doc.

⁵⁶ 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. at 66319; Press Release, U.S. Customs and Border Protection, 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. See also U.S. Bureau of Customs and Border Protection, *Customs 24 Hour Rule FAQs*, available at http://www.cbp.gov/xp/cgov/import/carriers/24hour_rule/.

Issuance of a “No-Load” directive often leads to a request for the container to be inspected; if the foreign port participates in CSI the inspection can be carried out under that program. See *Customs 24 Hour Rule FAQs*, *supra*.

⁵⁷ 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. 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 24 hours before any lading may begin. This adds significantly to time and expense for shipments bound for the United States. For further discussion of commercial concerns raised by the 24 Hour Rule, see Clyne, *supra* note 1, at 1206-07.

of cargo security programs.⁵⁸

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, but the reduced timeframes for overland and airborne cargo presented particular logistical problems. Twenty-four hours of advance notice prior to loading (or even prior to arrival at the border) was considered an unacceptable burden on these more rapid forms of shipment.⁵⁹ Accordingly, CBP issued a final rule in 2003 requiring electronic submission of specified cargo information at least 30 minutes prior to arrival for shipments by truck and at least 2 hours' advance notice for shipments by rail.⁶⁰ For shipments by air from North America and portions of Central America, submission of required cargo information was required prior to departure, whereas for shipments by air from all other destinations cargo information submission was required within 4 hours of arrival.⁶¹ Again, 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.

⁵⁸ See *infra* Part V.A.1.

⁵⁹ It has been noted, for example, that 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. Joseph L. Parks, *The United States-Canada Smart Border Action Plan: Life in the Fast Lane*, 10 SPG L. & BUS. REV. AM. 395 n.17 (2004). Adding 24 hours of lead time to such shipments would increase the shipping cycle more than 48-fold.

⁶⁰ Department of Homeland Security, Bureau of Customs and Border Protection, Required Advance Electronic Presentation of Cargo Information, 68 Fed. Reg. 68140, 68173-174 (Dec. 5, 2003) (codified at 19 C.F.R. §§ 123.91-123.92). Advance electronic cargo information submission was mandated by section 343 of the Trade Act of 2002, as modified by the Maritime Transportation Security Act of 2002. See Maritime Transportation and Security Act of 2002, Pub. L. No. 107-295, § 104, 116 Stat. 2064, 2085 (2002).

⁶¹ Department of Homeland Security, Bureau of Customs and Border Protection, Required Advance Electronic Presentation of Cargo Information, 68 Fed. Reg. at 68170-171 (codified at 19 C.F.R. § 123.48a).

D. The Customs-Trade Partnership Against Terrorism (“C-TPAT”)

In November 2001, Customs (now CBP) launched a program called the “Customs-Trade Partnership Against Terrorism,” more commonly referred to by the awkward acronym “C-TPAT.”⁶² C-TPAT is aimed at identifying and eliminating weaknesses in U.S. importer supply chains such as poor security procedures and unvetted foreign suppliers and shippers.⁶³ Improved supply chain security is intended to translate into reduced 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.⁶⁴

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,⁶⁵ the veracity of all actors in their international supply chains—including shippers, wholesalers, and intermediate

⁶² 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.

⁶³ See Bureau of Customs and Border Protection, *C-TPAT Validation Process Guidelines* (Jan. 23, 2003), available at http://www.customs.ustreas.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/validation_process_guidelines.ctt/validation_process_guidelines.pdf; Bureau of Customs and Border Protection, *C-TPAT Importer Security Criteria* (Mar. 25, 2005), available at http://www.customs.ustreas.gov/xp/cgov/import/commercial_enforcement/ctpat/criteria_importers/ctpat_importer_criteria.xml; Bureau of Customs and Border Protection, *Customs-Trade Partnership Against Terrorism (C-TPAT) Security Criteria for Importers: Implementation Plan* (Mar. 25, 2005), available at http://www.customs.ustreas.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/criteria_importers/implementation_plan.ctt/criteriaImplementation2.doc.

⁶⁴ Schoenbaum & Langston, *supra* note 1, at 1347; Glick, *supra* note 1, at 632-633. For a discussion of possible scenarios involving the use of supply chains for terrorist attacks, see Stephen E. Flynn, *Bolstering the Maritime Weak Link* (Dec. 6, 2001), available at http://www.senate.gov/~gov_affairs/120601flynn.htm (testimony before U.S. Senate Governmental Affairs Committee).

⁶⁵ In this regard, C-TPAT is thematically similar to previous efforts to modernize U.S. customs law by placing greater legal compliance responsibilities more on the shoulders of the private sector. It also is similar to the self-compliance structure of U.S. export control laws. See Customs Modernization and Informed Compliance Act, NAFTA Implementation Act, tit. II, 19 U.S.C. §§ 3331-35; Bowman, *supra* note 12, at 319, 320-22 nn. 7 & 9.

consignees—all the way back to the original vendor of each product.⁶⁶ C-TPAT 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 or compelling existing ones to modify their operations or procedures; altering shipping routes; employing tamper-proof cargo container seals; and so on.⁶⁷ 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 previously the United States had little influence or reach. In CBP parlance, this is a “layered, defense-in-depth strategy against terrorism.”⁶⁸

In return for participating in the C-TPAT program, U.S. importers gain the benefit of

⁶⁶ U.S. Bureau of Customs and Border Protection, *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism Strategic Plan* (Nov. 2004), available at http://www.customs.ustras.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf; Bureau of Customs and Border Protection, *Customs-Trade Partnership Against Terrorism (C-TPAT) Security Criteria for Importers: Implementation Plan* (Mar. 25, 2005), available at http://www.customs.ustras.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/criteria_importers/implementation_plan.ctt/criterialImplementation2.doc. Participation in C-TPAT initially was limited to U.S. importers, although later the program was opened to other international supply chain actors such as customs brokers, freight forwarders, and non-vessel operating common carriers (NVOCCs). Bureau of Customs and Border Protection, *Customs Set to Begin Phase 3 of Customs-Trade Partnership Against Terrorism* (Aug. 21, 2002), available at http://www.customs.ustras.gov/xp/cgov/newsroom/press_releases/archives/legacy/2002/82002/08212002.xml. These non-importers primarily benefit from C-TPAT participation by being “approved” suppliers of services for C-TPAT importers. See *infra* text accompanying notes 70-71.

⁶⁷ U.S. Bureau of Customs and Border Protection, *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism Strategic Plan* at 26-27 (Nov. 2004), available at http://www.customs.ustras.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf. Thus, in a sense, C-TPAT is a U.S. government effort to get U.S. importers to engage 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.

⁶⁸ U.S. Bureau of Customs and Border Protection, *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism Strategic Plan* at 7 (Nov. 2004), available at http://www.customs.ustras.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf.

reduced U.S. import inspections and expedited customs processing.⁶⁹ 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. CBP recently issued separate guidelines for various types of C-TPAT participants such as carriers, customs brokers, suppliers and port operators.⁷⁰ CBP has also issued a “best practices” document to assist C-TPAT participants.⁷¹

In other words, CBP has employed what one commentator aptly describes as a “carrot-and-stick approach” to encouraging “voluntary” C-TPAT participation.⁷² This approach has been spectacularly successful: as of January 2006 C-TPAT had over 10,000 participants, up from only seven at the program’s inception three years earlier.⁷³ These participants included

⁶⁹ See Glick, *supra* note 1, at 634-635. 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 2003 KEY CARGO SECURITY REPORT, *supra* note 41, at 5 (statement of Richard M. Stana). The GAO (previously called the General Accounting Office) also was critical of CBP’s implementation of both C-TPAT and CSI in 2003. See GAO 2003 CSI REPORT, *supra* note 41. See also Lipton, *supra* note 46.

⁷⁰ U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for Air Carriers* (Apr. 24, 2006); U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for Air Freight Consolidators, Ocean Transportation Intermediaries and Non-Vessel Operating Common Carriers (NVOCCs)* (Apr. 24, 2006); U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for Licensed U.S. Customs Brokers* (Apr. 24, 2006); U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for Manufacturers* (Apr. 24, 2006); U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for Rail Carriers* (Apr. 24, 2006); U.S. Bureau of Customs and Border Protection, *C-TPAT Security Guidelines for U.S. Marine or Port Terminal Operators* (Apr. 24, 2006). All of these documents are available through CBP’s website at http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_guideline/.

⁷¹ U.S. BUREAU OF CUSTOMS AND BORDER PROTECTION, SUPPLY CHAIN SECURITY BEST PRACTICES CATALOG: CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM (C-TPAT) iii (2006), available at http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_best_practices.ctt/ctpat_best_practices.pdf [hereinafter C-TPAT BEST PRACTICES CATALOG].

⁷² See Glick, *supra* note 1, at 634.

⁷³ C-TPAT BEST PRACTICES CATALOG, *supra* note 71, at iii.

nearly 90 of the top 100 U.S. importers by volume and represented over 95 percent of U.S. containerized imports.⁷⁴ 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. CBP has sought, with considerable success, to “internationalize the core principles of C-TPAT through cooperation and coordination with the international community,”⁷⁵ and has obtained both WCO and G-8 support for these efforts.⁷⁶ 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 (“FAST”) 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

⁷⁴ U.S. Bureau of Customs and Border Protection, *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism Strategic Plan* at 13 (Nov. 2004), available at http://www.customs.ustras.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf.

⁷⁵ Bureau of Customs and Border Protection, *C-TPAT Importer Security Criteria*, available at http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/criteria_importers/ctpat_importer_criteria.xml.

⁷⁶ See European Commission, Taxation and Customs Union Directorate-General, Customs and Security, available at http://europa.eu.int/comm/taxation_customs/customs/policy_issues/customs_security/index_en.htm; G-8 2003 Action Plan, *supra* note 50; Press Release, U.S. Customs and Border Protection, 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; Schoenbaum & Langston, *supra* note 1, at 1348. See also *infra* Part V.A.1.

security in light of the events of September 11, 2001.⁷⁷ The focus of FAST is on North American supply chains, and in this regard it is intended to be complementary of C-TPAT, which is global in scope. 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.⁷⁸

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 15 of FAST's 30-Point Action Plan reads as follows: "Clearance Away From The Border: [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)."⁷⁹ Like C-TPAT, participation by importers and shippers in FAST 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 cross-border shipments at designated border crossings.⁸⁰

⁷⁷ U.S. Customs and Border Protection, FAST Fact Sheet, *available at* http://www.customs.ustreas.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/fast.ctt/FASTBrochure.doc [hereinafter FAST Fact Sheet].

⁷⁸ *Id.* As with NAFTA, the genesis of the FAST program was a bilateral agreement between the United States and Canada.

⁷⁹ Press Release, Office of Homeland Security, Specifics of Secure and Smart Border Action Plan (Jan. 7, 2002), *available at* http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0036.xml.

⁸⁰ FAST Fact Sheet, *supra* note 77; U.S. Customs and Border Protection, FAST Reference Guide: Enhancing the Security and Safety of Trans-border Shipments (2005), *available at* http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/fast_ref_guide.ctt/fast_ref_guide.pdf.

IV. Political Geography and “Pushing the Border Outward”

The programs discussed above 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 through moving functions traditionally associated with borders to sites outside the geographical United States (such as cargo inspection under CSI); by 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 by extending *de facto* U.S. jurisdiction over foreign parties via a supply chain security program (C-TPAT). 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.”⁸¹ These works help both to highlight significant commonalities among these U.S. government programs and to place these programs in 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

⁸¹ HANS W. WEIGERT *ET AL.*, *PRINCIPLES OF POLITICAL GEOGRAPHY* 5-8 (1957); *see also* MARTIN JONES *ET AL.*, *AN INTRODUCTION TO POLITICAL GEOGRAPHY: SPACE, PLACE AND POLITICS* 173 (2004) [hereinafter *SPACE, PLACE AND POLITICS*].

from a legal perspective.⁸²

For purposes of this article, there are two lines of political geographic inquiry that aid in analysis of current U.S. border initiatives. Each was developed in the early or mid-twentieth century during times of political upheaval and fluid national boundaries. It is thus quite fitting that they 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,” since 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. This is especially important because political geography scholarship has not always used consistent terminology, with the predictable effect of occasional confusion and

⁸² Early- and mid-twentieth century political geography writings are most helpful for purposes of this article because they focused largely on identifying, justifying, and describing the nature, functions, and establishment of national boundaries or borders. 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.*, SPACE, PLACE AND POLITICS, *supra* note 81, 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 (1993) (discussing historical evolution of political geography’s scope); KEVIN R. COX, POLITICAL GEOGRAPHY: TERRITORY, STATE AND SOCIETY 1 (2002) (recommending a narrower, essentialist definition of political geography based on—and hence limited by—the “defining concepts” of “territory and territoriality”), cited in SPACE, PLACE AND POLITICS, *supra* note 81, at 2. This latter 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 81, at 5-8.

implied distinctions where none exists.⁸³

First, a perusal of the cited political geography texts reveals that they eschew the term “border” in favor of “boundary” (or “international boundary”). This article, however, predominantly will use the term “border” to refer to the demarcation between sovereign nation states.⁸⁴ 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—and in any event the terms “border” and “boundary” are synonymous in ordinary parlance.⁸⁵

Second, the term “frontier” has suffered frequently from poor definition in the field of political geography. Often it has been used interchangeably with the term “boundary,”⁸⁶ while at other times it has denoted different types of transitional zones.⁸⁷ For purposes of this article, it is sufficient to distinguish between borders (or boundaries) and frontiers by noting that “‘frontier’

⁸³ See J.R.V. PRESCOTT, *GEOGRAPHY OF FRONTIERS AND BOUNDARIES* 13 (1965); WEIGERT *ET AL.*, *supra* note 81, at 7. One notable attempt to clarify political geography terminology sought to distinguish between the terms “boundary” and “frontier.” Ladis K.D. Kristof, *The Nature of Frontiers and Boundaries*, 49 *ANNALS OF THE ASS’N OF AM. GEOGRAPHERS* 269 (1959).

⁸⁴ See C.B. FAWCETT, *FRONTIERS: A STUDY IN POLITICAL GEOGRAPHY* 5 (1918) (“the 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”).

⁸⁵ See *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION* (2000) (defining the term “border” as “[t]he line or frontier area separating political divisions or geographic regions; a boundary,” and similarly defining the term “boundary” as “something that indicates a border or limit” or “the border so indicated”); *Miriam-Webster OnLine*, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=boundary> (defining the word “border” to mean “boundary,” and defining the word “boundary” as “something (as a line, point, or plane) that indicates or fixes a limit or extent”).

⁸⁶ PRESCOTT, *supra* note 83, at 13 (criticizing interchangeable use of these terms by other commentators); FAWCETT, *supra* note 84, at 6. See also generally George Nathaniel Curzon, *Romanes Lecture on the Subject of Frontiers*, University of Oxford (1907), available at <http://www-ibru.dur.ac.uk/resources/links.html>; S. WHITTEMORE BOGGS, *INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS* 22 (1940).

⁸⁷ For example, distinctions are sometimes made between “frontiers of separation” versus “frontiers of intercourse or pressure.” FAWCETT, *supra* note 84, at 6; PRESCOTT, *supra* note 83, at 16-17.

denotes an area, and ‘boundary’ a line.”⁸⁸

Third, the term “buffer state” has been used in political geography to convey multiple concepts.⁸⁹ For present purposes, the most appropriate definitions are that a buffer state is a state “located in the path of an enemy advance,”⁹⁰ or alternatively a state whose “territory separates those of two or more other states, thus preventing direct contact”⁹¹ 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 since they have some of the same effects.⁹²

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.”

⁸⁸ PRESCOTT, *supra* note 83, at 6; BOGGS, *supra* note 86, at 22. In the words of one early twentieth century commentator, “[Political] frontiers 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 84, at 24. In similar fashion, Kristof characterized boundaries (borders) as “inner-oriented” and frontiers as “outer-oriented.” Kristof, *supra* note 83, at 270-271.

⁸⁹ STEPHEN B. JONES, BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS 14 (1945) [hereinafter BOUNDARY-MAKING HANDBOOK].

⁹⁰ *Id.* In the early- and mid-twentieth century, Belgium was commonly cited as a prime example of a buffer state between Germany and France.

⁹¹ *Id.*

⁹² BOGGS, *supra* note 86, at 27.

1. Lord Curzon of Kedleston and the Passes to India

In 1907, Lord George Nathaniel Curzon—former British Viceroy of India and future British Foreign Minister—became one of the first commentators to attempt to establish a taxonomy of border types.⁹³ In his Romanes Lecture at the University of Oxford that year, Lord Curzon drew upon his experiences in India to analyze the nature of borders and frontiers. Much of his lecture was devoted to distinguishing between what he called “natural” borders, such as oceans, mountains, deserts, or mountain ranges, and “artificial” borders, such as frontiers or buffer zones. In so doing, he concentrated heavily on the defensive aspects of frontiers or borders.⁹⁴

In particular, Lord Curzon spoke of the natural advantages of having oceans as frontiers, since they constituted a physical space difficult to cross, as well as using mountain ranges as boundaries, since they offered defensive advantages and limited passes through which enemy forces could approach.⁹⁵ 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.⁹⁶

The natural-versus-artificial border dichotomy set forth by Lord Curzon largely has been

⁹³ For biographical information on Lord Curzon of Kedleston, see Curzon, George Nathaniel Curzon, Marquess, Viscount Scarsdale, Baron Ravensdale, *Encyclopedia Britannica Online* (2006), available at <http://www.britannica.com/eb/article-9028300>.

⁹⁴ Curzon, *supra* note 86.

⁹⁵ *Id.*

⁹⁶ *Id.*

abandoned, and in fact his analysis contained the seeds of its own destruction.⁹⁷ He acknowledged, for example, that oceans were not only barriers but also avenues of commerce, and that technological advances such as the locomotive could render deserts useless as frontiers.⁹⁸ 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 to 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. Furthermore, the establishment of U.S. personnel at key foreign ports through the CSI program and private sector efforts (through C-TPAT) to ensure supply chain security through these foreign ports are conceptually similar to concentration of defensive efforts at mountain passes, since 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.⁹⁹

⁹⁷ BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 14-16.

⁹⁸ Curzon, *supra* note 86; BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 14-16.

⁹⁹ 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 BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 8-9; PRESCOTT, *supra* note 83, at 12-13.

2. Border Taxonomies and Border Functions

Various political geographers in the early twentieth century sought to develop a working taxonomy of border types and their respective characteristics and advantages.¹⁰⁰ 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 below.

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.¹⁰¹ 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.”¹⁰² Mid-twentieth century American political geographers worked to objectively identify and discuss the appropriate functions of distinct national borders,¹⁰³ with principle border functions including the

¹⁰⁰ See, e.g., Curzon, *supra* note 86; FAWCETT, *supra* note 84, at 5. Early discussions sometimes attempted to fit different types of borders into a universal, theoretical framework of borders, generally with little success. See, e.g., WEIGERT *ET AL*, *supra* note 81, at 5-8; PRESCOTT, *supra* note 83, at 13-17. Later commentators were more inclined to eschew universality and view each border as a unique construct, albeit with common characteristics. See, e.g., BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 14; WEIGERT *ET AL*., *supra* note 81, at 5-8; PRESCOTT, *supra* note 83, at 13.

¹⁰¹ See, e.g., FAWCETT, *supra* note 84, at 6; WEIGERT *ET AL*., *supra* note 81, at 5-8; Curzon, *supra* note 86.

¹⁰² BOGGS, *supra* note 86, at 22.

¹⁰³ See, e.g., *id.* at 21-22; BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 15. It has been observed that American political geographers might have been more focused on mechanics of border operations because they lived on a continent with few border disputes, as opposed to their European colleagues, who tended to focus more on conceptual issues. See WEIGERT *ET AL*., *supra* note 81, at 7.

administration of customs laws and the prevention of smuggling and other illegal imports.¹⁰⁴ The implicit assumption in these works was that these functions would occur at or near the physical border.

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, and functionally this approach was consistent with having borders that were “sharply defined lines” or “fences.”¹⁰⁵ Under post-September 11 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 port entry.

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. The post-9/11 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

¹⁰⁴ See generally BOUNDARY-MAKING HANDBOOK, *supra* note 89; BOGGS, *supra* note 86.

¹⁰⁵ BOGGS, *supra* note 86, at 22.

“direct contact” with the U.S. homeland.¹⁰⁶ 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.” These foreign states thus 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.¹⁰⁷ One therefore could view the United States as a buffer zone or buffer state for those trading partners that have based customs inspectors at U.S. ports (currently only Canada and Japan) or that have imposed supply chain requirements that 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, and 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. A recent study funded by the government of Canada, for example, concluded that the Canadian trucking industry has borne significant costs in complying with post-9/11 U.S. border security programs but has received little benefit from voluntary participation in trade-facilitating aspects of these

¹⁰⁶ BOUNDARY-MAKING HANDBOOK, *supra* note 89, at 14.

¹⁰⁷ See, e.g., European Commission, Taxation and Customs Union Directorate-General, Customs and Security, available at http://europa.eu.int/comm/taxation_customs/customs/policy_issues/customs_security/index_en.htm#agreen (discussing EU implementation of programs); Industry Canada, Border Compliance Certification Tool Kit (summarizing Canadian implementing of U.S.-cooperative border security programs), available at <http://strategis.ic.gc.ca/epic/internet/indsib-logi.nsf/en/pj00101e.html>.

U.S. programs (in terms of reduced inspection and border delay times).¹⁰⁸ 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 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 below in Part V.

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.¹⁰⁹ This section addresses each of these concerns in turn, 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. This is true regardless of whether the extraterritorial jurisdiction exercised by the United States under these programs is characterized as prescriptive jurisdiction (*e.g.*, via implementation of cargo security

¹⁰⁸ TRANSPORT CANADA BORDER REPORT, *supra* note 26, at 39-40.

¹⁰⁹ *See, e.g.*, Romero, *supra* note 1, at 601-602.

requirements), enforcement jurisdiction (*e.g.*, the ability to compel compliance or cooperation with these requirements), or adjudicatory jurisdiction (*e.g.*, the authority to certify or de-certify participants in cargo security programs such as C-TPAT), or some combination of the three.¹¹⁰ This is also true regardless of whether the underlying international law principle for such extraterritorial jurisdiction is the protective principle, subjective territorial jurisdiction, passive personality jurisdiction, or even (although currently unlikely) universal jurisdiction.¹¹¹ Accordingly, this article focuses on 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 it is not an infallible one. It is entirely possible that multilateral consent could be withdrawn, in whole or in part, by the United States' 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 the United States' foreign trading partners or supply chain participants. This rather counter-intuitive conclusion is explored at the end of this section.

¹¹⁰ AMERICAN LAW INSTITUTE, RESTATEMENT THIRD, RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 421 & 431 (1987).

¹¹¹ *Id.* At § 402; I.A. SHEARER, STARKE'S INTERNATIONAL LAW 183-212 (11th ed. 1994).

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.¹¹² These concerns were grounded in large part in the traditional notion of Westphalian state sovereignty and the role of states as unitary actors.¹¹³ 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.¹¹⁴

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.¹¹⁵ Early in the life of the

¹¹² See, e.g., Romero, *supra* note 1, at 601-602; Jau, *supra* note 1; Aaron Lukas, *Protection without Protectionism* 11, CENTER FOR TRADE POLICY STUDIES (Apr. 8, 2004), available at <http://www.free-trade.org/pubs/pas/tpa-027.pdf>.

¹¹³ An underlying premise of states as unitary actors is that such a system helps promote 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, 870-873 (2004).

¹¹⁴ Cf. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4-5 (2005) (employing rational choice theory to analyze actions of states within international law framework).

¹¹⁵ See, e.g., OPPENHEIM'S INTERNATIONAL LAW § 595 (Robert Jennings & Arthur Watts eds.) (9th ed. 1992). 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: ORGANISED 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 nation-state regulate or restrict certain types of interference with the state’s activities.

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 non-consensual surrenders of sovereignty by a series of weaker states to a much stronger United States.¹¹⁶ 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.¹¹⁷ 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).¹¹⁸ 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. This concern 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.

¹¹⁶ See Romero, *supra* note 1, at 601-602; Jau, *supra* note 1.

¹¹⁷ See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 1.3 (5th ed. 2003).

¹¹⁸ See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE INT’L L.J. 1, 13-14 (1999).

In the few years since their inception, CSI and its related programs have gained substantial multilateral support through the EU, G-8, and WCO, 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 “internationalization” of U.S. cargo security policy.¹¹⁹ 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.¹²⁰ This agreement also encourages U.S. reciprocity in such matters through the promotion of “comparable” cargo security standards in U.S. ports; backs the joint development of “minimum standards” for cargo risk management; and establishes a working group of U.S. and EU member customs personnel to propose recommendations in such matters.¹²¹ In like fashion, G-8 members have pledged to “work[] together to reinforce container security arrangements generally” and have pledged to support development of “joint standards and guidelines for electronic transmission of customs data for cargo” (to facilitate pre-shipment reporting such as under the U.S. 24 Hour Rule) and the further expansion of the CSI program.¹²²

The WCO’s members similarly have adopted the *Framework of Standards to Secure and Facilitate Global Trade*, which rests on several key principles aimed at harmonizing customs

¹¹⁹ Beisecker, *supra* note 50 (discussing primarily in context of WCO support).

¹²⁰ 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, O.J. L.304/34 (Apr. 24, 2004), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_304/l_30420040930en00340037.pdf.

¹²¹ *Id.*

¹²² G-8 2003 Action Plan, *supra* note 50.

reporting and risk assessment procedures in order to maximize inspection capability and lower transactions costs and delays.¹²³ 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.”¹²⁴ A second principle is that advance reporting of imports should be required, much along the lines of the U.S. 24 Hour Rule. A third WCO Framework principle advocates the development of government-private sector “partnerships” along the lines of C-TPAT, in order to promote supply chain security.¹²⁵ To date, a substantial number of WCO member states have submitted declarations of intent to implement the WCO Framework through their domestic laws.¹²⁶

Regardless of the form of these EU, G-8, 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 these countries do not currently consider these U.S. cargo security programs to impermissibly infringe on their sovereignty or to be jurisdictional overreaching by the United States. This support is significant, since the countries involved represent the United States’ primary trading partners.¹²⁷ Circular though it may be, such significant multilateral agreement or consensus concerning these programs can be viewed as

¹²³ 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.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Beisecker, *supra* note 50 (discussing primarily in context of WCO support).

¹²⁷ See U.S. Census Bureau, Foreign Trade Statistics Division, Top Trading Partners—Total Trade, Imports, Exports, January-December 2005, available at <http://www.census.gov/foreign-trade/statistics/highlights/top/top0512.html#total>.

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 others' 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 national jurisdictions to a mutually agreed-upon extent."¹²⁸ 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.¹²⁹

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,¹³⁰ and the performance of these functions abroad can be seen to enhance U.S. security, since potential visa recipients remain outside the

¹²⁸ See Kalypso Nicolaidis & Gregory Schaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROB. 263, 266-267 (2005).

¹²⁹ See *Id.*

¹³⁰ See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 115, at § 486. General information concerning current United States policies and procedures for visa processing is available from the U.S. Department of State online at <http://www.unitedstatesvisas.gov>.

United States and away from actual U.S. borders until they have been vetted for security and other concerns. In the case of both visa processing and cargo review and inspection, U.S. government personnel are thus engaged in 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. In the case of CSI, reviewing U.S. personnel are actually stationed abroad, like their U.S. consular counterparts. 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.

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 the above discussion makes clear, the United States has sought to sidestep objections to its cargo security programs by advocating their adoption as multilateral programs. Yet one might question whether the United States means what 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.

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. 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?¹³¹ "Comparable" does not mean "identical," and there certainly is room for maneuver or debate as to 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

¹³¹ See *supra* Part III.A.

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.¹³² Rather, the purpose here is to explore possible legal justifications for these 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 the legal and the political perspective. Yet multilateralism is not unassailable as a legal justification for these programs. It therefore is worth exploring bilateral or unilateral bases for legally 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. 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 might occur if the United States refuses to let CSI member states, such as the United Arab Emirates or Malaysia, station customs personnel in the United States, even though these countries have permitted the stationing of U.S.

¹³² 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.,* KRASNER, *supra* note 115; Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 A.J.I.L. 205 (1993); MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* (2005); GOLDSMITH & POSNER, *supra* note 114.

personnel in their ports.¹³³ Opposition to Middle Eastern personnel or companies being involved in U.S. port security matters is anything but hypothetical, as the demise of the UAE Dubai Ports World deal in March 2006 clearly illustrates.¹³⁴ 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 requests to inspect outbound cargo, thus effectively quarantining them from U.S. port security matters. 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. 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 forego 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.” This 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

¹³³ See CSI Fact Sheet, *supra* note 36.

¹³⁴ See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES A1, Mar. 10, 2006.

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 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. If the agreements are truly voluntary (a view that can be questioned, as discussed above), 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.¹³⁵ Thus, the argument goes, any cession of sovereignty or greater assertion of U.S. jurisdiction is consensual and non-problematic.

From a non-multilateral 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” (SOFA) agreements 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 foreign nations to enable the establishment of U.S. military bases in those foreign countries.¹³⁶ The establishment of these

¹³⁵ See Dunoff & Trachtman, *supra* note 118, at 13-14.

¹³⁶ See Brig. Gen. 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*,

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.¹³⁷ 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 War era. 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.¹³⁸ 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. 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.

Of course, the express agreement justification for U.S. cargo security programs can be

26 A.F. L. REV. 21, 21-22 (1987); SIMON W. DUKE & WOLFGANG KRIEGER, U.S. MILITARY FORCES IN EUROPE: THE EARLY YEARS, 1945-1970 90-94 (1993); Jaime M. Gher, *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 (2002) (generally discussing NATO SOFA and U.S.-Japan SOFA); Steven G. Hemmert, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 217-220 (1999) (discussing NATO SOFA).

¹³⁷ See Teagarden, *supra* note 136, at 21-22; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 115, at §§ 499-509, 549-551; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 349-368 (5th ed. 1998).

¹³⁸ Michael T. Klare & Daniel Volman, *Africa's Oil and American National Security*, CURRENT HIST. 226, 231 (May 2004).

countered by the contract of adhesion concerns discussed above. The United States will be the dominant actor in many bilateral cargo security agreements, 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.¹³⁹ 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.¹⁴⁰ The United States might appreciate its foreign trading partners’ concerns with these programs and in some cases might even seek to address them, 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

¹³⁹ See Jau, *supra* note 1.

¹⁴⁰ U.S. DEP’T OF COMMERCE, CENSUS BUREAU, BUREAU OF ECONOMIC ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES, ANNUAL REVISION FOR 2004 1 (2005), *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 (goods and services)).

justification or 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.

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.

The United States has long claimed broad extraterritorial jurisdiction through its export control laws.¹⁴¹ 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. content.¹⁴² Thus, the United States claims extraterritorial jurisdiction over

¹⁴¹ See Bowman, *supra* note 12, at 319; DOUGLAS E. ROSENTHAL & WILLIAM M. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY 53-55 (1982).

¹⁴² See Bowman, *supra* note 12, at 333-336. 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 zero percent U.S. content by value. See *id.*

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 to the United States or U.S. commerce.

One justification that has been advanced for such expansive jurisdictional claims is that foreign parties dealing in items of U.S. origin or content implicitly have agreed to U.S. extraterritorial jurisdiction over these items.¹⁴³ Stated differently, extraterritorial U.S. jurisdiction could be seen as having been implicitly consented to *after the fact*, due to the U.S.

¹⁴³ See 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, 478-481 (1981) (discussing the possibility of implicit consent to U.S. export control law as a justification for extraterritorial jurisdiction); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1317-1318 (1985) (characterizing the implicit claim that jurisdiction follows the good as "preposterous"); 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 (1986); ROSENTHAL & KNIGHTON, *supra* note 141, 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, 360-361 (1984). 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, 50 U.S.C. §§ 2401-2420, were structured as a general *ban* on exports unless an express U.S. government license was granted for the export. In 1995, 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 Dep't of Commerce, Bureau of Export Administration, Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. 12714 (Mar. 25, 1996) (interim rule) (stating that "[n]o 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 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 also Marcuss & Richards, *supra*.

This distinction is in fact 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 61 Fed. Reg. 12714. 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 U.S. 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.

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 is certainly a creative argument, but it is fundamentally flawed in the export context, as other observers have noted.¹⁴⁴ 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. Such a justification seems forced at best and disingenuous at worst.

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 á vis other participants in the import supply chain. 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

¹⁴⁴ See *supra* note 143.

to decline to be bound and experience import delays or loss of business. This may not be a choice between equally attractive options, but it is, strictly speaking, a choice. Provided that participation rules are applied objectively and non-discriminatorily, these programs should be able to withstand any claims that they are restrictive trade barriers in violation of WTO rules.¹⁴⁵

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.

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.

¹⁴⁵ See RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 537-538 (2005); Barry Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1208-1209 (1987).

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. 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. 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, 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.

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 nations 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 foregoing importation to 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. While 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 inception—the United States has placed customs personnel abroad, but to date few nations have reciprocally stationed their

customs personnel in the United States.¹⁴⁶ Similarly, C-TPAT has extended U.S. influence over foreign supply chains inbound to the United States, but to date there has been little overt foreign influence over U.S. outbound supply chain security.¹⁴⁷ 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.¹⁴⁸

Thus, as discussed previously, the United States' current efforts 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.¹⁴⁹ This approach is entirely consistent with the defensive rhetoric of these programs and their focus on U.S. national security.

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

¹⁴⁶ *See supra* Part III.A.

¹⁴⁷ *See supra* Part III.D.

¹⁴⁸ *See supra* Parts III.B, III.C, & III.E.

¹⁴⁹ BOGGS, *supra* note 86, at 22.

entities that expand their power and control into new areas over which they previously had little or no influence. Such new spheres can be physical ones, 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 protection efforts in the 1960s and 1970s). 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.¹⁵⁰ 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.

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 United States' assertion of greater control over inbound cargo security matters now more closely matches its longstanding extraterritorial claims of control and jurisdiction over outbound cargo.¹⁵¹

B. Long-Term Effects

The short-term effect of current U.S. efforts to “push the border outward” is 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

¹⁵⁰ See, e.g., JERRY EVERARD, *VIRTUAL STATES: THE INTERNET AND THE BOUNDARIES OF THE NATION-STATE* xviii, 5-9 (2000) (discussing various facets or spheres of state activity).

¹⁵¹ See Carter, *supra* note 145, at 1208-1209 (noting the traditional imbalance in extraterritoriality between U.S. customs laws and export control laws).

programs falters, then the long-term prognosis may well look like an extension of the short-term, unilateral nature of these programs. If multilateral support for and participation in CSI, C-TPAT and related cargo security programs continues, however, the long-term effects promise to be quite different.

1. Increased Harmonization of Global Cargo Security Measures and Reduced Cargo Security Transactions Costs

First, if multilateral support and participation continues, 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, the adoption of common standards for cargo security would increase inter-jurisdictional transparency for cargo security requirements and reduce transactions costs pertaining to cargo security. This would occur 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 non-harmonized rules to a single, generally harmonized set of rules. This 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, since 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.¹⁵² 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.¹⁵³

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

¹⁵² 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.

¹⁵³ 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, 526-527 (1995) (noting uncertainty created by inconsistent state commercial laws).

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.¹⁵⁴ 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 developed by the Brussels-based Customs Cooperation Council and already in use by most U.S. trading partners.¹⁵⁵ Similar harmonization has occurred with respect to the U.S. export classification scheme (internationally harmonized scheme adopted in 1995),¹⁵⁶ as well as antidumping and countervailing duty laws, which are to an extent internationally harmonized through WTO auspices.¹⁵⁷ In addition, the United States and many of its trading partners have reached agreements on a consensual basis on related matters such as proliferation control measures to be implemented voluntarily into participating nation’s domestic laws.¹⁵⁸ Such voluntary harmonization can be expected to reduce some of the transactions 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.

¹⁵⁴ FOLSOM *ET AL.*, *supra* note 10, at 291.

¹⁵⁵ *Id.*

¹⁵⁶ See Dep’t of Commerce, Bureau of Export Administration, Export Administration Regulation; Simplification of Export Administration Regulations, 61 Fed. Reg. 12714 (Mar. 25, 1996) (interim rule).

¹⁵⁷ FOLSOM *ET AL.*, *supra* note 10, at 363, 399.

¹⁵⁸ See Bowman, *supra* note 12, at 345-347.

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 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 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.¹⁵⁹

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 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 transactions 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 is the case 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

¹⁵⁹ See, e.g., Richard Rosecrance, *The Rise of the Virtual State*, 75 FOR. AFF. 45 (1996); EVERARD, *supra* note 150, at 3.

from abroad.

If international cargo security measures were to influence or apply to wholly domestic shipments, however, this would change. It would be, in short, a raising of the transactions-cost bar in domestic transactions. The overall impact, then, would be a simultaneous lowering of transactions costs in international cargo shipments (due to harmonization) and a raising of transactions costs in domestic shipments (due to new requirements). In the short term this 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, this might mean they would be more prepared for the entry into international trade, if they so choose. 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 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 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, however, the story is one of improvements in technology or simplifications to governmental regulations flattening the competitive field or reducing transactions cost barriers to entry.¹⁶⁰ In the case of cargo security, however, domestic actors could be faced with additional regulatory requirements for cargo security—and yet paradoxically, the long-term effect of multilateralization of cargo security measures might be to promote international trade, irrespective of the additional transactions costs that these measures

¹⁶⁰ See *supra* text accompanying notes 155-159 (regarding harmonization of customs laws); see also Anne Hubbard, *Initiatives Promote Paperless Environment*, U.S. CUSTOMS TODAY (Jan. 2002), available at http://www.cbp.gov/xp/CustomsToday/2002/January/custoday_ia.xml; Governance, Finance and Trade Division, East and Central Asia Development Bank, Working Paper No. 1: Harmonization and Simplification of Customs Documentation and Procedures (Oct. 2003) (noting already-existent harmonization of customs procedures and documentation among Asian nations and EU member states), available at http://www.adb.org/Documents/Events/2003/CCC/Second_Mtg/wp_01.pdf; Sub-Committee on Customs Procedures, Asia-Pacific Economic Cooperation Forum, *Toward One Community: Meet the Challenge, Make the Change* (Nov. 2005) (discussing simplification and harmonization of APEC member customs procedures), available at http://www.apec.org/apec/apec_groups/committees/committee_on_trade/sub-committee_on_customs.html. In addition, see THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (discussing technological advances allowing smaller entities to participate in international business activities).

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. 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. These forward deployment measures, however, have raised concerns over infringement on the sovereignty and jurisdiction of U.S. trading partners. 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 has lent support to the programs’ legitimacy. As discussed, however, it is possible that multilateral support for these

programs could falter. In the absence of 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 let the resulting integration and harmonization make its positive mark on the patterns of global trade.