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ARTICLES

Terror on the High Seas

THE TRADE AND DEVELOPMENT IMPLICATIONS OF U.S. NATIONAL SECURITY MEASURES

Marjorie Florestal[†]

I. INTRODUCTION

It really boggles my mind that there could be 40,000 nuclear weapons, or maybe 80,000, in the former Soviet Union, poorly controlled and poorly stored, and that the world isn't in a near state of hysteria about the danger.

—Howard Baker, U.S. Ambassador to Japan¹

[†] Marjorie Florestal is an Assistant Professor of Law at the University of the Pacific, McGeorge School of Law (B.A., J.D. New York University). The author expresses deep appreciation to the colleagues and friends who sat through numerous discussions on what they once considered an obscure topic. In particular, heartfelt appreciation to Raj Bhala, Andrea Bjorklund, and Peggy McGuinness for insightful comments on an earlier draft of this work; Ruth Jones, Thom Main, Greg Pingree, Kojo Yelapaala, and participants in the McGeorge faculty works in progress helped the author shape these ideas, and the able intervention of some wonderful research assistants was critically important to the success of this work—particular thanks to Antonia Badway who shepherded this project through its very early stages. Lee Sheldon subsequently took up the mantle with assistance from Nicole Sargent and Lindsey Read. This article was supported by a McGeorge Summer Research Fund.

¹ Testimony of Howard Baker before the Senate Foreign Relations Committee, *quoted in* Graham Allison, *Fighting Terrorism – By Invitation – Could Worse Be Yet to Come?*, *ECONOMIST*, Nov. 1, 2001, *available at* http://www.economist.com/world/na/displayStory.cfm?Story_ID=842483. In fact the world—and certainly the United States—is very concerned with the possible implications. U.N. Resolution 1540 “[a]ffirm[s] that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security” and goes on to prohibit states in aiding or abetting non-state actors from acquiring such weapons. S.C. Res. 1540 ¶ 1, U.N. Doc. S/RES/1540 (April 28, 2004) [hereinafter Resolution 1540]. The resolution also directs states to establish effective domestic controls to prevent the proliferation of nuclear weapons or weapons of mass destruction. *Id.* In addition, in 2003, President Bush announced the establishment of the Proliferation Security Initiative (“PSI”), which would seek international

Shipping containers are the new frontline in the War on Terror. Before September 11, 2001, the innocuous forty by eighty foot steel structures were seen as nothing more than floating boxes meant to transport goods from country of production to country of consumption.² If Americans gave any thought to the millions of containers that find their way to U.S. shores each year, at best, they imagined that within their narrow, windowless confines were several tons of used clothes bound for the Dominican Republic, or perhaps toys imported from China. Few would have considered, even for a moment, the possibility that a shipping container could house an Al-Qaeda terrorist. But only one month after the September 11 attacks, Italian officials intercepted Rizik Amid Farid, an Egyptian national and reputed Al-Qaeda member, in a container bound for Canada.³ Farid carried with him a Canadian passport, along with several airport security passes, and an aircraft mechanic certificate that allowed him entry into sensitive areas in New York's John F. Kennedy Airport, as well as Newark International, Los Angeles International and Chicago-O'Hare.⁴

agreements allowing the United States and its allies to interdict planes and ships suspected of transporting nuclear cargo or weapons of mass destruction. ARMS CONTROL ASS'N, THE PROLIFERATION SECURITY INITIATIVE (PSI) AT A GLANCE (Sept. 2005), <http://www.armscontrol.org/factsheets/PSI.asp>. For a description of the initiative and its impact in Asia, see Mark J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (Int'l Inst. for Strategic Studies, Adelphi Paper No. 376, 2005).

² Containers come in lengths of ten, twenty, thirty, and forty feet long by eight feet wide, but the most common containers are the twenty- and forty-foot varieties. Construction-Guide.com, Matthew Bendert, Cargo Containers, <http://www.construction-guide.com/cargo-containers.htm> (last visited Oct. 31, 2006).

³ PHILLIPE CRIST, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SECURITY IN MARITIME TRANSPORT: RISK FACTORS AND ECONOMIC IMPACT 8-9 (2003), available at <http://www.oecd.org/dataoecd/63/13/4375896.pdf> [hereinafter OECD REPORT]. See also Andrea Felsted & Mark Odell, *Al-Qaeda: After Afghanistan; Agencies Fear Extent of Al-Qaeda's Sea Network*, FIN. TIMES, Feb. 21, 2002, available at <http://specials.ft.com/attackonterrorism/FT3U47PPYXC.html>. Lawyers for Rizik Amid Farid deny that he was ever part of any terrorist organization, claiming that he stowed away in a shipping container because "he had personal problems in Egypt that made him flee that country." *Egyptian Stowaway Had Canadian Passport*, CBC NEWS, Oct. 26, 2001, http://www.cbc.ca/canada/story/2001/10/25/stowaway_farid011025.html. When released from an Italian prison, Farid disappeared. OECD REPORT, *supra*, at 8. See also Robert C. Bonner, U.S. Customs Comm'r, Speech Before the Center for Strategic and International Studies (CSIS), Washington, D.C. (Jan. 17, 2002), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/jan172002.xml [hereinafter Bonner Jan. 2002].

⁴ OECD REPORT, *supra* note 3, at 7. See also Felsted & Odell, *supra* note 3.

How could the enemy so easily infiltrate the most important link in the global trade supply chain?⁵ Experts believe without the intermodal shipping container—standard-sized steel boxes that can be hoisted onto a ship as a single unit and transported by sea, rail, and truck—globalization would not have been possible.⁶ Before the invention of the shipping container, goods were individually loaded onto a ship piece by piece in “break bulk,” an expensive process that often took days to complete and subjected goods to theft or breakage.⁷ “Containerization” did for maritime shipping what Henry Ford’s assembly line did for the automobile manufacturing industry, largely automating the loading and unloading process, thus making the system faster, more efficient, and cost effective.⁸ But the very attributes of “the box”—its speed, efficiency, and above all its anonymity—are what allowed Farid

⁵ The “enemy” has long infiltrated the maritime transportation industry. Since Captain Blackbeard roamed the Caribbean Sea striking fear in the hearts of sailors and merchants alike, maritime trade has had a long and colorful history of criminal activity. For a discussion of Blackbeard’s exploits, see generally JEAN DAY, BLACKBEARD, TERROR OF THE SEAS (1997). While current threats to the international trade supply chain go far beyond piracy, the profession is not dead. See generally INT’L CHAMBER OF COMMERCE, INT’L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, 2005 ANNUAL REPORT (2006). Most recently, passengers on a cruise ship bound for Mombassa, Kenya found themselves in the midst of an all-out pirate attack. *Cruise Ship Repels Somali Pirates*, BBC NEWS, INT’L VERSION, Nov. 5, 2005, <http://news.bbc.co.uk/2/hi/africa/4409662.stm>. In 2003, The International Maritime Bureau Piracy Reporting Centre, a non-governmental organization under the auspices of the International Chamber of Commerce, reported that 445 ships were attacked by pirates. See PIRACY AND ARMED ROBBERY AGAINST SHIPS, *supra*, at 5. The Malacca Strait and the area around Sumatra and Indonesia pose the greatest risks of piratical attacks. See Paul Dillon, *Did Tsunamis Ruin Pirates of Sumatra?*, GLOBE AND MAIL, Jan. 25, 2005, at A1. Of the 100,000 ships that sail through those waters carrying half of the world’s oil supplies and one-third of all its cargo, 149 were subjected to pirate attacks in 2003. See PIRACY AND ARMED ROBBERY AGAINST SHIPS, *supra*, at 5. Perhaps the only bright spot from the devastating 2004 Tsunami in Asia was the short-lived respite in pirate attacks in the region. See Dillon, *supra*, at A1.

⁶ For a history of containers and their impact on world trade, see generally MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER (2006); see also Ron Adner, *High Technology and Strategy Project: Containers – Revolutionizing Global Transport*, June 9, 2002, at 16, available at <http://faculty.insead.fr/adner/PREVIOUS/Projects%20May/Container%20Project.pdf>.

⁷ 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, 347 (2002) (citing MARK L. CHADWIN ET AL., OCEAN CONTAINER TRANSPORTATION 1 (1990)).

⁸ Malcolm McLean is credited with inventing the containerization process in 1956. See Mellor, *supra* note 7, at 347-48. See also *All Things Considered: Shipping Containers in Seattle* (NPR radio broadcast May 15, 2001), available at <http://www.npr.org/templates/story/story.php?storyId=1122981>. Despite the impact of his invention, McLean died in relative obscurity. See Barry Rascovar, *Shipping Pioneer Largely Ignored*, BALTIMORE SUN, June 14, 2001, at 23A.

to bypass security safeguards. Those same characteristics have made shipping containers the new frontline in the War on Terror.

Over 90% of world trade moves by container.⁹ But only about 2% of the nearly nine million containers entering the United States each year are ever inspected.¹⁰ For the most part, U.S. Customs and Border Protection (“Customs”)—the agency charged with protecting the nation’s land and sea borders—has no firsthand knowledge of what is being transported in those containers.¹¹ It must rely on the unverified information shippers provide in their cargo manifest documents.¹² This largely self-regulated system has seen a number of security breaches: In 1999, the Interagency Commission on Crime and Security in U.S. Seaports reported that containers have been used to smuggle into the United States everything from drugs to illegal arms and munitions to undocumented workers.¹³ More recently, scientist Abdul Qadeer Khan, the father of Pakistan’s atomic bomb, confessed to smuggling nuclear equipment and technology to Libya, Iran and North Korea in a smuggling network that spanned fifteen

⁹ Press Release, U.S. Dep’t of Homeland Sec., *U.S. Customs and Border Protection Fact Sheet* (Mar. 29, 2006) at 2, available at http://www.cbp.gov/linkhandler/cgov/border_security/international_activities/csi/csi_fact_sheet.ctt/csi_fact_sheet.doc [hereinafter CSI Fact Sheet]. See also Bonner Jan. 2002, *supra* note 3.

¹⁰ Bonner Jan. 2002, *supra* note 3. See also, OECD REPORT *supra* note 3, at 7. The amount of container traffic to the United States is expected to more than double over the next two decades. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 101, 116 Stat. 2064, 2066 (2002).

¹¹ The U.S. Customs and Border Protection agency is far more comprehensive than the former U.S. Customs Service. As a result of the World Trade Center attacks, on March 1, 2003, all immigration inspectors, agricultural inspectors, and the border patrol merged to form one agency, under the Department of Homeland Security, with exclusive authority to patrol and manage U.S. borders. See Robert C. Bonner, U.S. Customs Comm’r, Remarks of Commissioner Robert C. Bonner: 2003 Liner CEO Forum (Apr. 1, 2003), available at http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2003/apr01003.xml [hereinafter Bonner 2003].

¹² See Bonner Jan. 2002, *supra* note 3.

¹³ The Interagency Commission on Crime and Security in U.S. Seaports concluded that drug smuggling was the most prevalent reported crime, with the twelve seaports participating in the study reporting that between 1996-1998, narcotics seized constituted 69% of total weight of cocaine, 55% of marijuana, and 12% of heroin. The smuggling of illegal aliens was the second-most prevalent problem, with the twelve participating seaports reporting 1187 stowaways and 247 individuals with fraudulent documents arriving aboard vessels between 1996 and 1999 alone. Finally, cargo theft—often conducted by organized crime figures—was identified as the third-most prevalent problem, accounting for between \$6 billion and \$12 billion of direct losses annually. S. Comm. on Commerce, Science and Transportation, Port and Maritime Security Act of 2001, S. 1214, 107th Cong. (2002); S. REP. NO. 107-64, at 5 (2001) [hereinafter Port and Maritime Security Act].

years.¹⁴ Khan purportedly shipped all of his nuclear materials inside containers.¹⁵

The seemingly obvious solution to the security risk posed by shipping containers is to increase the number of inspections. Why not inspect 100% of the containers arriving in the United States? If Customs was to adopt such a policy, the supply chain¹⁶ would grind to a halt, trailing global economic catastrophe in its wake.¹⁷ In a “just-in-time” world—where businesses purchase and accept delivery of products as needed rather than buying them in advance and incurring expensive warehousing and other storage costs—the slightest delay in the delivery of goods leads to significant economic loss.¹⁸ In 2002, a

¹⁴ In a televised confession, Khan admitted selling nuclear material and begged for clemency. *Profile: Abdul Qadeer Khan*, BBC NEWS, INT'L EDITION, Feb. 20, 2004, http://news.bbc.co.uk/1/hi/world/south_asia/3343621.stm. See also Global Security, *Weapons of Mass Destruction: A.Q. Khan*, <http://www.globalsecurity.org/wmd/world/pakistan/khan.htm> (last visited Jan. 9, 2006).

¹⁵ Christian Caryl, *The Box Is King*, NEWSWEEK INT'L, Apr. 10 2006 (citing former U.S. State Department official David Asher), available at <http://www.msnbc.msn.com/id/12112804/site/newsweek>. Examples such as Farid and Khan are only the tip of the iceberg. In recent years, terrorist organizations have begun to use the maritime industry in novel and sophisticated ways to advance their objectives. A number of terrorist groups are reported to own maritime fleets that conduct both legitimate and shadowy activities to generate profits. The Liberation Tigers of Tamile Eelam (LTTE), a guerilla force at war with the Sri Lankan government since the 1980s, is perhaps the most engaged in the shipping industry, with a profitable fleet estimated at ten to twelve freighters. See OECD REPORT, *supra* note 3, at 14. Al Qaeda also owns or controls a fleet of fifteen cargo vessels. See John Mintz, *15 Freighters Believed to Be Linked to Al Qaeda*, WASH. POST, Dec. 31, 2002, at A1.

¹⁶ A “supply chain” generally is defined as a network of retailers, distributors, transporters, storage facilities, and suppliers that participate in the sale, delivery, and production of a particular product. See Supply-Chain Council, Supply-Chain.Org: FAQ, http://www.supply-chain.org/cs/root/about_us/faq (last visited Jan. 9, 2006).

¹⁷ In addition to the costs imposed by 100% inspection, some experts argue that it would amount to no more than a waste of time and effort. See Alane Kochems & James Jay Carafano, *One Hundred Percent Cargo Scanning and Cargo Seals: Wasteful and Unproductive Proposals*, The Heritage Foundation (May 5, 2006), <http://www.heritage.org/Research/HomelandDefense/wm1064.cfm> (noting that “[i]nspecting every container that is shipped to the U.S. makes no sense. Doing so would cost billions of dollars and drown authorities in useless information. Moreover, it is not clear why every container would require inspection. The ‘nuke-in-a-box’ scenarios deployed to justify such drastic measures are highly implausible.”). Despite that, CBP appears to be moving towards a 100% inspection model. As a result of the Security and Accountability for Every Port Act, signed into law October 13, 2006, CBP has directed additional resources to the nation’s busiest port—Los Angeles-Long Beach—to ensure that by January 2007, 100% of container traffic exiting the port by truck and rail will be screened for nuclear and radiological materials. Press Release, U.S. Customs and Border Protection, SAFE Ports LA/Long Beach Style: CBP Shows Off High-Tech Equipment to Detect Radiological Weapons (Nov. 2, 2006), http://www.cbp.gov/xp/cgov/newsroom/news_releases/112006/11022006.xml (statement of Commissioner W. Ralph Basham).

¹⁸ The U.S. automobile industry is a case in point. After the borders reopened within just days of the September 11 attacks, the backlog of container traffic was so

ten-day strike by West Coast area dock workers was estimated to cost the U.S. economy as much as \$1 billion a day,¹⁹ ultimately leading the President to invoke federal authority to order strikers back to work.²⁰ And a mere two-day delay in shipments after the September 11 attacks nearly crippled the U.S. automobile industry.²¹ Moreover, merely increasing the number of inspections would not lead to greater security. Without sufficient information to target specific containers, Customs would be searching for the proverbial needle-in-the-haystack—at great economic cost.

But if September 11 revealed the tragic gaps in airport security, when those two airplanes hit the World Trade Center it also forced Customs officials to acknowledge holes in the maritime trade security infrastructure. If a shipping container could house an Al Qaeda operative, could it also hold a “dirty bomb”?²² Could a terrorist stow a nuclear device in a container, ship it to one of the nation’s busiest ports, and then detonate that device by remote control upon arrival? The “nuke-in-a-box” scenario, which would have seemed far-fetched before September 11, now drives U.S. container security policy. Just four months after the attacks, Customs adopted the controversial Container Security Initiative (“CSI”), describing it in this way:

severe that it caused enormous delays in auto-parts shipments from Canada and Mexico, which in turn jeopardized the industry’s financial position and threatened to lead to plant closings and massive layoffs. *See* Bonner Jan. 2002, *supra* note 3. As the war on terrorism heats up, U.S. companies are purchasing products further in advance of what is needed (just-in-case inventory). One expert estimates the increased inventory holding could add \$50 to \$80 billion in U.S. costs and wipe away approximately half of the productivity gains the U.S. has achieved in the past ten years. OECD REPORT, *supra* note 3, at 18 (citing Donald Bowserbox & David Closs, *Supply Chain Sustainability and Cost in the New War Economy*, TRAFFIC WORLD, Apr. 1, 2002).

¹⁹ Press Release, White House, President Takes Action to Protect America’s Economy and Jobs (Oct. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021007-3.html>. *See also* U.S. Won’t Cite Either Side in Dock Dispute, N.Y. TIMES, Nov. 14, 2002, at A31. Underscoring the difficulty of quantifying economic losses in the maritime industry, the figures on losses generated by the West Coast strike vary widely. Some experts discount the \$1 billion a day figure and peg losses at less than \$500 million per day for the total ten-day lock-out period. *See* Patrick L. Anderson, *Lost Earning Due to the West Coast Port Shutdown: Preliminary Estimate 1* (Anderson Econ. Group LLC, Working Paper No. 2002-10, 2002).

²⁰ David E. Sanger, *President Invokes Taft-Hartley Act to Open 29 Ports*, N.Y. TIMES, Oct. 9, 2002, at A1.

²¹ Bonner Jan. 2002, *supra* note 3. Ironically, after the September 11 attacks, only a few critical ports were closed in the New York area and the general container trade was not significantly impacted. OECD REPORT, *supra* note 3, at 4.

²² A “dirty bomb” is one “made of nuclear materials wrapped around conventional explosives.” Felsted & Odell, *supra* note 3.

Imagine if a weapon of mass destruction sitting in a container within the sea cargo environment were detonated. This program helps keep that from happening.²³

Designed to “extend the zone of security outward,” CSI’s central premise is that American seaports and borders must become the last line of defense and not the first.²⁴ In short, by the time a nuclear device hidden in a shipping container laden with Chinese footwear finds its way into a U.S. port, it is already too late. CSI is meant to prevent just such an occurrence.²⁵ Rather than waiting until the container arrives in the United States, CSI shifts security and screening activities to the border of the exporting country. With the host

²³ Slide Presentation, CSI, U.S. Customs and Border Protection, Response to Terrorism, http://www.cbp.gov/linkhandler/cgov/border_security/international_activities/csi/csirev_1002.ctt/standard_current_generic_csi.ppt [hereinafter Slide Presentation].

²⁴ Press Release, Dep’t of Homeland Sec., Remarks of Tom Ridge at the Port of Newark, New Jersey (June 12, 2003), available at <http://www.dhs.gov/dhpublic/display?content=960> [hereinafter Ridge].

²⁵ CSI was not the only security measure to be adopted post-September 11. To protect America’s ports, ships and cargo, the United States adopted a “layered” security system featuring a separate but related latticework of over twenty-five laws, regulations and initiatives, including both voluntary and mandatory measures, and affecting both domestic and international participants. DEP’T OF HOMELAND SEC., SECURE SEAS, OPEN PORTS: KEEPING OUR WATERS SAFE, SECURE AND OPEN FOR BUSINESS 3-4 (June 21, 2004), available at <http://www.dhs.gov/xlibrary/assets/DHSPortSecurityFactSheet-062104.pdf>.

Figure 1: Layers of Port and Maritime Security – Post-September 11

Overseas	
24-hr Advance Manifest	Container Security Initiative
Customs-Trade Partnership Against Terrorism	ISPS Code
International Port Security Program	Operation Safe Commerce
In Transit	
Smart Box Initiative	Ship Security Alert System
Automated Targeting System	96-Hour Advance Notice of Arrival
On U.S. Shores	
National Targeting Center	Intelligence Fusion Centers
Security Boardings	Operation Port Shield
Automatic Identification System	MTSA
Security Committees	Port Security Assessment Program
Port Security Grants	NII Technology
Rad., Chem., Bio. Screening	Maritime Safety and Security Teams
Operation Drydock	Transportation Workers Identity Card
America’s Waterway Watch	

government's permission,²⁶ Customs agents are posted in the foreign port where they inspect "high risk" containers bound for the United States before they ever leave the foreign port.²⁷

In principle, CSI began as no more than a voluntary program by which Customs, through a series of bilateral agreements, obtains authorization from some of the United States' top trading partners to deploy personnel abroad in order to prevent a catastrophe at home.²⁸ But in practice, CSI is a "hidden revolution"²⁹ that has radically altered the way international maritime trade is conducted, and it has transformed the world trade system. The effect of CSI has been to favor some trading partners over others, creating clear winners and losers. Opting to implement the program in three

²⁶ Bonner Jan. 2002, *supra* note 3. CSI teams are not legally authorized, however, to inspect containers on their own but must seek permission from the host government to inspect any shipments. If permission is not granted, the shipment is sent to the United States without inspection, although CSI teams are required to place a domestic hold on the shipment, so that it will be inspected upon arrival at its U.S. destination. A recent report by the Government Accountability Office has found that, in at least a few instances, some containers which CSI teams had labeled "high-risk" but which host government officials had not permitted to be inspected in-country were also not inspected upon arrival in the United States. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-466T, HOMELAND SECURITY: KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED 4 (May 26, 2005), available at <http://www.gao.gov/new.items/d05466t.pdf> [hereinafter GAO REPORT, May 2005] (statement of Richard M. Stana, Director, Homeland Security and Justice Issues).

²⁷ In a reciprocal program, CSI authorizes participating countries to post their own officials at U.S. borders. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-770, CONTAINER SECURITY: EXPANSION OF KEY CUSTOMS PROGRAMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS 10 n.10 (July 2003), available at <http://www.gao.gov/new.items/d03770.pdf> [hereinafter GAO REPORT 2003]. Canada and Japan have posted officials to the United States. *Id.* While CSI's critical innovation is that it moves inspection of high-risk containers to a much earlier point in the overall process, the program incorporates three additional components: (1) Establish security criteria to identify those containers that are considered "high-risk"; (2) Use non-intrusive equipment such as radiation, gamma, and x-rays to quickly pre-screen high-risk containers; and (3) Develop secure and "smart" devices that could detect any tampering with the container that might have occurred en route. Bonner Jan. 2002, *supra* note 3.

²⁸ While CSI began as an initiative of Customs—taken under its own authority—on October 13, 2006, President Bush signed into law The Port Security Improvement Act of 2006, which codified the program. The move toward codification appeared to be an effort on the part of Congress to actively manage the port security issue. Jeff Berman, *Bush Signs Off on New Port-Security Legislation*, LOGISTICS MGMT., Oct. 1, 2006, available at <http://www.logisticsmgmt.com/article/CA6382237.html?stt=000&pubdate=10%2F01%2F2006> ("As certain programs like . . . CSI go toward increasing cooperation between the government and shippers, we make them a product of statutory authority, as opposed to just a program of the administrations. . . . We put the imprimatur of the Congress on it" (quoting Rep. Dan Lungren)).

²⁹ Caryl, *supra* note 15 (quoting Former Coast Guard Captain, Stephen Flynn).

stages,³⁰ Customs initially excluded from CSI membership all but the top twenty “megaports”—those ports that send the largest volume of container traffic to the United States.³¹ In Phase II of the project, ports of political or strategic significance are permitted membership in CSI provided they meet certain criteria.³² Only in Phase III will ports that require

³⁰ Bonner 2003, *supra* note 11.

³¹ The top twenty megaports account for over 70% of the maritime container traffic to the United States. Robert C. Bonner, U.S. Customs Comm’r, Remarks of U.S. Customs Comm’r Robert C. Bonner: Center for Strategic and International Studies (Aug. 26, 2002), *available at* http://www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2002/aug262002.xml [hereinafter Bonner Aug. 2002]. By June 2003, nineteen of the top twenty ports had agreed to implement CSI, and CBP Commissioner Bonner along with Secretary of Homeland Security Tom Ridge were able to announce Phase II of CSI. Press Release, U.S. Customs and Border Protection, Secretary Ridge Announces Security Initiatives Phase II (June 12, 2003), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/cbp_press_releases/062003/06122003_2.xml.

Currently, there are fifty-one operational CSI ports throughout the world:

Africa (1):

South Africa (1).

Asia (17):

Singapore (1), Japan (4), Hong Kong (1), South Korea (1), Malaysia (2), Thailand (1), UAE (1), China (4), Sri Lanka (1), Oman (1).

Europe (24):

The Netherlands (1), Germany (2), Belgium (2), France (2), Sweden (2), Italy (5), United Kingdom (5), Greece (1). Spain (3), Portugal (1).

The Americas (9):

Canada (3), Brazil (1), Argentina (1), Honduras (1), The Dominican Republic (1), Jamaica (1), The Bahamas (1).

Ports in CSI – CBP.gov, Currently Operational Ports (Sept. 28, 2006), *available at* http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml [hereinafter Ports in CSI].

³² To participate in CSI a candidate nation must commit to the following minimum standards:

The Customs Administration must be able to inspect cargo originating, transiting, exiting, or being transshipped through a country.

Non-intrusive inspectional (NII) equipment (including gamma or X-ray imaging capabilities) and traditional detection equipment must be available and utilized for conducting such inspections. The equipment is necessary in order to meet the objective of quickly screening containers without disrupting the flow of legitimate trade.

The seaport must have regular, direct, and substantial container traffic to ports in the United States.

Commit to establishing a risk management system to identify potentially high-risk containers, and automating that system. This system should

technical assistance and capacity building—those ports in developing countries—be considered for CSI membership.³³

Membership in CSI comes with tangible benefits, the most significant of which is the ability to move through Customs with little delay. Given these benefits, exporters are more likely to source from countries with CSI-certified ports. In fact, that appears to be a deliberate design of the program; Customs admits that “[i]n the event of a terrorist attack, the CSI ports would have a competitive advantage. They would be rewarded for their foresight.”³⁴

CSI’s “hidden revolution” has impacted the world, but the effect of the measure is perhaps more deeply felt at the margins. Given CSI’s staggered implementation schedule, along with the conditionalities imposed on membership, most developing countries become eligible to participate years after the program has been implemented in developed countries’ ports. Moreover, even if they are eligible, many of the poorer developing countries do not have the resources and technical know-how to implement CSI’s requirements (indeed, at least one *developed* country is finding implementation beyond its capacity).³⁵ The developing country perspective is virtually

include a mechanism for validating threat assessments and targeting decisions and identifying best practices.

Commit to sharing critical data, intelligence, and risk management information with the United States Customs service in order to do collaborative targeting, and developing an automated mechanism for these exchanges.

Conduct a thorough port assessment to ascertain vulnerable links in a port’s infrastructure and commit to resolving those vulnerabilities.

Commit to maintaining integrity programs to prevent lapses in employee integrity and to identify and combat breaches in integrity.

CSI Fact Sheet, *supra* note 9, at 3.

³³ While Phase III has not been officially announced, CBP has begun to incorporate some developing countries into the CSI program. As of September 2006, CSI was operational in ports in Kingston, Jamaica, Freeport, The Bahamas and Caucedo, the Dominican Republic. Ports in CSI, *supra* note 31. CSI also added ports in Buenos Aires, Argentina and Puerto Cortes, Honduras. *Id.*

³⁴ CSI Fact Sheet, *supra* note 9, at 4.

³⁵ Greece, a CSI participant, member of the European Union, and host of the 2004 Summer Olympics, did not have the requisite technology. In a departure from standard procedure, the United States supplied the necessary technology on loan. See GlobalSecurity.org, *Greece Signs Container Security Agreement with U.S.*, June 25, 2004, available at <http://www.globalsecurity.org/security/library/news/2004/06/sec-040625-usia01.htm> [hereinafter *Greece Signs Agreement*]. CSI requires that participating members have the requisite non-intrusive inspectional equipment (NII), including gamma and x-rays, in place. See also CSI Fact Sheet, *supra* note 9, at 3

ignored in the balance the United States has struck between protecting its borders and ensuring the efficacy of the maritime trade supply chain. For developing countries, exclusion from CSI creates a formidable non-tariff barrier to trade, further entrenchment of existing trading patterns that favor the rich, and greater marginalization of preference programs like the African Growth and Opportunity Act, all of which are likely to have severe consequences for their development agendas.

Beyond the impact on developing countries, CSI also poses a significant dilemma for the trading system. Terrorism is the single greatest threat facing the multilateral system in the twenty-first century, yet CSI's unilateral approach bypasses the multilateral system altogether. By opting for a "go it alone" strategy—working with just a few like-minded states—rather than seeking to build a broad-based coalition of countries to address the problem, the United States is effectively undermining multilateralism.³⁶ If the multilateral system is ineffective in dealing with the greatest challenge today, then its ultimate demise is inevitable. Given that the multilateral trading system has effectively advanced U.S. interests in a number of areas, undermining the system by choosing a unilateral approach ultimately jeopardizes U.S. interests.

In the face of terrorist threats, the idea that the United States would take measures to protect its ports and the maritime trade supply chain is not surprising, particularly given the importance of the system and the enormity of the crisis a successful attack would precipitate. The critical question, therefore, is not *should* the United States take action, but rather *how should* the United States implement such action so as to maximize protection of domestic security interests while minimizing potential economic harm to both the United States and its trading partners.

This article analyzes CSI and argues that the program's discriminatory and unilateral approach will ultimately prove detrimental to developing countries, U.S. security interests, and the multilateral trading system as a whole. Part II evaluates CSI within the context of U.S. international obligations, arguing that CSI violates the non-discrimination

("Does CBP provide X-ray or gamma ray detection technology to help scan containers? CSI implementation requires the host country to have NII equipment.")

³⁶ For a more detailed discussion of the unilateral/bilateral approach, see *infra*, section III.A.

requirement of GATT Article I, and it is not justified by the national security exception of GATT Article XXI because it fails to consider the impact on development. Part III concludes with a prescription for a more development-friendly measure that balances the need for domestic security with the development objectives of the trading system's most vulnerable members.

II. A UNILATERAL APPROACH TO A MULTILATERAL PROBLEM: CSI AND THE WORLD TRADE ORGANIZATION

It is by now cliché to assert that September 11, 2001 has changed the face of U.S. society. Confronted with the single greatest terrorist³⁷ catastrophe ever to hit American soil, the United States responded in ways that have had enduring effects both at home and abroad. Domestically, legislation like the USA Patriot Act³⁸ reversed long-cherished notions of the law's role in regulating government's interaction with the accused. A body of law that once championed the rights of criminal defendants has now given way to notions of "enemy combatants" and indefinite detentions without charge or access to legal counsel.³⁹ And internationally, the United States'

³⁷ Defining terrorism is a complex endeavor, and it has often been said that "one man's terrorist is another man's freedom fighter." Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, Institute for Counter-Terrorism (ICT), available at <http://www.ictconference.org/var/119/17070-Def%20Terrorism%20by%20Dr.%20Boaz%20Ganor.pdf>. U.S. law defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents." 22 U.S.C. § 2656f(d)(2) (2004 & Supp. 2006). But by that measure, the U.S. also labeled as "terrorism" efforts of the African National Congress (ANC) to liberate South Africa from the tyranny of a racist minority regime. From the Irish Republican Army to the Palestine Liberation Organization to the ANC, governments have long sought to delegitimize armed dissent, even in the face of popular support for the combatants or the "justness" of the liberation struggle. While coming to an accepted definition of terrorism is beyond the scope of this article, few would dispute that the perpetrators of September 11—targeting as they did unarmed, non-combatant civilians—engaged in acts of terrorism. For further discussion of the dangers inherent in defining terrorism, see Ganor, *supra* (noting that "[t]he statement, 'One man's terrorist is another man's freedom fighter,' has become not only a cliché, but also one of the most difficult obstacles in coping with terrorism. . . . In the struggle against terrorism, the problem of definition is a crucial element in the attempt to coordinate international collaboration, based on the currently accepted rules of traditional warfare.").

³⁸ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (codified in scattered sections of the U.S.C.), was passed one month after the World Trade Center attacks with little debate and by an overwhelming margin in both houses of Congress (Senate: 98-1; House: 357-66). See 147 CONG. REC. S11060 (2001); 147 CONG. REC. H7224 (2001).

³⁹ For a critique of U.S. domestic measures in the face of terrorism, see David D. Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV.

posture shifted from one focused on building strong international institutions to combat common problems to one championing pre-emptive war and shying away from institution-building for fear that those same institutions would be turned against American interests.⁴⁰ In short, in the aftermath of September 11, the U.S. worldview swung from multilateral cooperation to a go-it-alone strategy or at best a bilateral approach—a “coalition of the willing”—working with only a handful of like-minded states.

No aspect of U.S. foreign policy escaped this new approach. Even in the international trade arena, where multilateralism has brought decisive benefits to the American

C.R.-C.L. L. REV. 1, 2 (2003) (arguing that the United States has not learned the lessons of the McCarthy Era, and any decline in the traditional forms of repression are “more than offset” by the development of new ones).

⁴⁰ The United States’ position regarding the creation of the International Criminal Court (“ICC”) presents perhaps the starkest example of America’s move away from multilateralism and institution-building. From President Woodrow Wilson’s League of Nations to the post-World War II efforts of Roosevelt, Truman and Eisenhower to create the United Nations and the multinational economic institutions like the World Bank and the International Monetary Fund, the United States had been at the forefront of international institution-building. But with respect to the ICC, one Bush Administration official noted baldly, “[It] is an organization whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interests of the United States, and harmful to our presence abroad.” John R. Bolton, Under Sec’y for Arms Control and Int’l Sec., *The United States and the International Criminal Court*, Remarks to the Federalist Society (Nov. 14, 2002), available at <http://www.state.gov/t/us/rm/15158.htm>. Rather than championing the fledgling institution, the United States renounced its signature of the Rome Statute of the ICC and negotiated a number of bilateral agreements—so-called Article 98 agreements—whereby signatory states agreed not to submit U.S. citizens to the jurisdiction of the court. U.S. Communication to the United Nations (May 6, 2002), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>. For a discussion of these Article 98 agreements and their legal impact, see Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L L. REV. 1115 (2004).

Article 98 of the Rome Statute provides:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Rome Statute of the International Criminal Court art. 98, July 17, 1998, 2187 U.N.T.S. 90, available at http://www.un.org/law/icc/statute/99_corr/9.htm.

economy, the United States has acted unilaterally to combat the scourge of terrorism.⁴¹ CSI is illustrative of that general trend. The following section explores whether CSI conforms to U.S. obligations under the World Trade Organization. It first examines CSI in the context of Article I of the General Agreement on Tariffs and Trade (“GATT”). Maintaining that CSI likely violates Article I, the section goes on to determine whether the national security exception of GATT Article XXI provides a viable excuse for the derogation.

A. *Does CSI Violate Article I’s Most Favored Nation Obligation?*

When the United States proposed creation of the International Trade Organization, the still-born precursor to the GATT, the very idea that the world trade community could be ordered in a non-discriminatory fashion—that members would be bound by the same obligations and entitled to the same benefits—was the height of controversy.⁴² The history of trading relations up until 1946 was one in which advantages were bestowed or compelled through special relationships, economic duress, and even war.⁴³ The bold declaration of non-discrimination inherent in GATT Article I was a call to reinvent the status quo ante.⁴⁴ In this new world order,

⁴¹ In recent days, it appears the Bush Administration is re-thinking its “go it alone” strategy. See, e.g., David E. Sanger, *A Bush Alarm: Shun Isolation*, N.Y. TIMES, Mar. 13, 2006, at A1 (“The president who made pre-emption and going it alone the watchwords of his first term is quietly turning in a new direction, warning at every opportunity of the dangers of turning the nation inward and isolationist, and making the case for international engagement on issues from national security to global economics.”).

⁴² For a discussion of the negotiations on the ultimately unsuccessful International Trade Organization, see generally CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* (1949).

⁴³ See generally KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 42 (1970) (stating that “[t]he United States had made elimination of all preferences a major principle of its policy for post-war organization of world trade”).

⁴⁴ To be sure, Article I does not eliminate *all* discrimination recognizing as it does the preferential relationships between some countries and their former colonies. See, e.g., General Agreement on Tariffs and Trade art. I, sec. II, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47.pdf [hereinafter GATT] (allowing pre-existing preferences for *inter alia*, “two or more territories which . . . were connected by common sovereignty or relations of protection or suzerainty”). In addition, GATT-WTO law allows for a number of waivers of the MFN obligation, including a waiver to provide for “differential and more favourable treatment” to developing countries. *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203-05 (1980). Other waivers

preference-based trading relationships would give way to an all-for-one-and-one-for-all system of trading. Almost single-handedly,⁴⁵ the United States persuaded those nations represented in the GATT negotiations to adopt non-discrimination—or “most favored nation” treatment—as the cornerstone obligation of the new, rules-based system of trading.⁴⁶ While the United States was one of the earliest champions of non-discriminatory trading relationships,⁴⁷ the

of the MFN obligation can be found in GATT Article XXIV’s sanction of regional trading agreements—free trade areas and customs unions—which necessarily discriminate in favor of their members; and of course, the general exceptions of the GATT embodied in Articles XX and XXI constitute waivers of the MFN obligation.

⁴⁵ As early as 1941, before the end of World War II, Prime Minister Winston Churchill and President Franklin Roosevelt met secretly off the coast of Newfoundland to chart the course of the new world order. “There they jointly agreed that the principle of multilateralism would be the cornerstone of an emergent international economic system.” See Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time* 8 (Ctr. for Canadian Studies, Working Paper No. 62/00, 2000). British support for the ITO and the new order had been purchased by the large amount of economic support the Americans had pledged for post-war reconstruction. *Id.* Despite that, British support for the principle of MFN was lukewarm at best, as they sought American agreement that discrimination “of a defined and moderate degree in favour of a recognised political or geographical grouping of states would be permitted,” primarily to preserve “a moderate degree of Imperial Preference.” JOHN TOYE & RICHARD TOYE, *THE U.N. AND GLOBAL POLITICAL ECONOMY: TRADE, FINANCE AND DEVELOPMENT* 24 (2004) (internal quotation marks omitted).

For the other participants not beholden to American financing, the objections to MFN were particularly vociferous—and sometimes even amusing: The Russian delegation contended that MFN was “a device of the devil to ensnare and enslave small countries,” and the Latin American contingent eschewed MFN in favor of a preference-based system that self-consciously took into consideration the interests of developing countries:

[W]ealth and income . . . should be redistributed between the richer and the poor states. Upon the rich, obligations should be imposed; upon the poor, privileges should be conferred. The former should recognize it as their duty to export capital for the development of backward areas; the latter should not be expected . . . to insure the security of such capital, once it was obtained. The former should reduce barriers to imports; the latter should be left free to increase them. The former should sell manufactured goods below price ceilings; the latter should sell raw materials and food stuffs above price floors. Immediate requirements should be given precedence over long-run policies, development over reconstruction, and the interests of regionalism over world economy. Freedom of action, in the regulation of trade, must be preserved. The voluntary acceptance by all states, of equal obligations with respect to commercial policy must be rejected as an impairment of sovereignty and a means by which the strong would dominate the weak.

WILCOX, *supra* note 42, at 32.

⁴⁶ See DAM, *supra* note 43, at 42 (noting that “[t]he United States had made elimination of all preferences a major principle of its policy for the post-war organization of world trade.”).

⁴⁷ Over time, U.S. support for MFN has been somewhat mercurial. It has itself circumvented MFN’s precept, including its refusal in the 1950s to extend MFN

Container Security Initiative bestows on some WTO members certain advantages not afforded to others, thereby calling into question its conformity with Article I.⁴⁸

Article I:1 of the GATT provides in relevant part:

[W]ith respect to all rules and formalities in connection with importation and exportation, . . . *any advantage, favour, privilege or immunity* granted by any Member to any product originating in or destined for any other country *shall be accorded immediately and unconditionally to the like product* originating in or destined for the territories of all other Members.⁴⁹

The core obligation of Article I can be summed up in the idea that “membership has its privileges”; by virtue of its membership in the WTO, a country is entitled to receive the same treatment—or at least treatment “no less favorable”—for its imports as that received by other WTO members.⁵⁰ The prototypical example of the operation of most favored nation (“MFN”) treatment involves tariffs. Imagine this scenario: The United States, France and South Africa, all of whom are WTO members, are engaged in a series of protracted (and undoubtedly heated) negotiations over the tariff duty rate to be

treatment to communist countries. JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1997). But for a long time, preference programs that would discriminate in favor of developing countries came under considerable fire in U.S. trade circles. Such programs were seen as impermissible departures from the MFN principle. *See id.* *See also* ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993) [hereinafter HUDEC, *ENFORCING TRADE LAW*].

⁴⁸ While beyond the scope of this article, CSI may well violate other provisions of the WTO Agreement, including the Agreement on Technical Barriers to Trade. South Africa, before it was admitted to CSI, appeared to make such an argument. *See* Business Report, U.S. Customs, *U.S. Plan Could Hurt Trade*, July 22, 2002, available at <http://www.tralac.org/scripts/content.php?id=407> [hereinafter Business Report] (quoting a South African official stating “[t]he US initiative could be discriminatory against the exports of developing countries and could be in breach of World Trade Organisation rules. While acknowledging the US’s security concerns behind this initiative, we are concerned that these should not be a license for unilateral actions which unduly restrict trade.”). Moreover, even if U.S. action does not violate the WTO agreement, non-CSI members may potentially raise a non-violation nullification and impairment claim. *But see* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 615-17 (1990) (arguing that a non-violation claim is inappropriate if the measure taken is consistent with GATT Article XXI); *see also* GATT Panel Report, *United States-Trade Measures Affecting Nicaragua*, ¶ 4.9, L/6053 (Oct. 13, 1986) [hereinafter *U.S.-Trade Measures Affecting Nicaragua*] (declining to examine non-violation claim because there were no remedies available under the circumstances if Nicaragua were to prevail).

⁴⁹ GATT, *supra* note 44 (emphasis added).

⁵⁰ Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada-Autos*].

imposed on imports of bottled water into the United States. After much heated discussion, South Africa and the United States manage to come to an agreement that would lower the tariff from 10% to 5%. Negotiations between the French and the Americans break down. MFN treatment nonetheless requires the immediate and unconditional extension of the 5% duty rate to French bottled water imports. Moreover, even WTO members who chose not to participate in the negotiations at all—for example, Italy—would be entitled to the same benefits.⁵¹

The MFN obligation is not restricted to customs duties or charges. It also includes the obligation to refrain from discriminating among WTO members with respect to *any* advantage, including domestic regulations, such as CSI.⁵² To successfully establish a violation of MFN, three elements must be satisfied: First, there must be an “advantage” of the type covered by Article I; second, that advantage must not be accorded to the “like product” of all WTO Members; and third, that advantage must not be granted to members “immediately and unconditionally.”⁵³

An “advantage” in the WTO context is broadly defined.⁵⁴ The advantages conferred by CSI membership are both economic and political in scope. The greatest economic benefit to participants is the ability to move through the shipping process with little fear that containers will be stopped or delayed at the U.S. border. Once containers from CSI ports pass inspection in-country, they are usually not re-examined

⁵¹ For a general discussion of MFN, see RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT OF TARIFFS AND TRADE* (2005). For a discussion on the historical evolution of MFN, see Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246, 255-64 (1996).

⁵² GATT Article I:1 also provides:

[A]nd with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 44. GATT Article III:2 refers to taxes while GATT Article III:4 refers to domestic regulations. *Id.*

⁵³ Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.138, WT/DS54/R (July 2, 1998).

⁵⁴ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 206, WT/DS27/AB/R (Sept. 9, 1997) (noting that a “broad definition has been given to the term ‘advantage’ in Article I:1 of the GATT 1994”).

upon entry to a U.S. port.⁵⁵ In a “just-in-time” world, the ability to navigate the trade supply chain with a minimum of delay is a significant competitive advantage—even a single day’s delay at Customs adds almost 1% to the cost of goods.⁵⁶ CSI ports therefore immediately obtain “preferred” status, and countries that do not have CSI-certified ports are at a competitive disadvantage given the likelihood that their shipments will undergo more complex examinations and will thus be cleared more slowly.

Beyond the immediate fast-track benefit, CSI membership also serves as an “insurance policy.” Should the unimaginable happen and a terrorist attack is successfully implemented against the maritime trade supply chain, CSI ports would likely not be shut down at all, whereas shipments from all other ports would not be allowed entry into the United States.⁵⁷ Even if the maritime transportation sector had to be shut down completely, CSI-certified ports would begin handling containerized cargo far sooner than other ports.⁵⁸ The implications for the economies of CSI and non-CSI-certified countries are enormous.⁵⁹ Ultimately, CSI-certification gives a strategic business advantage to some ports over others; all other things being equal, shippers who wish to continue exporting to the United States are induced to ship from CSI ports.

In addition to the economic benefits, CSI membership also confers a significant political advantage to participants. While a “voluntary” program, CSI is nevertheless a cornerstone of the U.S. War on Terror. Few countries, even Germany and France,⁶⁰ are willing to be seen as obstructionist or non-

⁵⁵ Ridge, *supra* note 24.

⁵⁶ WORLD BANK REPORT, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA 198 (2004), *available at* <http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf> [hereinafter Global Economic Prospects].

⁵⁷ Bonner Aug. 2002, *supra* note 31.

⁵⁸ CSI Fact Sheet 6, *supra* note 9, at 2-3.

⁵⁹ After the French tanker *Limburg* was attacked in Yemen, underwriters immediately tripled premiums for vessels calling on Yemeni ports (as much as \$300,000 per vessel). Some lines cut Yemen altogether from their schedules and switched to neighboring ports, resulting in massive layoffs at Yemeni terminals (as many as 3000 people) and losses totaling \$15 million per month. Despite the government’s efforts to retain business by putting in place a loss guarantee program, shippers fled Yemen. OECD REPORT, *supra* note 3, at 17.

⁶⁰ Both German and French ports signed bilateral CSI agreements with the United States. Initially, their cooperation appeared costly when the European Union Commission decided to bring infringement action against all EU member states that

cooperative.⁶¹ Along with the big stick, however, comes a tantalizing carrot: CSI members are seen as “partners” in the War on Terror, and as such are entitled to special treatment. For example, the United States loaned Greece the equipment necessary to implement CSI despite the fact that CSI requires a potential member to own the requisite equipment before it can be considered for membership.⁶² And certainly Pakistan is a poster child for the tangible benefits that accrue to cooperative partners in the War on Terror.⁶³

Membership in CSI thus brings substantial benefits. For those left out of the system, the costs of being on the frontlines of the War on Terror without a shield are considerable.⁶⁴ While CSI membership is no protection against economic losses stemming from an actual terrorist attack,⁶⁵ its benefit on the front-end of the transaction—as a perceived “insurance policy”—is enormous. Exporters are more likely to utilize CSI-certified ports based on their assumption that those

had signed CSI agreements, alleging they had no such authority. The Commission subsequently dropped the proceedings after entering into an EU-wide CSI agreement with the United States. Container Security, European Union Factsheet, *available at* http://ec.europa.eu/comm/external_relations/us/sum06_03/cs.pdf [hereinafter EU Factsheet].

⁶¹ Evidence of the inability of most countries to “just say no” to U.S. antiterrorism initiatives can be found in how quickly CSI was implemented. Former Customs Commissioner Robert Bonner noted that while placing U.S. officials in a foreign country usually would have been a slow and difficult process, CSI moved from concept to implementation at “lightening [sic] speed.” Bonner Aug. 2002, *supra* note 31. Unfortunately, the speed with which CSI was rushed in place did not allow for proper evaluation. The GAO noted that Customs implemented the program without even having a way to measure whether they were successful in that respect—whether CSI gave them any greater capabilities than they had before. GAO REPORT 2003, *supra* note 27, at 26.

⁶² See *Greece Signs Agreement*, *supra* note 35.

⁶³ After securing Pakistan’s cooperation in the War on Terror, the United States adopted a number of provisions to reward the country for its efforts. See, e.g., Pakistan Emergency Economic Development and Trade Support Act, S. 1675, 107th Cong. § 2 (2001) (authorizing the President to reduce or suspend duties on Pakistani textiles imports if he determines, among other things, that Pakistan is incurring “substantial economic harm” as a direct consequence of its assistance in the War on Terror). See also Pub. L. No. 107-57, 115 Stat. 403 (authorizing the President to waive with respect to Pakistan U.S. legal prohibitions on providing direct assistance to a country whose “duly elected head of government was deposed by decree or military coup”).

⁶⁴ Yemen’s experience after a devastating terrorist attack is illustrative. See *supra* note 59 and sources cited therein.

⁶⁵ Indeed, globalization means countries suffer economically even when they *have not* faced attack. Even countries that are not directly involved in a terrorist event may expect their incomes to decline; one post-September 11 study found that decline could amount to \$75 billion per year as a result of a 1% ad valorem increase in “frictional” (i.e., transactional) trade costs. Global Economic Prospects, *supra* note 56, at 186.

ports are less likely to face a terrorist attack in the first place, and in any case they would be first in line when the supply chain reopens after an attack. This provides a considerable competitive advantage to CSI member countries. Recognizing the distortions to trade CSI engenders, the European Union (“EU”) Commission brought infringement proceedings against eight member states that signed individual agreements with the United States.⁶⁶ In the Commission’s view, CSI jeopardizes the common commercial policy by distorting competitive conditions among EU ports.⁶⁷ In short, the EU Commission considered CSI to create unhealthy competition among EU ports by causing shippers to divert trade from non-CSI ports to ports within the program.⁶⁸ Ultimately, to avoid the trade-distorting impact of CSI, the Commission signed its own CSI agreement with the United States, which made all EU ports eligible for membership.⁶⁹

The CSI advantage is not granted to the “like product” of all WTO member countries. Defining “like product” under GATT Article I is a challenging exercise.⁷⁰ Perhaps the

⁶⁶ EU Factsheet, *supra* note 60.

⁶⁷ *Id.* The top eight European ports handle 85% of Europe’s containerized cargo bound for the United States. *Id.*

⁶⁸ The New Zealand government appears to have reached a similar conclusion—to avoid any competitive disadvantage to its ports, New Zealand is reportedly working towards negotiating a nation-to-nation agreement with the United States. See U.N. Conference on Trade and Development [UNCTAD], *Container Security: Major Initiatives and Related International Developments*, UNCTAD/SDTE/TLB/2004/1 (Feb. 26, 2004), at 22 [hereinafter UNCTAD Report], available at http://www.unctad.org/en/docs/sdtetlb20041_en.pdf.

⁶⁹ The U.S.-E.U. Agreement provides “[p]articipation of Community ports in the Container Security Initiative is necessary to avoid significant barriers to large volumes of transatlantic trade with the United States resulting from customs control measure in US ports.” Agreement between the European Community and the United States of America on Intensifying and Broadening the Agreement of 28 May 1997 on Customs Co-operation and Mutual Assistance in Custom Matters to Include Co-operation on Container Security and Related Matters, Explanatory Mem. para. 2, Jan. 22, 2004 [hereinafter U.S.-E.U. Agreement]. The Annex provides that “[r]ecognizing that expansion of CSI should occur as quickly as possible for all ports within the European Community where exchange of sea-container traffic with the United States of America is more than de minimis and where certain minimum requirements are met and where adequate inspection technology exists.” *Id.*

⁷⁰ It is perhaps not surprising given the inherent difficulty in determining with specificity, for example, whether dry-roasted Costa Rican coffee is “like” un-roasted Venezuelan coffee. Moreover, it is in the “like product” analysis that countries so inclined find the best opportunity for hidden discrimination. For example, imagine that the United States wishes to disfavor Venezuela for its political and economic policies and wants to favor Costa Rica as a counterpoint dominant actor in the region. Some Customs official could be asked to analyze the imports of the respective countries and imagine that it was discovered that Venezuela shipped dry roasted coffee beans and Costa Rican exported un-roasted. The U.S. might well charge a higher tariff on

simplest way to conceive of it—to borrow an idea from one trade scholar—is to think of “likeness” as a continuum, with “identical” merchandise at one end of the spectrum and “different” merchandise at the other end; in between would be products that are “similar.”⁷¹ The easiest analysis, not surprisingly, is at the edges: Different products are not entitled to MFN treatment, while identical products are. Thus, the United States may assess one duty rate on unprocessed cocoa imports from the Ivory Coast and another on chocolate bars from Belgium because those products are “different.” Imports of raw cocoa from both countries are “identical” and would thus be subject to the same duty. The difficulty lies with “similar” products. Are imports of sweetened, ground and processed cocoa from Belgium like ground cocoa from the Ivory Coast? The short answer is that it depends.⁷²

Much of the wealth of GATT-WTO “like product” jurisprudence is irrelevant in evaluating CSI’s conformity with Article I, however. CSI does not discriminate on a product-specific but on a country-specific basis. In other words, in treating shipments from CSI ports better than shipments from non-CSI ports, CSI discriminates based on the origin of the product rather than on the product itself. Thus, the question becomes whether origin-based discrimination is permissible under GATT Article I. The seminal case on this point is *Belgian Family Allowances*.⁷³

In 1951, Belgium found itself brought before a GATT dispute settlement panel. Denmark and Norway objected to a Belgian-imposed tax on imports purchased by local government

dry roasted and argue that the products are not “like” because they are not classified under the same tariff heading, for example. See Report of the Panel, *Spain – Tariff Treatment of Unroasted Coffee*, L/5135 (Apr. 27, 1981), GATT B.I.S.D. (28th Supp.) (1981) [hereinafter Spain Tariff]. See also Report of the Panel, *Treatment by Germany of Imports of Sardines*, ¶ 12, G/26 (Oct. 30, 1952), GATT B.I.S.D. (1st Supp.) at 57 (1953) [hereinafter German Sardines].

⁷¹ BHALA, *supra* note 51, at 7.

⁷² In GATT jurisprudence, a determination of “likeness” is made after taking into account such factors as physical characteristics and consumer preference. See, e.g., Spain Tariff, *supra* note 70. See also German Sardines, *supra* note 70. For a discussion of the policy dimensions of Article I’s like product requirement, see Robert E. Hudec, “Like Product”: *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101-23 (Thomas Cottier & Petros Mavroidis, eds., 2000), reproduced at <http://www.worldtradelaw.net/articles/hudeclikeproduct.pdf>.

⁷³ Report of the Panel, *Belgian Family Allowances (allocations familiales)*, G/32 (Nov. 7, 1952), GATT B.I.S.D. (1st Supp.) at 59-62 (1963) [hereinafter Belgian Family].

bodies.⁷⁴ The purpose of the tax was to provide a broad revenue base to fund Belgium's family allowance program (a government social welfare benefit program). Rather than imposing the tax on all imports, Belgium exempted from the program products from countries that had a family allowance regime similar to its own. Denmark and Norway had family allowance programs in place and sought such an exemption, but were denied. While both countries maintained that the discrimination lay only in Belgium's failure to exempt them from application of the tax, the panel appeared to go one step further, concluding that Belgium's legislation was "based on a concept which was difficult to reconcile with the spirit of the General Agreement." What did the "spirit" of GATT require?

[T]he Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.⁷⁵

Although the panel did not arrive at a definitive ruling, it concluded the Belgian legislation was inconsistent with the provisions of Article I. Apparently, neither the panel nor GATT members found this to be a conceptually difficult case.⁷⁶ John H. Jackson, one of the leading scholars in the field, characterized *Belgian Family Allowances* as follows:

The case can be interpreted to support the proposition that although treatment can differ if the characteristics of goods themselves are different, differences in treatment of imports cannot be based on differences in characteristics of the exporting country that do not result in differences in the goods themselves.⁷⁷

Applying the panel's determination in *Belgian Family Allowances* to an evaluation of CSI, one is led to the ultimate conclusion that the difference in treatment of developing country imports is not based on any inherent differences in the products themselves. Developing countries are not being

⁷⁴ ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 135 (2d ed. 1990). For an analysis of whether Hudec got it right, see generally Steve Charnovitz, *Belgian Family Allowances and the Challenge of Origin-Based Discrimination*, 4 *WORLD TRADE REV.* 7 (2005).

⁷⁵ *Belgian Family*, *supra* note 73, at 60.

⁷⁶ The entire process from referral to the panel to the adoption of the panel report took nine days. The panel's report was adopted with little discussion. See Charnovitz, *supra* note 74.

⁷⁷ JACKSON, *supra* note 47, at 163.

treated differently because their exports of bananas, lumber or textiles are inherently more of a security risk. Rather, they face different treatment because Customs has made the determination initially to limit CSI membership to those countries of strategic and economic significance to the United States. Thus, the differing treatment afforded CSI and non-CSI goods has little to do with differences in the goods being exported—i.e., Customs has not made the determination (except perhaps implicitly) that goods from non-CSI members are inherently more of a security risk than goods from CSI members.⁷⁸ Goods from CSI and non-CSI countries face different treatment merely because Customs constructed an implementation schedule that was administratively convenient.

The CSI advantage is not accorded “immediately and unconditionally” to the like product of all other WTO members.⁷⁹ Not every interested country is permitted to join CSI. In the first phase of implementation, membership was restricted to the top twenty megaports, which send the largest volume of container traffic to the United States. Phase II of the project targets ports that are of political or strategic significance.⁸⁰ These ports are asked to join CSI only if they satisfy certain minimum standards, the most important of which include having “regular, direct and substantial” container traffic to the United States and having the requisite non-intrusive inspectional equipment available.⁸¹ Merely satisfying some of the criteria for membership does not, however, guarantee inclusion in CSI. For example, Mexico apparently sought membership only to be denied because it did not have sufficient container traffic to the United States.⁸² Similarly, Jamaica’s port security system appeared to meet CSI

⁷⁸ There is an argument to be made that goods of developing countries are not “like products” because they are not subjected to the same domestic security controls as are goods from CSI members. In short, the assumption is that poorer countries devote less resources to port, container and customs’ security measures. That is, of course, merely an assumption. Some developing countries have excellent controls. *See, e.g.,* Arlene Martin-Wilkins, *Jamaica’s Port Security Procedures to Be Used as World Benchmark*, JAMAICA OBSERVER, June 21, 2005, available at http://www.jamaicaobserver.com/news/html/20050620t220000-0500_82811_obs_jamaica_s_port_security_procedures_to_be_used_as_world_benchmark.asp.

⁷⁹ Canada-Autos, *supra* note 50.

⁸⁰ CSI Fact Sheet, *supra* note 9.

⁸¹ *Id.*

⁸² Trade Policy Review, *Mexico Question & Answer*, WT/TPR/M/97/Add.1 (June 11, 2002), available at http://www.wto.org/English/tratop_e/tpr_e/tp_rep_e.htm.

requirements, but it was not admitted into CSI until September 2006, several years after the program became operational.⁸³ Developing countries for the most part are excluded from CSI in the first two phases of implementation. While a tiny minority of ports in developing countries participate in CSI—Sri Lanka, Malaysia, and South Africa to name a few—only in Phase III are significant numbers of developing country ports considered for CSI membership.⁸⁴

Thus, CSI would appear to violate Article I because it confers benefits on some members that are not immediately and unconditionally made available to all WTO members. It would be difficult to forget that CSI was implemented in the face of a pervasive fear of terrorist attack on the most important—and perhaps most vulnerable—link in the trade supply chain. Having concluded that CSI violates a central tenet of the WTO Agreement, it does not automatically follow that the multilateral system is ill-equipped to deal with terrorism. The GATT was crafted in a time of war, and its authors and signatories were well aware of the need for trade rules to give way to security measures. It would have been short-sighted indeed if the GATT had not contemplated and made provisions for the situation where a member would have to act to protect its national security interests, even if that meant violating the provisions of a trade agreement.

The next section maintains that the WTO Agreement *does* enable countries to deal with the single greatest threat facing the world in the twenty-first century. GATT Article XXI recognizes and explicitly authorizes members to take action that would otherwise be inconsistent with their WTO obligations if such actions are taken to protect their “essential security interests.” Implicit in Article XXI, however, is the recognition of a “development dimension.” What does this development dimension entail? Can CSI be justified in light of it?

⁸³ See Martin-Wilkins, *supra* note 78. The United States signed a Declaration of Principle with Jamaica in June 2006, and by September 2006, Jamaica’s Kingston port was included in CSI. See *Container Security Initiative Coming to Jamaica: Innovative CBP Program Screens Cargo for Dangerous Materials Before Arriving in U.S.* (June 20, 2006), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/062006/06202006_2.xml; see also Ports in CSI, *supra* note 31.

⁸⁴ It is not clear when Phase III implementation will begin. While Customs has recently admitted a handful of developing countries in CSI, it has not officially announced commencement of Phase III. See Ports in CSI, *supra* note 31.

B. *Justifying CSI Under the National Security Exception*

The *Charter* is long and complicated and difficult. . . . But we must not lose sight, in all of its detail, of the deeper problems that underlie these mysteries. For the questions with which the *Charter* is really concerned are whether there is to be economic peace or economic war, whether nations are to be drawn together or torn apart, whether men are to have work or to be idle, whether their families are to eat or go hungry, whether their children are to face the future with confidence or with fear.

—Honorable William L. Clayton⁸⁵

No provision of international law or the WTO Agreement itself prevents a country from taking measures necessary to protect its own security interests. National security is the “Achilles’ heel of international law.”⁸⁶ In any international agreement, “the issue of national security gives rise to some sort of loophole . . . [allowing] any nation-state to protect itself . . . by employing otherwise unavailable means.”⁸⁷

From its inception, GATT recognized the “Achilles’ heel” of national security would require trade rules to be subordinated to national security considerations. Article XXI was thus adopted as a general exception allowing members to derogate from any and all of their obligations in specific instances of national security. But the text of Article XXI has led to a great deal of controversy. While it unequivocally states that “[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,”⁸⁸ the language of Article XXI nevertheless presents some significant interpretive difficulties. The following section addresses one of the key questions in this area: Is Article XXI “self-judging,” thus insulating national security measures from any possibility of review from the WTO’s dispute settlement

⁸⁵ W. L. Clayton, *Foreword to WILCOX*, *supra* note 42, at ix. William Lockhart Clayton was head of the U.S. delegation at the historic negotiations under the auspices of the United Nations Conference on Trade and Employment, which culminated in the signing of ITO Charter. The ITO never came into existence, primarily because Congress refused to ratify it based on concerns from the business sector that developing countries had too much leeway to expropriate foreign property. *See* Drache, *supra* note 45, at 28.

⁸⁶ Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT’L L. 424, 426 (1999).

⁸⁷ *Id.*

⁸⁸ GATT, *supra* note 44, art. XXI.

mechanism? After reviewing relevant authority on the question, the section then moves on to argue that even accepting the self-judging argument, Article XXI contains a two-fold requirement that must be satisfied if a measure is to be consistent with its terms: proportionality and development. In other words, Article XXI limits members to taking only those measures that are “necessary”; this necessity obligation can only be satisfied if the measure taken is proportionate to the harm being addressed and does not unduly burden the development needs of poorer developing countries.

The question of how Article XXI is to be interpreted is not merely a technical one. In a post-September 11 world where the War on Terror promises to be a long one, and where the enemy has no home or well defined borders, it is of critical importance to have a clear understanding of what is permissible under the national security exception. Otherwise, the security exception promises to unravel the careful balance of rights and obligations constructed by the WTO Agreement.

1. On the Self-Judging Nature of Article XXI

In 1947, only a few short years after the restoration of peace in Europe, and with the Continent in economic ruin, fifty-four countries ushered in a new era of trade relations with the signing of the *Final Act* of the Havana Charter for the International Trade Organization (“ITO”).⁸⁹ The unfettered exercise of sovereign rights had only led to a political meltdown, and in this new era, notions of sovereignty were to be tempered with economic cooperation.

But with the memory of World War II fresh in the delegates’ minds, the need to balance the economic development promised by greater cooperation with national security considerations was paramount; the clash of these somewhat competing interests caused negotiators not inconsiderable difficulties.⁹⁰ As one U.S. delegate noted:

We gave a good deal of thought to the question of the security exception We recognized that there was a great danger of

⁸⁹ HON. JAMES G. FULTON & HON. JACOB K. JAVITS, REPORT FOR THE S. COMM. ON FOREIGN AFFAIRS, 80TH CONG., THE INT’L TRADE ORG., AN APPRAISAL OF THE HAVANA CHARTER IN RELATION TO UNITED STATES FOREIGN POLICY, WITH A DEFINITIVE STUDY OF ITS PROVISIONS 8 (Comm. Print 1948). Argentina and Poland were the two lone dissenting governments who participated in the negotiations but failed to sign on to the agreement. *Id.*

⁹⁰ WILCOX, *supra* note 42, at 36.

having too wide an exception . . . because that would permit anything under the sun. . . . [T]here must be some latitude here for security measures. It is really a question of balance.⁹¹

The balance struck during the ITO negotiations ultimately led to adoption of the security exception in GATT Article XXI, which provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in *time of war or other emergency* in international relations;

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁹²

The greatest cause of debate and consternation, and the section most invoked by far, has been section (b) (iii). The question surrounding Article XXI (b) (iii) has been exactly *who* is allowed to interpret its terms? Despite the wealth of competing arguments, a review of relevant authority—GATT practice and GATT/WTO jurisprudence—fails to yield a definitive answer.

a. Reviewing Relevant Authority

Despite the apparent open-ended language of Article XXI—or perhaps because of it—the national security exception

⁹¹ Quoted in ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 600 (6th ed. 1995) [hereinafter GATT ANALYTICAL INDEX].

⁹² GATT, *supra* note 88, art. XXI (emphasis added).

has rarely been invoked by WTO members.⁹³ This surprising restraint evidences WTO members' recognition that with

⁹³ No Article XXI cases have gone to dispute settlement under the WTO system. The European Union did raise a claim against the United States' Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C §§ 6021-6091 (better known as the Helms-Burton Act), which penalized foreign companies "trafficking" in property formerly owned by U.S. citizens that had been expropriated by the Cuban government during the revolution. Given the sensitive nature of U.S.-Cuban relations in the WTO, the United States has refused all dealings with the communist government. Should the matter have proceeded to dispute settlement, the United States undoubtedly would have invoked Article XXI. The parties ultimately reached a negotiated solution without resort to the WTO's formal dispute mechanism. Resolution on the Negotiations Between the Commission and the U.S. Administration on the Helms-Burton Act, June 10, 1997, 1997 OJ (C 304) 116.

Under the old GATT system, only a handful of matters concerning Article XXI were ever notified or addressed by the Contracting Parties:

1. *United States–Czechoslovakia (1949)*: Czechoslovakia sought GATT action on a U.S. export control licensing scheme, which prevented the export of certain goods to Czechoslovakia. The Czech government brought its complaint under GATT Articles I and XXI, but its claim was ultimately rejected by the GATT panel. GATT ANALYTICAL INDEX, *supra* note 91, at 602.
2. *Ghana–Portugal (1961)*: Ghana imposed a total ban on trade with Portugal at the latter's accession to the GATT claiming Portugal's support of the war in Angola constituted a potential threat to the peace of the African continent. Any action which might pressure the Portuguese Government into lessening this danger was justified in the essential security interest of Ghana. GATT ANALYTICAL INDEX, *supra* note 91, at 600.
3. *United States–Cuba (1962)*: The United States imposed an embargo on trade with Cuba a few years after the Cuban Revolution and justified the measure as a matter of national security. GATT ANALYTICAL INDEX, *supra* note 91, at 605.
4. *Sweden (global measure) (1975)*: Sweden imposed quota restrictions on certain footwear imported from any GATT contracting party claiming essentially that decreasing domestic production of footwear threatened its security by calling into question Sweden's ability to outfit its military:

[The] decrease in domestic production [of footwear] has become a critical threat to the emergency planning of Sweden's economic defence . . . necessitat[ing] the maintenance of a minimum domestic production capacity in vital industries . . . to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.

GATT ANALYTICAL INDEX, *supra* note 91, at 603. The GATT Contracting Parties, we are told, "expressed doubts as to the justification of these measures under the General Agreement." *Id.*

5. *European Community–Argentina (1982)*: The EC as well as its member states, along with Canada and Australia, suspended imports from Argentina in retaliation for Argentinean armed intervention in the Falkland/Malvinas Islands. Argentina was ultimately successful in getting the GATT Contracting Parties to issue an interpretation of Article XXI, which provided in part that "the contracting parties undertake, individually and jointly: . . . to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement." GATT ANALYTICAL INDEX, *supra* note 91, at 603 (alteration in original). The

liberal use, Article XXI could easily evolve into “the exception that swallowed GATT.”⁹⁴ But its limited explicit use in practice has not prevented controversy from swirling around Article XXI almost from its adoption.

As the dominant users of Article XXI, developed countries take a decidedly “hands off” approach to the interpretation of the national security exception.⁹⁵ As early as 1949, in the first dispute involving Article XXI, the United States insisted that the security exception was “a virtually unlimited escape clause, controlled only by the general policy notion that the GATT system should not be undermined

Contracting Parties additionally adopted notification requirements for measures taken pursuant to GATT Article XXI. *See Decision Concerning Article XXI of the General Agreement*, L/5426 (Nov. 30, 1982), GATT B.I.S.D. (29th Supp.), at 23 (1982).

6. *United States–Nicaragua (1985)*: The United States notified the GATT contracting parties of its imposition of a trade embargo on Nicaraguan exports several years after the populist Sandinista National Liberation Front (*Frente Sandinista de Liberación* or FSLN) took control of the government. GATT ANALYTICAL INDEX, *supra* note 91, at 603. For further discussion of the dispute, see text and footnotes *supra* section II.B.

7. *European Communities–Yugoslavia (1992)*: The EC and its member states revoked Yugoslavia’s preferential access to the EC market—citing Article XXI—in an effort to force a peaceful solution to the Yugoslavian conflict. Yugoslavia protested, arguing that its situation was “a specific one [that] does not correspond to the . . . meaning of Article XXI(b) and (c).” GATT ANALYTICAL INDEX, *supra* note 91, at 604. The GATT Council established a dispute panel to examine the EC’s action, pursuant to a request from Yugoslavia. *Id.* But with the dissolution of Socialist Federal Republic of Yugoslavia, the Article XXI dispute was superceded by events, and the matter quickly devolved into a discussion of whether the newly reconstituted Federal Republic of Yugoslavia (consisting of Serbia and Montenegro) could participate in GATT as the successor nation. *Id.* at 604-05.

These seven matters listed above will be referred to hereinafter as “Article XXI Measures in GATT Practice.”

⁹⁴ RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 157 (1998). No Article XXI disputes have been adjudicated under the WTO system, and only a handful of such measures were ever notified to the GATT. *See supra* note 93. But the controversy surrounding Article XXI meant that GATT members often chose not to notify their security measures to the GATT but rather to implicitly rely on the security exception. *See generally* Wesley Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *YALE J. INT’L L.* 413 (2001). In 1982, at the instigation of Argentina, the GATT Contracting Parties adopted provisions requiring notification of such measures. *Decision Concerning Article XXI of the General Agreement*, *supra* note 93, at 23.

⁹⁵ *But see supra* note 93 (Ghana’s invocation of Article XXI to justify a total ban on Portuguese goods).

through the use of the security exception.”⁹⁶ When GATT members subsequently discussed the United Kingdom’s trade embargo on Argentina in retaliation for its armed intervention in the Falkland Islands, the United States again declared that “the General Agreement left to each contracting party the judgment as to what *it* considered to be necessary to protect its security interests. The [Contracting Parties] had no power to question that judgment.”⁹⁷ The UK echoed that view, maintaining that “[t]he exercise of these rights constituted a general exception to the GATT and ‘required neither notification, justification, nor approval.’”⁹⁸

By and large, developing countries reject the notion of a self-judged security exception.⁹⁹ There have been no WTO disputes involving Article XXI and little in the way of GATT jurisprudence to resolve the matter.¹⁰⁰ While the preponderance of scholarly writing has rejected the notion that Article XXI is self-judging, some scholars disagree.¹⁰¹ Regardless of the merits of either position, a definitive view on the interpretation of Article XXI, at least with respect to its self-judging character, is beyond the scope of this article. Rather, this article seeks to make a more fundamental point: No matter who gets to interpret it, the WTO Agreement contains requirements on *how* the national security exception should be applied. The question of whether Article XXI is self-

⁹⁶ Hahn, *supra* note 48, at 569. The dispute was brought by Czechoslovakia against the United States for the imposition of a discriminatory export licensing scheme that prohibited exportation of certain key products to the then Communist state.

⁹⁷ Quoted in BHALA & KENNEDY, *supra* note 94, at 157.

⁹⁸ Hahn, *supra* note 48, at 574.

⁹⁹ *But see* Ghana’s invocation of Article XXI to justify its trade embargo against Portugal, *supra* note 93. Ghana specifically argued that “under this Article each contracting party was the sole judge of what was necessary in its essential security interest.” GATT ANALYTICAL INDEX, *supra* note 91, at 600.

¹⁰⁰ *See supra* note 93. In *Military and Paramilitary Activities In and Against Nicaragua*, The International Court of Justice had an opportunity to examine the U.S. trade embargo against Nicaragua. In doing so, it compared the language found in GATT Article XXI with the language contained in article XXI of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua. Ultimately, the ICJ concluded:

After examining the available material, particularly the Executive Order of President Reagan of 1 May 1985, the Court finds that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, and the general trade embargo of 1 May 1985, cannot be justified as necessary to protect the essential security interests of the United States.

Military And Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

¹⁰¹ *See generally* Cann, *supra* note 94.

judging reduces the focus to only one portion—the “it” element—of the Article XXI analysis (“Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which *it* considers necessary . . .”). Left out of the analysis is an equally compelling question: How should the term “necessary” be defined? Addressing that question, however, requires an initial examination of the critical assumption underlying the self-judging debate—the belief that without an enforcement mechanism, no requirements or obligations can exist.

b. A “Right Without a Remedy?”

Implicit in the self-judging/non-self-judging debate is the assumption that without recourse to a coercive dispute settlement mechanism, a country against whom an Article XXI measure has been imposed has no hope of influencing the way in which the country taking such action chooses to impose it. In short, both proponents and opponents subscribe to the maxim of *ubi jus ibi remedium*—there is no right without a remedy.¹⁰²

International legal scholarship is rich in theoretical and empirical analyses of state compliance with international obligations and norms in the absence of enforcement mechanisms. What emerges is an understanding that states uphold their obligations for reasons other than mere coercion.¹⁰³ Enforcement in international law is always a challenge given the continuing preeminence of sovereignty. But even in the absence of enforcement, international law imposes on states a duty to carry out their treaty obligations in good faith¹⁰⁴—

¹⁰² WILLIAM BLACKSTONE, 3 COMMENTARIES *23.

¹⁰³ See, e.g., Omar M. Dajani, *Shadow or Shade: The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT’L L. ____ (forthcoming 2007; manuscript on file with author) (maintaining that “international law may exert influence not only as a result of the *shadow* it casts over bargaining, but also by virtue of the *shade* it offers—that is, its perceived value, independent of the threat of enforcement, as an objective and legitimate standard for resolving disputed issues”). See also Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT’L L.J. 158, 163-64 (2000) (noting that “[n]either GATT nor the WTO possess centralized enforcement power, the upshot being that both have relied on the complainant itself to implement any retaliatory measures that may be authorized. . . . [T]his threat [of such enforcement alone] is obviously insufficient to induce [concessions] in the majority of cases . . .”).

¹⁰⁴ The doctrine of *pacta sunt servanda* holds that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, available

indeed, states must refrain from acts that would defeat the object and purpose of the treaty even *before* it is ratified.¹⁰⁵ Thus, under the WTO's "single undertaking,"¹⁰⁶ members are bound by all WTO rules *not* because there is some coercive force compelling compliance but because they undertook those obligations in good faith.

There is much to suggest that this good faith presumption is well founded. The trillions of dollars of world trade that takes place every day, 98% of which is covered by the WTO Agreement, has led to only a handful of disputes since 1995.¹⁰⁷ Many of those have been resolved at the consultations stage between members, never giving rise to an actual dispute.¹⁰⁸ Thus, *most* of the time *most* members act in accordance with *most* of their WTO obligations. And in instances where at least one side has perceived that a member's action was inconsistent with its obligations, the disputing parties were able to come to a negotiated settlement. These accommodations and negotiated agreements are possible because states find some benefit in complying with their

at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention].

¹⁰⁵ Vienna Convention, *supra* note 104, art. 18.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Id.

¹⁰⁶ The WTO noted: "It is now well established that the WTO Agreement is a 'single undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal 'conflict' between them." Report of the Panel, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 7.38, WT/DS98/R (June 21, 1999).

¹⁰⁷ Dispute Settlement Body Overview, Update of WTO Dispute Settlement Cases, WT/DS/OV/26 (Mar. 1, 2006). The WTO has been notified to date of 335 requests for consultations; 110 of these cases have adopted the Appellate Body, Panel, or Panel Compliance Reports. *Id.*

¹⁰⁸ Of the 335 requests for consultations, fifty resulted in "Mutually Agreed Solutions," twenty-nine became "Inactive" (terminated, panel request withdrawn, etc.), sixteen resulted in "Arbitrations on Level of Suspension of Concessions" (pursuant to arbitration proceedings under Articles 22.6 and 22.7 of the DSU and Article 4.11 of the Subsidies agreement), and fifteen were given "WTO Authorizations of Suspension of Concessions" (pursuant to Article 22.7 of the DSU and 4.10 of the Subsidies Agreement). *Id.*

obligations (or not breaching them in the first instance) that has little to do with a dispute settlement mechanism.

Professor Hudec's famous study, though now somewhat dated, bears out this conclusion at least in part. Evaluating state compliance with GATT panel reports, Hudec found that at a time when few penalties attached and few enforcement mechanisms existed, contracting parties largely complied with their GATT obligations.¹⁰⁹ That outcome is not surprising considering that for nearly thirty years GATT was a "diplomatic" system, one of the hallmarks of which was the critical need for cooperation among members in order for decisions to be taken.¹¹⁰ Despite the shift in 1995 from a diplomatic to a rules-based system, cooperation remains the hallmark of WTO decision-making. For example, consensus rather than majority voting remains the norm in the WTO; thus, if even one member protests, consensus is not reached and action normally will not be taken.¹¹¹ The need for consensus voting is perhaps one explanation as to why countries would comply with their obligations in the absence of an effective enforcement mechanism.

There is of course some basis for holding the competing viewpoint that states will not act unless forced to do so. Certainly the WTO currently is in an implementation crisis: In several controversial and high profile cases, members—mainly

¹⁰⁹ HUDEC, ENFORCING TRADE LAW, *supra* note 47, at 6.

¹¹⁰ Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 4 (1999). Hudec claims:

[D]uring the first thirty years of GATT history, roughly 1948-1978, the GATT disputes procedure did exhibit a distinctly diplomatic character. Its operating procedures were quite ill-defined, its legal rulings were written in vague language that suggested more than it said, and both its procedures and its rulings left plenty of room for negotiation. In 1970, the artful ambiguity of this early GATT procedure led this author to christen its methods "A Diplomat's Jurisprudence."

Id. He went on to note:

After 1980, the GATT dispute settlement procedure transformed itself into an institution based primarily on the authority of legal obligation. The GATT procedure's transformation into a more "judicial" or "juridical" instrument was not only remarkable in its own right, but more important to our present subject, the development of these legal powers and their general acceptance by GATT governments laid the essential foundation for even stronger legal powers that followed under the WTO.

Id.

¹¹¹ For further discussion on the WTO's consensus voting methods, see, for example, Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 26 (2005).

the United States and, to a lesser extent, the European Union—have refused to implement cases they have lost.¹¹² Even more to the point is the *U.S.–Nicaragua* Article XXI dispute.¹¹³ In that case, the United States imposed a trade embargo on Nicaragua in retaliation for the communist government’s “policies and practices,” which allegedly constituted an extraordinary threat to American security.¹¹⁴ After having a difficult time securing authorization to establish a dispute settlement panel,¹¹⁵ Nicaragua ultimately received little for its trouble. The panel made no ruling on Nicaragua’s allegation that the U.S. embargo, even if justified under Article XXI, nullified or impaired benefits accruing to it under the GATT. The panel based its determination not on the legal merits of Nicaragua’s position, but on its determination that no adequate countermeasures could be authorized to Nicaragua should it prevail on its claim. In short, the panel declined to address the question of whether Nicaragua’s rights had been

¹¹² See, e.g., *United States – Tax Treatment for Foreign Sales Corporations – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2 (Feb. 13, 2006); *U.S. – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13 (Aug. 19, 2005); *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/1 (Nov. 10, 2004).

¹¹³ *U.S.–Trade Measures Affecting Nicaragua*, *supra* note 48.

¹¹⁴ Executive Order 12513 reads:

I, Ronald Reagan, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.

I hereby prohibit all imports into the United States of goods and services of Nicaraguan origin; all exports from the United States of goods to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto.

Quoted in U.S.–Trade Measures Affecting Nicaragua, *supra* note 48. The Reagan Administration was later to run into trouble for trading arms for hostages in order to support the Sandinistas, the so-called “organized democratic resistance.” See generally H. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987) (Report of the Congressional Committees Investigating the Iran-Contra Affair).

¹¹⁵ The United States made the now familiar argument that its actions were covered under Article XXI:(b)(iii) and that “[a] panel could therefore not address the validity of, nor the motivation for, the United States’ invocation of Article XXI:(b)(iii).” *U.S.–Trade Measures Affecting Nicaragua*, *supra* note 48, at 1. Nicaragua was ultimately successful in getting a panel established, but at the insistence of the United States the terms of reference specifically precluded the Panel from examining or judging the validity of or motivation for U.S. invocation of Article XXI:(b)(iii). *Id.* at 1-2. At the time, establishment of a panel was not an automatic right.

violated precisely because it concluded there would be no way to remedy the situation:

The Panel noted that, under the embargo . . . not only imports from Nicaragua into the United States were prohibited but also exports from the United States to Nicaragua. In these circumstances, a suspension of obligations by Nicaragua towards the United States could not alter the balance of advantages accruing to the two contracting parties under the General Agreement in Nicaragua's favour.

The Panel noted that the United States had stated that an authorization permitting Nicaragua to suspend obligations towards the United States "would be of no consequence in the present case because the embargo had already cut off all trade relations between the United States and Nicaragua" and that Nicaragua had agreed that "a recommendation by the Panel that Nicaragua be authorized to withdraw its concessions in respect of the United States would indeed be a meaningless step because of the two-way embargo."

The Panel therefore had to conclude that, *even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether or not it was justified under Article XXI, the CONTRACTING PARTIES could, in the circumstances of the present case, take no decision ... that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo* ...

In the light of the foregoing considerations the Panel decided not to propose a ruling this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.¹¹⁶

But if *U.S.–Nicaragua* illustrates anything, it is that dispute settlement in the area of national security simply will not work—particularly in a superpower versus developing country "showdown."¹¹⁷ Despite the lack of available recourse to dispute settlement, however, less powerful developing countries have managed to obtain some benefits within the trading system, including, for example, adoption of the Generalized System of Preferences and other "special and differential rights."¹¹⁸

¹¹⁶ *Id.* at 13 (emphasis added).

¹¹⁷ Indeed, for developing countries dispute settlement has not been an effective tool. *See, e.g.*, Communication from Nicaragua, *United States-Trade Measures Affecting Nicaragua*, L/5847 (July 15, 1985). *See also* Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9 J. INT'L ECON. LAW 427 (2006), available at <http://jiel.oxfordjournals.org/cgi/content/abstract/9/2/427>.

¹¹⁸ *See, e.g.*, GATT, *supra* note 44, pt. IV.

The greatest refutation of the position of proponents of the “no right without a remedy” argument has been the evolution of Article XXI itself. Beginning as it did with the general premise that the national security exception required “neither notification, justification, nor approval,” the position of developed countries has shifted significantly—or, more accurately, GATT/WTO practice has changed. Where developed countries once argued that Article XXI required no notification, GATT members adopted the *Understanding on Article XXI*, which specifically requires notification.¹¹⁹ Where developed countries once argued that no justification is required under Article XXI, in fact the practice has been to provide some sort of justification.¹²⁰ With respect to CSI, as described further below, the United States has provided a full explanation for taking action.¹²¹ And finally, where developed countries once argued that Article XXI required no approval, in practice they have lobbied for such approval. In at least one instance, the *U.S.–Czechoslovakia* 1949 Article XXI dispute, GATT approval was explicitly forthcoming.¹²² But even without a panel determination, members imposing Article XXI measures seek approval at least from their allies. In the *European Community–Argentina* matter, for example, the United Kingdom sought “approval” and support from its allies, and the Article XXI measure was imposed not only by the European Community but also by Canada and Australia.¹²³

Thus, even accepting the argument that Article XXI measures are self-judging and therefore ultimately are not subject to evaluation by any dispute settlement body, one is

¹¹⁹ *Decision Concerning Article XXI of the General Agreement*, L/5426 (Dec. 2, 1982), GATT B.I.S.D. (29th Supp.) at 23 (1983). “The Contracting Parties *decide* that: (1) Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.” *Id.* (emphasis added).

¹²⁰ Article XXI Measures in GATT Practice, *supra* note 93.

¹²¹ In this instance, the United States took pains to explain the measure and its rationale, rather than merely imposing it. *See, e.g.*, Trade Policy Review, *Mexico Question & Answer*, *supra* note 82.

¹²² Summary Record of the Twenty-Second Meeting: Held at Hotel Verdun, Annecy, at 9, GATT/CP.3/SR.22 (June 8, 1949), available at <http://gatt.stanford.edu/bin/object.pdf?90060100>. The summary notes: “The Chairman, however, was of the opinion that . . . the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I.” *Id.* A vote by roll-call resulted in one affirmative (Czechoslovakia), seventeen negatives, three abstentions, and two absent votes, approving the U.S.’s use of Article XXI. *Id.*

¹²³ GATT ANALYTICAL INDEX, *supra* note 91, at 603.

still left with the question of whether such measures must conform to any WTO obligations at all, and if so, what?

2. The “Development Dimension”: Interpreting Article XXI’s Necessity Obligation

A WTO member is not authorized under Article XXI to take *any* action it chooses in the name of national security. By its terms, the security exception limits the available response to those actions that are *necessary*. What are the limits of this necessity requirement?

The argument to be developed below maintains that the “necessary” language of Article XXI cannot be read in isolation. The WTO Appellate Body has long relied on the interpretive rule of Article 31 of the Vienna Convention on the Law of Treaties, which states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²⁴ When the necessity obligation is so read, it becomes clear that a measure is “necessary” if and only if it is proportionate to the harm faced by the invoking country and that the measure does not unduly burden the development objectives of vulnerable developing countries.

Even if the text of Article XXI itself does not suggest a broader interpretive reading, general norms of equity and fairness, along with the nature of this new War on Terror—a war without an end date against an enemy without geographical boundaries—calls for a reinterpretation. Article XXI surely could not have been intended to allow a member to

¹²⁴ Vienna Convention, *supra* note 104, art. 31. In *United States – Import Prohibition of Certain Shrimp And Shrimp Products*, the Appellate Body concluded:

The Panel did not follow all of the steps of applying the “customary rules of interpretation of public international law” as required by Article 3.2 of the DSU. As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*].

reconfigure the world trade order in such a way as to unduly burden and penalize the most vulnerable members.

a. Proportionality

It is by now well established in WTO jurisprudence that as an exception to the general treaty obligations of the WTO Agreement, Article XXI is to be narrowly construed.¹²⁵ Thus, the apparently expansive language that would allow a member to take “any measure” must be constrained by certain core or fundamental principles of international law, one of which is the principle of proportionality. As one court notes, the principle of proportionality requires that “the application of . . . rules . . . must be appropriate for securing attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.”¹²⁶ In short, the basic premise underlying the proportionality principle is that the punishment must fit the crime; one is justified in responding to an attack, but both the means employed to respond and the level of the response must be calibrated to the harm actually suffered. Or, to use less war-and-crime laden language, the means employed to address a problem must be appropriate for securing the objective and cannot go beyond what is necessary to attain it.

The proportionality principle is central to an analysis of Article XXI because it establishes limits on the type, manner and amount of the countermeasure a member may take to protect its essential security interests. But, as with most interpretations of the provisions of Article XXI, the proportionality principle applied in this context is not without controversy. One could make the argument that a

¹²⁵ See, e.g., Report of the Panel, *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253 (Feb. 2, 1988), GATT B.I.S.D. (35th Supp.) at 163 (1989). The United States argued that “[a]ny exceptions to the ban on quantitative restrictions had to be construed as narrowly as possible, and all criteria for such an exception had to be met.” *Id.* ¶ 3.2.2. The panel concurred, noting:

In order for an import restriction to be justified under Article XI:2(c)(i) all of the conditions noted above must be fulfilled. Therefore, in those cases in which the Panel found that one condition was not met, it did not consider it necessary to examine the restriction further in the light of the other conditions.

Id. ¶ 5.3. See also Report of the Panel, *European Economic Community – Restrictions on Imports of Apples*, L/6513 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 135 (1989).

¹²⁶ The European Court of Justice also employs the principle of proportionality in its jurisprudence. See, e.g., Case C-58/98, *Corsten*, 2000 E.C.R. I-7919, I-7957.

proportionality analysis is not relevant to an interpretation of Article XXI. The national security exception is unlike GATT's other general exception—Article XX's health, safety and morals exception—which specifically recognizes a “least trade restrictive” limitation.¹²⁷ But that argument merely re-engages

¹²⁷ The chapeau to GATT Article XX specifically provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

GATT, *supra* note 44, art. XX. The Appellate Body has interpreted that language as follows:

Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of “General Exceptions” in Article XX to prevent such far-reaching consequences.

Shrimp-Turtle, *supra* note 124, ¶ 156.

Article XXI lacks the explicit tempered language to be found in Article XX, but the argument developed here would implicitly draw in to Article XXI, the jurisprudence the Appellate Body has developed with regard to Article XX. *See, e.g.*, Rene E. Browne, Note, *Revisiting “National Security” in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L.J. 405, 423-24 (1997) (arguing “[b]ecause Article XX also describes ‘exceptions’ that justify trade restrictive measures under GATT, it is the section of the agreement most analogous to Article XXI. It would seem reasonable—in the absence of any decisions pertinent to the security exceptions and considering Article XXI’s proximity and substantive similarity to Article XX—for a panel reviewing Article XXI to consider Article XX decisions.”). Browne goes on to argue for the incorporation of Article XX’s “least trade restrictive measure” requirement into Article XXI:

A similar construction applied to Article XXI would allow parties to determine their own security interests, just as parties determine their own domestic environmental or public health policies. When these policies have

the self-judging/non-self-judging debate: There is no question that Article XX allows a *panel* to make the assessment of whether a measure is proportionate—i.e., least trade restrictive. But arguing that a panel cannot make a similar assessment with respect to Article XXI is not to say that Article XXI does not, nevertheless, require a measured response to a national security emergency. Admittedly, however, some countries have tried to make the claim for a proportionality standard in Article XXI, with little success.¹²⁸ But in the case of CSI, whether the measure applied must conform to some standard of proportionality is a less difficult legal hurdle given the United States appears to acknowledge, at least tacitly, the need for such a standard.¹²⁹ In the WTO's 2005 review of U.S. trade policies, the European Union and the United States exchanged the following set of questions and answers:

Question: (EU #3)

What procedures does the U.S. have in place to ensure that the principle of proportionality/least trade restrictiveness and non-discrimination have been adequately observed in the development of new proposals and new measures to increase security against future terrorist attacks? Have there been any risk analyses undertaken or studies into the likely impact on trade flows of specific measures?

Answer: (United States)

CBP has numerous layers of targeting and risk management tools in place to assist in making decisions concerning threat assessments. By using advance information, risk management and technology, and by partnering with other nations and with the private sector,

extraterritorial effect that impairs other parties' rights under GATT, however, the party invoking the exception would have to demonstrate that no alternative measures consistent with the GATT, or less inconsistent with it, are available to achieve these essential security objectives.

Id. at 426. *But see* Raj Bhala, *Fighting Bad Guys With International Trade Law*, 31 U.C. DAVIS L. REV. 1, 1 (1997) (concluding "[t]he first feature of article XXI is that it is an all-embracing exception to GATT obligations. This point is evident from the first word of the article: 'nothing.' Once a WTO Member relies on article XXI to implement a measure against another Member, the sanctioning Member need not adhere to any GATT obligations toward the target Member.").

¹²⁸ In the *United States – Nicaragua* dispute, for example, some countries maintained that U.S. action was disproportionate, but the issue was not addressed by the GATT panel. General Agreement on Tariffs and Trade, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, C/M/188 (June 28, 1985), available at http://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.

¹²⁹ *Question to the United States from the European Union during TPRM: United States – Trade Policy Review Body – Minutes of Meeting – Addendum*, at 31-32, WT/TPR/M/126/Add.3 (Nov. 22, 2004), available at http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

the twin goals of the United States of enhanced security and trade facilitation do not have to be mutually exclusive. Since 9-11, we have developed ways to make our borders more secure that also ensure the efficient flow of legitimate trade and travel.¹³⁰

In the case of a War on Terror, the need for security measures to be informed by a proportionality analysis becomes even more important. The current war is being fought without a timetable for completion, and while the objective is to protect U.S. interests from stateless enemies, the means employed to achieve that objective very directly impact *state* actors. In short, CSI adversely impacts some WTO member countries—and will continue to do so for some time—despite the fact that those members are not the cause of the harm. While recognizing that “collateral damage” in wartime is inevitable, the damage inflicted must meet some minimum standards of decency and fair play. Adopting a proportionality analysis in Article XXI measures would achieve that equitable objective.

Merely adopting a proportionality element would not, however, be sufficient. While constraining the actions of stateless terrorists is the objective or the ends sought, the means the United States has used to achieve that objective—the Container Security Initiative—has great repercussions for developing countries, most of whom are no more than innocent bystanders in the War on Terror. Thus, to address that imbalance requires not just an application of the proportionality principle—balancing means and ends—but it also requires a deliberate, self-conscious recognition of the need to protect the interests of developing countries.

b. Development

Some have maintained that “there is no distinction in international law between developed and developing countries in matters of security.”¹³¹ The basic assumption underlying that statement is that when national security considerations are implicated, a country is authorized to take any action necessary for its own protection regardless of the adverse impact such action could have on developing countries; in

¹³⁰ *Id.*

¹³¹ Statement of the United States Delegate Before the GATT Council, General Agreement on Tariffs and Trade, *Minutes of Meeting held in the Centre William Rappard on 29 June 1982*, at 19, C/M/159 (Aug. 10, 1982), available at http://www.wto.org/gatt_docs/English/SULPDF/90440048.pdf [hereinafter Statement of U.S. Delegate Before the GATT Council].

short, national security concerns trump all other considerations and allow a member to take a measure *at any cost*. But taking a measure at any cost is exactly what Article XXI and the WTO Agreement are meant to prevent. Indeed, it is the foundational principle of the trading system that “if each of us insists on retaining freedom to take action without first considering how it would affect our neighbors, we shall provoke bad feeling, retaliation, and economic war.”¹³²

While it is true that Article XXI makes no mention of developed or developing countries, a proper interpretation of the national security exception prohibits one from reading that provision in isolation; the text must be read in context in light of the object and purpose of the WTO Agreement.¹³³ When read accordingly, it becomes clear that there is a recognized distinction in international trade law between developed and developing countries, and that developed countries have a special duty of care when implementing measures that may harm developing countries.

That “context” of Article XXI necessarily includes other provisions of the WTO Agreement. The most relevant provision on the duty of care developed countries owe to more economically vulnerable members is GATT Article XXXVII:3(c), which requires developed countries to:

Have *special regard* to the trade interests of less-developed parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures when they would affect essential interests of those contracting members.¹³⁴

And certainly the object and purpose of the WTO Agreement would not support the proposition that there are no differences between developed and developing countries in matters of security.¹³⁵

¹³² WILCOX, *supra* note 42, at 218.

¹³³ Vienna Convention, *supra* note 104, art. 31. In *United States – Trade Measures Affecting Nicaragua*, *supra* note 93, the panel concluded that “article xxi could not be read in isolation and is part of legal text with which it must be reconciled.” See also *Shrimp-Turtle*, *supra* note 124.

¹³⁴ GATT, *supra* note 44, art. XXXVII:3(c) (emphasis added).

¹³⁵ The WTO Agreement contains a number of provisions on “special and differential rights” treating developing countries different from—and better than—developed countries. In particular, Part IV of the GATT “recall[s] that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed

Thus, inherent in the right of members to take action to protect their security interests is the concomitant obligation of developed countries not to act in ways that would unduly harm the development objectives of developing countries. The idea that Article XXI measures must not be used in ways to harm poorer countries' development objectives is not novel, and it has long been advocated by developing countries themselves.¹³⁶ What *is* novel is that the War on Terror presents us with an explicit illustration of why the adoption of a development standard in Article XXI is necessary. In all previous Article XXI measures except *Swedish Footwear*, the member invoking the action did not adopt a global measure;¹³⁷ the trade prohibition was always targeted at one specific country. And in all instances except *Swedish Footwear*, the member invoking Article XXI took action because of some transgression the country on the receiving end was alleged to have committed that threatened the national security of the imposing state. In short, past national security actions were almost always retaliatory measures limited to one country. But developing countries that are being burdened by CSI are not the source of the harm CSI is meant to address. Rather than protecting their interests, CSI imposes additional burdens on developing countries.

One such burden is the 24-Hour Rule, which applies to all U.S. trading partners. The 24-Hour Rule enables Customs officials to gather and process information in order to target high risk shipments.¹³⁸ The need for information gathered under the 24-Hour Rule came about only after Customs had conceived and begun to implement CSI.¹³⁹ Once it established

contracting parties." *Id.* art. XXXVI:1(a). It goes on to authorize—indeed implore—developed countries to derogate from the rules to the benefit of developing countries:

The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following provisions:

(b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties.

Id. art. XXXVII(b).

¹³⁶ See, e.g., Cann, *supra* note 101.

¹³⁷ Article XXI Measures in GATT Practice, *supra* note 93.

¹³⁸ 19 C.F.R. § 4.7(b)(2) (2002) [hereinafter 24-Hour Rule].

¹³⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-557, CONTAINER SECURITY: A FLEXIBLE STAFFING MODEL AND MINIMUM EQUIPMENT REQUIREMENTS WOULD IMPROVE OVERSEAS TARGETING AND INSPECTION EFFORTS (Apr. 2005), available at <http://www.gao.gov/new.items/d05557.pdf>.

the first CSI-port in Rotterdam, Customs realized that legal and logistical problems prevented it from having access to data it needed to effectively pre-screen containers.¹⁴⁰ Rather than implementing a rule that would require only CSI members to provide the required data, Customs adopted the 24-Hour Rule, which would apply to CSI and non-CSI members alike.¹⁴¹

The Rule requires *all* exporters to file an electronic cargo manifest declaration form twenty-four hours prior to loading a container either bound for the United States or transiting through its borders.¹⁴² Implementation of the 24-Hour Rule is a significant obstacle for developing countries. Despite massive resistance from the trading community, Customs declared victory, claiming that there have been “no serious problems” in implementing the 24-Hour Rule’s requirements.¹⁴³ But that determination rests on the claim that no legitimate exports were turned away or delayed as a result of the Rule.¹⁴⁴ Even if true, the real impact of the 24-Hour Rule goes far beyond whether countries were ultimately successful in getting their goods past Customs. Measuring the real impact of the 24-Hour Rule must include an examination of the rule’s implementation costs as well as the disproportionate impact on the goods of developing countries.¹⁴⁵ When those

¹⁴⁰ See GAO REPORT 2003, *supra* note 27, at 18.

¹⁴¹ *Id.* at 7.

¹⁴² CSI Fact Sheet, *supra* note 9.

¹⁴³ In a 2003 speech, Commissioner Bonner derided doomsday predictions and declared victory in implementing CSI and the 24-Hour Rule:

We heard nightmarish tales about how the 24-hour rule would paralyze maritime trade and put companies out of business. We heard that companies would not be able to comply. So what have we found since February 2, when we started enforcing compliance with the rule? We’ve found that none of these doomsday predictions have come to pass. . . . Let me make this clear to you: through the 24-hour rule and the Container Security Initiative (CSI)—we are identifying shipments that pose potential threats. These programs are working.

Bonner 2003, *supra* note 11. But in the same speech, Bonner himself acknowledges some implementation problems: “Compliance with the new rule is high, and the number of disruptions is low.” *Id.*

¹⁴⁴ See Statement of Ambassador Linnet Deily, Deputy U.S. Trade Representative, *Trade Policy Review Of The United States, Response to Issues Raised in the Course of the Review Meeting* (Jan. 16, 2004), available at <http://www.usmission.ch/press2004/0116Deily%20TPR.html> [hereinafter Statement of Ambassador Deily] (asserting that “[t]he test of time has proven that there have been no instances where a legitimate shipment has been detained and prevented from sailing on board the vessel upon which it was originally scheduled to depart the foreign port.”).

¹⁴⁵ In evaluating the impact of measures like the 24-Hour Rule on developing countries, the United Nations Conference on Trade and Development concluded: “[p]otentially, the legitimate trade of developing countries may be adversely affected,

issues are factored in, it becomes clear that the 24-Hour Rule has had profound effects on the trading system, and those effects are particularly pronounced with respect to developing countries. In implementing the 24-Hour Rule, the financial costs have been significant for all U.S. trading partners. Even major trading partners with sophisticated customs regimes have seen their administrative costs increase by upwards of six hundred million dollars.¹⁴⁶ The expenditures are significant enough that even exporters from rich countries are calling for U.S. subsidies to offset the costs of implementation,¹⁴⁷ and the World Bank has underscored the need for importing and exporting countries to develop a cost sharing formula optimal for all.¹⁴⁸

For developing countries, the implementation cost of the 24-Hour Rule is considerably higher. Firstly, they bear additional costs not borne by developed countries. In India, for example, where nearly 35% of outbound trade is headed to the United States, exporters are incurring a new cost of having to pay local agencies to assist with document processing.¹⁴⁹ Secondly, developing countries are starting from a lower technological base. Most shippers and freight forwarders in developing countries conduct a manual trade and have access solely to telephones, typewriters and fax machines in order to conduct their business.¹⁵⁰ Shifting from a manual to an automated system will require equipment, know-how, and reliable electricity supply, to name a few things, that many developing countries do not have.¹⁵¹ To be sure, in the long term a shift to electronic transmission will undoubtedly prove beneficial for developing countries through increases in

due to the inability of particularly small and medium size enterprises within these countries, to effectively comply with the new requirements." UNCTAD Report, *supra* note 68, at 20.

¹⁴⁶ For example, Japan's administrative costs have increased by about \$625 million dollars. This figure captures only the administrative costs of inputting shipping information into the U.S. computer system (AMS). *Id.* at 25.

¹⁴⁷ Global Economic Prospects, *supra* note 56, at 188. "The Hong Kong Shippers Council . . . and the ASEAN Federation of Forwarders Associations [exporters from relatively wealthy countries] have urged [the United States] to subsidize the cost of its new requirements and U.S. importers to share . . . the burden of providing information." *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 184-85 ("Almost 35% of outbound trade from India is headed to the U.S.").

¹⁵⁰ *Id.* at 185; UNCTAD Report, *supra* note 68, at 25.

¹⁵¹ Global Economic Prospects, *supra* note 56, at 186; UNCTAD Report, *supra* note 68, at 25.

efficiency and a decrease in costs,¹⁵² but in the short to medium term, developing countries will have to bear the massive initial startup costs. The risk is that developing country exporters will find it increasingly difficult to participate competitively in the world market.

In addition to forcing developing countries to bear higher economic costs, the 24-Hour Rule affects disproportionately the type of cargo developing countries are likely to ship. Developing countries tend to export perishable commodities. Those goods are often harvested and prepared for shipping at the last minute. Before the 24-Hour Rule, documentation requirements were not an impediment to last-minute shipments as Customs would generally allow shippers to provide preliminary data that would then be finalized up to thirty days *after* the shipment had arrived in the United States.¹⁵³ This now-lost flexibility allowed shippers and freight forwarders to adequately verify and finalize required paperwork without delaying the shipment itself.¹⁵⁴ But the 24-Hour Rule requirement has cut the processing timeline in developing countries to shorter and shorter lengths. Given that processing export documents is often a time consuming and inefficient effort in developing countries, shippers are now requiring that shipments be processed and ready for boarding much earlier than they used to; otherwise they risk delays and fines.¹⁵⁵ Ports that previously accepted cargo as few as six hours before departure now require at least twenty-four.¹⁵⁶ The

¹⁵² Global Economic Prospects, *supra* note 56, at 186.

¹⁵³ OECD REPORT, *supra* note 3, at 47.

¹⁵⁴ *Id.* Of course, much of this hardship could be alleviated if shippers were to use air transportation rather than sea—presumably air transportation post-September 11 is more secure. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-616T, TRANSPORTATION SECURITY: POST-SEPTEMBER 11TH INITIATIVES AND LONG-TERM CHALLENGES (April 1, 2003) (Statement of Gerald L. Dillingham, Director, Physical Infrastructure Issues), available at <http://www.gao.gov/new.items/d03616t.pdf> (noting the security loopholes in air transportation prior to September 11, 2001, and highlighting changes after that period). But the air transportation sector is one of the most non-liberalized in international trade. While more than 20% of African exports enter the United States by air, the costs of air transportation in developing countries far exceeds the same costs in the developed world. Liberalization of the air transportation sector likely would decrease costs of transportation, which would make developing country goods more competitive in developed country markets. Global Economic Prospects, *supra* note 56, at 188.

¹⁵⁵ Global Economic Prospects, *supra* note 56, at 184.

¹⁵⁶ UNCTAD Report, *supra* note 68, at 23-24.

economic losses for developing country exports are still being tallied.¹⁵⁷

The trade-distorting impact of CSI is most pronounced with respect to developing countries. In order to remain competitive in the current business climate, exporters in non-CSI-certified countries may be forced to ship their goods to countries that have CSI ports for the onward voyage to the United States.¹⁵⁸ This will undoubtedly increase non-CSI members' transportation costs. Transportation costs are a crucial determinant of a country's ability to participate in the global economy,¹⁵⁹ and for developing countries even a small increase in the price of moving goods between destinations and across international borders serves as a formidable trade barrier.¹⁶⁰ Transit costs in developing country markets already are routinely two to four times higher than in rich countries.¹⁶¹ Adding on the additional costs of transporting goods to CSI-certified ports for transit to the United States further increases the price of those goods. Of even greater concern is the possibility that, in the long run, importers and exporters may adapt their trading patterns to avoid these additional costs by sourcing products from countries with CSI-certified ports.

Thus, CSI violates U.S. obligations under GATT Article I. Moreover, CSI cannot be justified under GATT Article XXI because it lacks a development dimension. The following section goes beyond the legal debate to explore some of the practical reasons why CSI and future U.S. security measures should incorporate a development dimension.

¹⁵⁷ See UNCTAD Report, *supra* note 68, at 24 (noting that “[n]o clear estimates of the overall costs of the 24-Hour Rule have, so far been published”). The Report went on to cite an OECD study, conducted only a few months after implementation of the Rule began, which estimated costs at \$5 to \$10 billion per year. Over the long term, the OECD Report acknowledged a more realistic estimate would be in the region of \$281.7 million. *Id.* The OECD report did not take into account the special circumstance of developing countries. OECD REPORT, *supra* note 3, at 47.

¹⁵⁸ Global Economic Prospects, *supra* note 56, at 181.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* While the focus within the WTO (and the GATT before that) has historically been on lowering tariffs, research has shown that for most developing countries the costs of transporting exports to foreign markets are a much greater hindrance to trade than are tariffs. *See id.* (noting that “a comparison of countries’ ‘transport cost incidence’ . . . shows that for 168 out of 216 U.S. trading partners, transport cost barriers outweigh tariff barriers”).

¹⁶¹ *Id.* at 179.

III. ENVISIONING A NEW POST-SEPTEMBER 11 SECURITY ARCHITECTURE

A. *Beyond the Legal Debate: Why Future Security Measures Should Incorporate a Development Dimension*

The global war on terrorism is like watching water running downhill. Water always goes to the place of least resistance.

—Admiral Walter F. Doran, U.S. Pacific Fleet Commander¹⁶²

Globalization has created a world in which social and economic ties are so intertwined that no country acting alone can ensure either its own prosperity or its own security. Particularly in the maritime transportation sector—where a ship may be owned by a company in one country, crewed by the nationals of a second country, and carry the cargo of a third to a port of a fourth¹⁶³—multilateral cooperation is necessary to effectively address the threat of terrorism. But multilateralism calls for more than cooperation amongst a group of like-minded and similarly-situated countries. As Mikhail Gorbachev recently noted, “you cannot ensure your security without ensuring global security.”¹⁶⁴ Incorporating a development dimension into CSI is necessary not merely because a proper reading of the WTO Agreement would seem to call for such a dimension, but also because failing to do so jeopardizes our own security. This section goes beyond the legal arguments developed above to explore some of the practical reasons why a development dimension in CSI, as well as in future security measures, is crucial.

Terrorism recognizes no state boundaries. Indeed, the new face of terrorism is one in which *non*-state actors play a leading role.¹⁶⁵ While organizations like Al-Qaeda may have found sanctuary in Taliban-controlled Afghanistan or pre-September 11 Pakistan, the hallmarks of these entities are

¹⁶² Press Release, The Int'l Institute for Strategic Studies, U.S. Maritime Intelligence Sharing (Oct. 1, 2003), available at <http://www.iiss.org/index.asp?pgid=5108>.

¹⁶³ Global Economic Prospects, *supra* note 56, at 187.

¹⁶⁴ Mikhail Gorbachev, Address at Univ. of the Pac. McGeorge Sch. of Law (Oct. 26, 2005) [hereinafter Gorbachev Statement].

¹⁶⁵ See, e.g., Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SECURITY 30, 30 (2003) (noting that “[t]he current wave of international terrorism, characterized by unpredictable and unprecedented threats from nonstate actors, not only is a reaction to globalization but is facilitated by it”).

their ability to work across national lines and their lack of formal ties or strict allegiance to any state. After the bombings of the U.S. embassies in Kenya and Tanzania in 1999, Secretary of State Madeline Albright acknowledged the rise of this new breed of terrorism: “What is new is the emergence of terrorist coalitions that do not answer fully to any government, that operate across national borders and have access to advanced technology.”¹⁶⁶ The problem is that U.S. response to the new terrorism has been “reactive and anachronistic.”¹⁶⁷ Adopting measures better suited to state-centric threats, the United States attempts to “cast twenty-first-century terrorism into familiar strategic terms.”¹⁶⁸

CSI and programs like it are premised on the notion that exports from certain states pose greater security risk than exports from others. CSI rewards participant states—mainly developed countries—for their “foresight,”¹⁶⁹ and Customs focuses its resources on the presumptively more high-risk containers arriving from non-participating—mostly developing—countries. Because the new breed of terrorists are not themselves bounded by state lines, at least two additional risks arise from U.S. action. One possibility is that terrorists manage to infiltrate containers from CSI countries. Successfully infiltrating a CSI-container virtually assures success of the overall mission (detonating a nuclear device on U.S. shores, for example) given the presumption that those containers are “clean” and likely would not face further inspection in the United States. Breaching security structures and “hijacking” a CSI container is not a far-fetched scenario; while CSI creates new security protocols, the system is largely self-regulated, leading one expert to dub it a “trust but don’t verify” program.¹⁷⁰ There have already been a number of

¹⁶⁶ Madeline Albright, *quoted in* Gideon Rose, *It Could Happen Here: Facing the New Terrorism*, FOREIGN AFFAIRS (March/April 1999). The bombings killed over 200 people, most of whom were nationals of Kenya or Tanzania. See *Black Americans Among Victims of Kenya and Tanzania Bombings: National Report*, JET, Aug. 24, 1999, available at http://www.findarticles.com/p/articles/mi_m1355/is_n13_v94/ai_21052788 [hereinafter *Victims of Kenya and Tanzania*].

¹⁶⁷ Cronin, *supra* note 165, at 30.

¹⁶⁸ *Id.*

¹⁶⁹ See CSI Fact Sheet, *supra* note 9.

¹⁷⁰ *Disturbing Lack of Attention Paid to America’s Security Vulnerabilities*, Interview by Michael Moran, Executive Editor, Council on Foreign Relations, with Stephen E. Flynn, former Coast Guard Commander (Dec. 21, 2005), available at <http://www.cfr.org/publication/9471> (stating that “if you rely essentially on a trust-but-don’t-verify system [where] you ask companies to be [responsible] but can’t determine if they really are, I worry that everything we defined as low risk will be redefined as high

security breaches. One of the most significant was Customs' failure to inspect a number of containers that arrived in the United States from a CSI port after those containers were determined to be high-risk, but the host-government refused permission to inspect them in-country.¹⁷¹ Moreover, employing the most state-of-the-art inspection technology on land does not insulate CSI countries from terrorists intersecting their containers at sea.¹⁷² Some terrorist organizations have an intimate knowledge of the maritime transportation industry, not simply as interlopers but as fleet owners—Sri Lanka's Tamil Tigers own a substantial fleet, as does Al-Qaeda.¹⁷³ Using their knowledge to access containers in transit is particularly feasible because so-called tamper-resistant technology—that would alert Customs to any interference with the container in transit—is at a nascent stage of development.¹⁷⁴ Alternatively, containers from non-CSI countries may become more attractive to terrorists seeking entry into the trade supply chain. Even if CSI allows Customs to deploy more of its resources to containers from non-CSI countries, there are insufficient resources available to inspect all such containers. The possibility of terrorists using such containers to stage an attack against the United States is certainly foreseeable. Whether in Kenya, Tanzania or Yemen, terrorists have long exploited the more lax security systems of

risk" (alterations in original)). In 2003, pirates staged what was believed to be a training run for a terrorist attack by boarding a container ship in the Malacca Strait and piloting it for several hours. The pirates subsequently disappeared into the night without stealing anything. Dillon, *supra* note 5. They could have easily infiltrated the container cargo being transported.

¹⁷¹ See GAO REPORT, May 2005, *supra* note 26.

¹⁷² The Tamil Tigers, a guerilla force at war with the Sri Lankan government since the 1980s, intercepted in-transit shipments of guns bound for the government and converted them for their own use. OECD REPORT, *supra* note 3, at 14-15.

¹⁷³ The Tamil Tigers are perhaps the most engaged in the shipping industry, with a profitable fleet estimated at ten to twelve freighters. *Id.* at 14. The fleets are used to generate income from legitimate shipping activities. *Id.* Al Qaeda's fleet is said to number fifteen cargo vessels. Mintz, *supra* note 15, at A1. Fearing Al Qaeda would use its fleet to escape capture, the United States reportedly assembled a coalition of ninety warships, including ships from the United Kingdom, Germany, France, Australia, Italy, Japan and Bahrain, to patrol the waters around the Arabian Peninsula and off the coasts of Pakistan and east Africa. Felsted & Odell, *supra* note 3; Mintz, *supra* note 15; OECD REPORT, *supra* note 15, at 15.

¹⁷⁴ Container inspection technology is advancing, and it may ultimately be the only real solution to the risks terrorists pose in this sector. The port of L.A./Long Beach—the busiest port in the country—is moving toward 100% inspection of all cargo in the near future. See *supra* note 17.

developing countries to launch attacks against U.S. targets.¹⁷⁵ Ignoring the central role developing countries play in the War on Terror leaves them vulnerable to proxy attacks where they suffer the harm but the United States is the ultimate target.¹⁷⁶ In so doing, the United States effectively undermines its own security.

A more reasonable approach to the new terrorism is to assist developing countries in raising their security standards. Ultimately, the new security protocols and advanced technologies CSI fosters are beneficial to the trading system. If developing countries do not begin to adopt these “best practices,” they will be left even further behind. Recognizing that possibility, developing countries indeed have—on their own initiative—taken on the challenge of upgrading their security infrastructures.¹⁷⁷ What remains is for the United States and other developed countries to recognize that assisting them, rather than excluding them, is the only practical response to the new terrorism.¹⁷⁸ To do otherwise would allow gaping holes in the global security infrastructure that would only be exploited by terrorists.

Thus, CSI’s present framework of engaging first with developed countries, and only later incorporating developing countries into its security web, poses significant dangers to U.S. security. By alienating developing countries, the United States also risks undermining a multilateral trading system that has served American interests well. The timing is particularly inauspicious considering the trading community is

¹⁷⁵ See Rose, *supra* note 166, at 131; *Victims of Kenya and Tanzania*, *supra* note 166. Even on U.S. soil, terrorists have used such a strategy to great effect, boarding commuter planes in states like Maine ultimately to board flights in New York bound for Los Angeles, both major airports that have far more elaborate security measures. See generally NATIONAL COMMITTEE ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

¹⁷⁶ In the U.S. embassy attacks in Kenya and Tanzania, alone, over 200 people were killed—most of whom were nationals. See *Victims of Kenya and Tanzania*, *supra* note 166; see also *supra* note 59.

¹⁷⁷ Jamaica, for example, adopted many of the CSI protocols well before they were eligible to join CSI. See *supra* note 83 and accompanying text. Similarly, the Agency for Air Transport Security in Africa has invested \$27 million “to modernize member states’ airport security infrastructure.” Global Economic Prospects, *supra* note 56, at 185.

¹⁷⁸ Moreover, assisting developing countries makes good political sense given the United States’ interest in engaging them in such U.S.-sponsored initiatives like United Nations Resolution 1540, which is designed to attack the proliferation of weapons of mass destruction. Resolution 1540, *supra* note 1, at 1-4.

currently in the midst of a new round of trade negotiations, the Doha Development Round,¹⁷⁹ which is meant to “redress the existing imbalances in multilateral trade relations.”¹⁸⁰ In return, developed countries are expecting developing countries to take on even more commitments to liberalize trade and implement WTO disciplines in areas like intellectual property.¹⁸¹ But the reality for developing countries is that the market access and other benefits they may achieve in the round will prove meaningless if the new security architecture excludes them from participation. In short, U.S. security measures potentially pose the greatest non-tariff barrier to trade for developing countries. The gains from the round will not be enough of an offset, calling into question the (already suspect) commitment of developed countries to redress imbalances inherent in the current trade order. Developing countries may ultimately conclude it is not in their interest to take on additional commitments or, in a less overtly confrontational response, they may adopt a “go-slow” approach to their current and future implementation obligations.¹⁸²

¹⁷⁹ The Doha Round was launched in October 2001, only one month after the terrible September 11 attacks. In July 2006, WTO Director General Pascal Lamy called a halt to negotiations after delegates failed to make progress. See WORLD TRADE ORG., REPORT OF DIRECTOR-GENERAL PASCAL LAMY, AS CHAIR OF THE TRADE NEGOTIATIONS COMMITTEE TO THE GENERAL COUNCIL (July 27, 2006), available at http://www.wto.org/english/news_e/news06_e/tnc_chair_report_27july06_e.htm; see also Madeleine Morris, *What Now for Doha?*, BBC NEWS, Aug. 1, 2006.

¹⁸⁰ Pascal Lamy, *Negotiations on the Doha Round Development Agenda: We Approach the Moment of Truth*, Speech to the Comm. on Int'l Trade European Parl., Brussels (Mar. 23, 2006), available at http://www.wto.org/english/news_e/sppl_e/sppl21_e.htm.

¹⁸¹ Under the WTO's single-undertaking, all WTO members must sign on to all WTO rules. Currently under negotiation in the Doha Round are agriculture, cotton, non-agriculture market negotiations, services, trade facilitation, DSU, environmental, TRIPS, and rules. World Trade Organization, Doha Work Programme, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC (2005), available at http://www.wto.org/English/thewto_e/minist_e/min05_e/final_text_e.pdf. For a discussion of the single-undertaking approach, see BHALA & KENNEDY, *supra* note 94, at 14. For an evaluation of the Doha Round's mandate and the possible impacts on developing countries, see SANDRA POLASKI, WINNERS AND LOSERS: IMPACT OF THE DOHA ROUND ON DEVELOPING COUNTRIES 21-56 (2006).

¹⁸² Some might argue developing countries have already adopted a “go-slow” approach, considering that almost eleven years after the birth of the World Trade Organization, many developing countries have failed to adequately implement their obligations. For developing countries, the “implementation issue” is a controversial one, with some experts maintaining it is not in the interest of some of the world's poorest countries to implement their WTO obligations. See, e.g., J. Michael Finger & Phillip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23 WORLD ECON. 431, 511 (2000) (noting that “[i]mplementation will require purchasing of equipment, training of people, establishment of systems of checks and balances, etc. This will cost money and the amounts of money involved are

Thus, the U.S. security framework jeopardizes relations with developing countries, and it may call into question the new commitments they are expected to adopt under the Doha negotiating round. Security measures like CSI not only impede U.S. efforts to expand the rules-based trade regime into other sectors, but have the added effect of diluting or negating U.S. development initiatives.

In recent years, U.S. development policy has experienced a renaissance of sorts. In 2000, President Clinton signed into law the African Growth and Opportunity Act (“AGOA”), which provides duty-free and quota-free access to exports from sub-Saharan Africa.¹⁸³ AGOA was the first significant innovation in U.S.-African trade relations in decades. In addition, the United States has tripled its development assistance to Africa and has embarked on negotiations with the Southern African Customs Union, which, if successful, would result in sub-Saharan Africa’s first free trade area with the United States.¹⁸⁴ Beyond the African continent, U.S. innovations include the Millennium Challenge Account, and a promised doubling of development assistance by 2010.¹⁸⁵ But development assistance and market access are insufficient inducements to counteract the competitive advantage of countries with CSI ports. Business will not be

substantial. . . . An entire year’s development budget is at stake in many of the least developed countries. Would such money be well spent? . . . [F]or most of the developing and transition economies—some 100 countries—money spent to implement the WTO rules . . . would be money unproductively invested.”)

¹⁸³ 19 U.S.C. § 3701 (2000). The African Growth and Opportunity Act was signed into law in 2000 as Title 1 of the Trade and Development Act of 2000, and was amended in 2002 by the Trade Act of 2002 (“AGOA II”). Trade Act of 2002, ch. 5, § 353, Pub. L. No. 107-210, 116 Stat. 933 (2002). In 2004, the AGOA Acceleration Act further modified the original act (“AGOA III”). AGOA Acceleration Act of 2004, Pub. L. No. 108-274, 118 Stat. 820 (2004).

¹⁸⁴ The Southern African Customs Union (“SACU”) came into existence in 1969; one of the oldest customs unions in the world, SACU’s members include two regional economic powers—South Africa and Botswana. Republic of S. Africa, Dep’t of Foreign Affairs, *Southern African Customs Union (SACU): History and Present Status*, available at <http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm>. Negotiations between the United States and SACU currently are at a deadlock. DANIELLE LANGTON, CONG. RES. SERV. REP. RS21387, UNITED STATES-SOUTHERN AFRICAN CUSTOMS UNION (SACU) FREE TRADE AGREEMENT NEGOTIATIONS: BACKGROUND AND POTENTIAL ISSUES 4 (2005).

¹⁸⁵ The Millennium Challenge Corporation, Millennium Challenge Account, http://www.mca.gov/about_us/overview/index.shtml; Steve Radelet & Bilal Siddiqi, Ctr. for Global Dev., *US Pledges of Aid to Africa: Let’s Do the Numbers* (2005), http://www.cgdev.org/files/2870_file_Accounting_for_Aid25.pdf (quoting President Bush as saying, “[T]he United States has tripled overseas development aid to Africa during my presidency and we’re making a strong commitment for the future: between 2004 and 2010, I propose to double aid to Africa once again.”).

lured to Africa or other locations in the developing world as long as U.S. security measures continue to pose an expensive and unpredictable non-tariff barrier to trade.¹⁸⁶ Without addressing that barrier, U.S. development initiatives are destined to fail—wasting both economic and political resources.

Five years after the tragedy of September 11, the unilateralism that characterized U.S. action in the immediate aftermath appears to be abating.¹⁸⁷ More developing countries are being added to the CSI program, and Customs has worked within the International Maritime Organization to internationalize the security protocols developed under CSI.¹⁸⁸ The United States has also played a significant role in security measures like the Proliferation Security Initiative and Resolution 1540—two significant multilateral efforts to address terrorism.¹⁸⁹ While not too late, U.S. action is too little in scope, relegating multilateralism and the interests of developing countries to a mere afterthought. The next section explores possible approaches to terrorism that balance security needs with development objectives.

B. Crafting a Response to Terrorism that Balances Security with Development

A world where some live in comfort and plenty, while half of the human race lives on less than \$2 a day is neither just nor stable. Including all of the world's poor in an expanding circle of development—and opportunity—is a moral imperative and one of the top priorities of U.S. international policy.

—President George W. Bush¹⁹⁰

¹⁸⁶ For the economic impact of CSI, see discussion *supra* section II.B.2.

¹⁸⁷ U.S. foreign policy in general appears to have taken an about face from the go-it-alone strategy prevalent in the immediate aftermath of September 11. See, e.g., Sanger, *supra* note 41 (noting that in a recent State of the Union address, President Bush, who once viewed globalization as “mushy Clintonianism,” cautioned that “the road of isolationism and protectionism may seem broad and inviting—yet it ends in danger and decline”).

¹⁸⁸ Recent developing countries admitted to CSI include Jamaica and The Bahamas. See Ports in CSI, *supra* note 31. In July 2004, the IMO's International Ship and Port Facility Security Code (ISPS Code)—a comprehensive set of measures to enhance the security of ships and port facilities—entered into force. The mandatory security measures are included as amendments to the 1974 Safety of Life at Sea Convention. See International Maritime Organization, <http://www.imo.org> (last visited Jan. 6, 2007).

¹⁸⁹ Valencia, *supra* note 1; Resolution 1540, *supra* note 1.

¹⁹⁰ REPORT OF THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 21 (2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter NATIONAL SECURITY STRATEGY].

Poverty and the maldistribution of wealth among nations create instability.¹⁹¹ Globalization has only exacerbated the divide between the wealthy and the poor; it also enables those who adopt violence against civilians as a tool for social change to export their discontent around the world. Thomas Barnett, author of *The Pentagon's New Map: War and Peace in the Twenty-First Century*, posits that modern instabilities in the world order stem almost exclusively from those countries left out of the “functioning core” of globalization.¹⁹² The U.S. embassy bombings in Kenya and Tanzania in 1998 reinforce the lesson: countries relegated to globalization’s periphery merely serve as a fertile hunting ground for terrorists.¹⁹³ Logically then, integrating those countries left behind is not just a moral imperative but is the last best hope for ensuring U.S. and global security.¹⁹⁴ The proposals that follow are thus broader than CSI or any single security measure; rather, they seek to inform the underlying basis from which the United States implements future antiterrorism initiatives.¹⁹⁵

¹⁹¹ The point is made most clear when one examines countries where wealth is stagnated in the hands of a tiny minority. Amy Chua’s *World on Fire* highlights the dangers of technical assistance projects that export U.S.-style free markets and democracy to developing countries without the legal and regulatory mechanism to protect against a “market-dominant minority” hijacking the bulk of economic activity. See generally AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

¹⁹² “America can only increase its security when it extends connectivity or expands globalization’s reach, and by doing so, progressively reduces those trouble spots or off-grid locations where security problems and instability tend to concentrate.” THOMAS P.M. BARNETT, *THE PENTAGON’S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 56 (2004).

¹⁹³ See *Victims of Kenya and Tanzania*, *supra* note 166.

¹⁹⁴ President Bush’s statement in the 2002 U.S. National Security Strategy, thus somewhat misses the point. See NATIONAL SECURITY STRATEGY, *supra* note 190. While helping the poor has been a moral imperative at least since the biblical period, in a post-September 11 security environment “doing good” is inevitably linked to peace and security.

¹⁹⁵ Any prescriptions raised by those outside the government’s national security agencies risk being labeled “facile.” The fears and uncertainties engendered by terrorist threats inevitably raise strong feelings of faith in government—citizens often believe, indeed need to believe, that government officials will do what is best to protect the nation’s security. What we are quickly learning—and perhaps history has already shown—is that even in the face of terrorism our national response runs the risk of being captured by special interests and pork barrel politics.

A disturbing report on U.S. spending on port defense has found that funding that should be utilized to shore up the nation’s most vulnerable ports—its frontline in the War on Terror—instead has become a casualty of pork barrel politics. DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, REVIEW OF PORT SECURITY GRANT PROGRAM (Jan. 2005), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-10_Jan05.pdf. The study found that Wyoming has received four times as much antiterrorism money per capita as New York. Grants were also given

Some argue that national security considerations trump all others, including civil liberties and certainly international obligations.¹⁹⁶ Particularly where commercial interests are concerned, the average citizen likely would rather see the government err on the side of caution, even if the measures taken unduly impact commerce or development.¹⁹⁷ But the U.S. government—and more specifically, Customs—does not subscribe to that view. CSI aims to balance security interests with trade and development considerations¹⁹⁸—one objective of the program is “enhancing homeland and border security while facilitating growth and economic development within the international trade community.”¹⁹⁹ Thus, the “closed borders” approach to terrorism some would advocate simply is not an option. It remains an open question, however, as to how to strike the proper balance between security, commerce and economic development in a principled way. Customs adopted CSI’s staged-implementation approach, relegating admission of most developing countries to some distant time in the future, based on its assessment that “efforts had to begin somewhere, and it just made sense to start with the largest volume

for purposes “other than security against an act of terrorism.” *Id.* at 35. For example, one small and remote facility that received less than twenty ships per year was awarded \$180,000 to install security lights; at another port, which stood next to a luxury entertainment pavilion, a \$25,000 grant was awarded to install video surveillance equipment and alarms, a project Department of Homeland Security staff concluded “appear[ed] to support a normal course of business.” *Id.* at 27, 35-36 (referenced by Eric Lipton, *Audit Faults U.S. for its Spending on Port Defense*, N.Y. TIMES, Feb. 20, 2005, § 1, at 1). See also Eric Lipton, *In Kentucky Hills, Bonanza*, N.Y. TIMES, May 14, 2006, § 1, at 1 (noting that Kentucky Representative Harold Rogers, chairman of the House subcommittee that controls the Homeland Security budget, has apparently used his position to benefit his hometown of Corbin, a small, poor, rural community in southeastern Kentucky. Rogers mandated that tamper-resistant identification cards that are to be issued to maritime workers be produced in Corbin using old technology (used in Corbin), rather than “smart-cards,” which are demonstrably superior.).

¹⁹⁶ See, e.g., Cole, *supra* note 39, at 22; see also Statement of U.S. Delegate Before the GATT Council, *supra* note 131 (“there is no distinction between developed and developing countries in matters of security”).

¹⁹⁷ Fear—even irrational fear—plays a significant role in public perception of the risks of terrorism. For a discussion of the role of public perception in guiding government action in the face of fear and uncertainty, see CASS R. SUNSTEIN, *LAW OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 83, 96-97 (2005).

¹⁹⁸ See, e.g., Statement of Ambassador Deily, *supra* note 144. (“It is fully recognized that the U.S. economy, as well as the global economy, cannot thrive without the expeditious movement of international trade. These initiatives have been designed to identify and carefully screen high-risk cargo shipments while facilitating the expeditious movement of legitimate trade.”).

¹⁹⁹ GAO REPORT, May 2005, *supra* note 26, at 8.

ports.”²⁰⁰ Remembering that CSI was adopted just four months after the September 11 attacks,²⁰¹ Customs’ desire to “do something” in the face of such a calamity is perhaps understandable. While such an approach may be administratively convenient, and it may have given Americans some comfort at a time when fear and the perception of risk from terrorist attack was at an unprecedented high, it is far from principled. Thus, in addition to its legal deficiency, CSI fails to advance Customs’ own objective of ensuring security while “facilitating growth and economic development.”²⁰²

Balancing new security priorities with economic and trade objectives is a complicated task given the potential risks to human life should the United States underprotect its borders. But in assessing the real risk from maritime terrorism, threat assessment cannot be confused with vulnerability assessment. Threat assessment determines the probability of a terrorist attack while vulnerability assessment evaluates the damage likely to ensue from an attack.²⁰³ Confusing the two could result in a remote possibility being deemed an imminent threat.²⁰⁴ In 2000, the Interagency Commission on Crime and Security in U.S. Seaports concluded that the threat of terrorism to U.S. seaports was low, although vulnerability to terrorist attack was rated high.²⁰⁵ More recently, the GAO explored the impetus behind CSI—the fear that terrorists may appropriate containers to transport weapons of mass destruction or a nuclear device to the United States—and concluded it was not an imminent threat. While acknowledging that containerized cargo is vulnerable to some form of terrorist action, the GAO report determined: “[A]n extensive body of work . . . by the [FBI] and academic, think tank, and business organizations concluded that . . . the likelihood of . . . containers [being used to move WMDs to the United States] is considered low.”²⁰⁶ The GAO’s finding is no

²⁰⁰ Customs and Border Protection, CSI Fact Sheet (Mar. 8, 2004), at 3, available at http://r0.unctad.org/ttl/docs-unctadxi/csi_5ffactsheet052404.pdf.

²⁰¹ Slide Presentation, *supra* note 23.

²⁰² GAO REPORT, May 2005, *supra* note 26, at 8.

²⁰³ Nancy A. Renfroe & Joseph L. Smith, *Threat/Vulnerability Assessments and Risk Analysis*, WHOLE BUILDING DESIGN GUIDE, available at <http://www.wbdg.org/design/riskanalysis.php>.

²⁰⁴ *Id.*; see also Statement Issued by the International Code Council (“ICC”), *Maritime Security: Separating Fact from Hype* (June 30, 2004), available at <http://www.cargosecurityinternational.com/print.asp?id=2947>.

²⁰⁵ Port and Maritime Security Act, *supra* note 13, at 6.

²⁰⁶ GAO REPORT, May 2005, *supra* note 26, at 5.

reason for inaction, but it does suggest there is time to construct measures to protect containers and the supply chain that make sense—in other words, measures that adopt a principled approach to balancing security, commerce and development considerations.

Redressing CSI's imbalance and increasing U.S. security requires a manifold approach. The realization that much of global insecurity will stem from those countries not integrated into globalizations “functioning core,”²⁰⁷ coupled with the arrival of a “new terrorism” without borders, points to the central role developing countries must play in the fight against terror. Future security measures must consciously and explicitly solicit their participation because the United States cannot ensure its security without their active engagement.²⁰⁸ In short, the very status of developing countries as marginal participants in the globalization revolution should make them “of strategic and political significance” to the United States.²⁰⁹

What would a more balanced CSI that incorporated a development dimension and was designed to address the new terrorism look like?

First, CSI would include technical assistance-capacity building as well as development assistance as part of its core structure. Without such assistance, developing countries cannot effectively be brought into the security fold. Membership in CSI is not without significant financial costs. At a minimum, CSI members must invest in state-of-the-art equipment and increased training for personnel all along the supply chain from customs officials to shippers to manufacturers and exporters.²¹⁰ The costs of required scanning equipment range from one to five million dollars, while total security-related implementation costs are estimated at 1-3% of the value of traded goods.²¹¹ Many developing countries would not be able to absorb those costs alone; indeed even developed

²⁰⁷ BARNETT, *supra* note 192.

²⁰⁸ Mikhail Gorbachev's prophetic statement that we cannot ensure our security without ensuring global security highlights the massive shift in the global security environment since the fall of the Berlin Wall. Gorbachev Statement, *supra* note 164.

²⁰⁹ See CSI Fact Sheet, *supra* note 9 (language used in Phase II of CSI implementation).

²¹⁰ *Id.* Of course some countries will already have had the equipment in use.

²¹¹ Global Economic Prospects, *supra* note 56, at 186. Note that the OECD suggests a more modest impact. See OECD REPORT, *supra* note 3, at 50.

countries like Greece apparently find CSI implementation challenging.²¹²

Admittedly, the idea that a country like the United States may have to pay others to ensure its national security may be unpalatable to some, but it is surely money well spent. Without question, helping ensure the security of developing countries' exports also ensures U.S. security and the security of the supply chain. As one of the biggest providers of development and technical assistance aid in the world,²¹³ the United States recognizes funding must often be provided to less wealthy countries in order to protect and advance U.S. interests.²¹⁴ Moreover, adopting a multilateral approach to fighting terrorism would enable the United States to share the costs of assisting developing countries with wealthy allies and international lending institutions like the International Monetary Fund or the World Bank. In any case, providing technical assistance is specifically contemplated in the current CSI. But by the time such assistance is provided in Phase III of CSI implementation, it may well be too little too late.

In addition to funding, many developing countries would need a transfer of technology and know-how to effectively implement CSI. Currently, CSI requires participating countries to establish and automate certain risk management systems to identify potentially high-risk containers, and they must also conduct port assessments to identify and resolve vulnerable links in a port's infrastructure.²¹⁵ Moreover, all CSI participants must own non-intrusive inspectional equipment ("NII"), which is equipment with gamma or X-ray imaging capabilities.²¹⁶ NII equipment allows officials to inspect a container without having to open it, making inspections more efficient and less disruptive to the flow of legitimate trade.²¹⁷ The United States should grant such equipment to developing countries that do not have it, and of course provide the experts

²¹² *Greece Signs Agreement*, *supra* note 35.

²¹³ See U.S. Agency for Int'l Development, Millennium Challenge Account Update: Fact Sheet (June 3, 2002), *available at* http://www.usaid.gov/press/releases/2002/fs_mca.html ("The United States is the world's largest bilateral donor to the developing world. While many donors provide economic assistance, the United States provides resources both to strengthen security and foster economic growth.")

²¹⁴ Indeed, the United States has already provided such assistance with respect to Greece. See *Greece Signs Agreement*, *supra* note 35.

²¹⁵ See *supra* note 32.

²¹⁶ *Id.*

²¹⁷ *Id.*

who can help train local personnel to use them. There is some precedent for such action. When it sought to protect turtles from the nets of shrimp farmers, the United States gave Caribbean fishers “turtle exclusion devices” that enabled farmers to harvest their product for export while protecting the turtles.²¹⁸ More recently, Customs provided NII equipment to Greece in order to bring that country online in time to host the 2004 Olympics.²¹⁹ That level of innovative thinking should be used immediately on a larger scale to assist developing countries in meeting CSI’s security protocols.

Perhaps the most difficult challenge in constructing a more principled approach to CSI implementation is in addressing the question of which developing countries should be permitted head-of-the-line privileges to join CSI. By relegating admission of developing countries to some time in the future—and slowly allowing in some of the more advanced and politically powerful developing countries²²⁰—Customs has not yet had to fully deal with that thorny issue. It is admittedly a difficult one because certain resource constraints must be taken into consideration. CSI implementation is costly even for the United States, both in monetary and human resource terms. For each CSI port, Customs must deploy four to five officers, computers and related paraphernalia to the foreign port.²²¹ Starting with a budget of only \$4.3 million in 2002, CSI has expanded to \$126 million in 2005 and about \$139 million was requested in fiscal year 2006.²²² In addition to the economic costs, CSI implementation presents formidable logistical challenges. As the number of CSI ports increases, Customs is finding it more difficult to attract qualified personnel to staff overseas posts.²²³ Currently, thirty CSI ports are fully operational with Customs staff in place, but as the program expands out to “hardship” posts like Brazil and Greece, the expectation is that staffing will become a more

²¹⁸ Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, at 1, WT/DS58/R (May 15, 1998); unfortunately, U.S. generosity was not rewarded in the WTO. *Shrimp-Turtle*, *supra* note 124, ¶¶ 187-88 (Appellate Body Report).

²¹⁹ *Greece Signs Agreement*, *supra* note 35.

²²⁰ Business Report, *supra* note 48 (noting that this came after a South African official’s comment that CSI could pose challenge to WTO rules).

²²¹ GAO REPORT 2003, *supra* note 27, at 12-13.

²²² See GAO REPORT, May 2005, *supra* note 26, at 9; GAO REPORT 2003, *supra* note 27, at 13.

²²³ See GAO REPORT 2003, *supra* note 27, at 28.

difficult issue.²²⁴ These costs limit how quickly CSI can expand and—potentially—which countries can be included. But these resources constraints must be handled in a way that does not undermine security or penalize developing countries themselves.

It is of course impossible to construct a list of developing countries that under all circumstances should be incorporated in CSI and future security measures. But it is possible to develop a set of parameters for admission that do not rely exclusively on a country's economic status. In the first instance, those countries that have the requisite equipment in place should not be denied admission. Thus, developing countries like Jamaica, Malaysia and South Africa, now part of CSI, would have been granted admission much earlier.²²⁵

Another concern with CSI's current implementation strategy is that on certain continents, a single country is privileged. In Africa, for example, South Africa is the only country with a CSI port, and until recently, South America had no ports at all.²²⁶ One response is to ensure that on every continent at least five to ten developing countries be incorporated in CSI. The criterion for admission cannot be based principally on whether a country has "substantial" trade with the United States,²²⁷ or at least the term must be loosely defined. What might be considered *de minimis* trade by U.S. standards could well be the economic life-blood of a developing country.

Finally, the question arises whether certain conditions should be imposed on developing countries in return for admission to CSI. "Conditionalities" are often imposed in World Bank or IMF lending, as well as in preference programs developed by wealthy nations to benefit developing countries.²²⁸

²²⁴ *Id.*

²²⁵ Jamaica became a CSI member in 2006—years after CSI had been established. Malaysia joined in March 2004, and South Africa in February 2003. *See* Ports in CSI, *supra* note 31.

²²⁶ CSI Fact Sheet *supra* note 9, at 1.

²²⁷ One of CSI's admission criteria is that a country have "regular, direct and substantial" container trade with the United States. *Id.* at 3.

²²⁸ AGOA, for example, sets certain conditions for membership, adding only those countries that:

have established, or are making continual progress toward establishing the following: market-based economies; the rule of law and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing

It is a popular way for those providing the funding to ensure their resources are being properly utilized. Much of the rationale behind conditionalities—protecting against corruption and waste—would presumably (and hopefully) not be at issue here given that improper implementation of CSI would expose developing countries themselves to terrorist attack.

CSI itself imposes certain conditions—such as having the requisite equipment and risk assessment capabilities²²⁹—that would be non-controversial if applied to all members. But one could imagine other conditions that would elicit controversy; for example, what if the United States were to require as a condition for admission that a developing country agree to launch trade facilitation negotiations within the WTO? Conditions that go to the heart of the proper implementation of CSI, including possible audits to ensure that monies are being well-spent, make some sense and could be developed in a way that does not unduly trample on the sovereignty rights of developing countries. Conditions that are only tangentially related to CSI implementation, however, would likely force developing countries to rebel. To the extent possible, CSI admission should not be used as a tool to advance other interests. U.S. security interests—as well as the interests of the supply chain—are too important to be exposed to traditional “pork-barrel” politics.

IV. CONCLUSION

Terrorism was not invented on September 11, 2001. But when the Towers came tumbling down, it signaled the arrival of a new form of terrorism and a shift in globalization.²³⁰ The “new terrorism” is one that is highly mobile, technologically advanced, unfettered by state control, and profoundly lethal. In turn, the new terrorism revealed a need to re-conceptualize the link between globalization and security. Before September 11, discussions of that link tended to focus on the breakdown of domestic control that occurred when

availability of health care and educational opportunities; protection of human rights and worker rights; and elimination of certain child labor practices.

H.R. 434, 106th Cong. (2000).

²²⁹ CSI Fact Sheet, *supra* note 9, at 3.

²³⁰ For a provocative discussion of the nexus between globalization and terrorism, see BARNETT, *supra* note 192.

protestors took to the streets during international meetings to demonstrate against the ever-encroaching tide of globalization.²³¹ But September 11 demonstrated that security and globalization are interrelated.²³² Terrorists fly a plane into the World Trade Center, and along with the damage to lives and property come border closings, which threaten whole industries because in a just-in-time world, American enterprises cannot prosper without inputs from businesses around the world. This interrelationship of security, commerce and globalization has moved the lowly shipping container to the frontline in the War on Terror.

In an effort to protect the advances made possible by globalization, shipping containers—which facilitate the interconnection of countries—must be protected. Given the challenges terrorism poses to the system, U.S. action is not surprising; indeed, action is necessary. The WTO Agreement is not an impediment to taking such action, but it does impose certain obligations. One of those obligations is the need to balance security considerations with development objectives. The United States cannot ensure its security at the expense of further impoverishing economically vulnerable countries. Such a course of action, in the end, would only make the terrorists' objectives that much easier to attain.

Before September 11, the debate in trade and development circles centered on proponents of “free trade” versus those who advocated “fair trade.” But in the current security environment, *secure* trade adds another dimension to the debate. A stable and prosperous trading system will only be achieved when all three elements—free, fair and secure—are incorporated within an expanded trade regime.

²³¹ See, e.g., Paul Reynolds, *Eyewitness: The Battle of Seattle*, BBC NEWS, Dec. 2, 1999, <http://news.bbc.co.uk/2/hi/americas/547581.stm>. The high-watermark for the anti-globalization protestors was, of course, the WTO Seattle Ministerial Conference in 1999. When the conference ended, without the long-awaited launching of a new round of negotiations, the antiglobalists claimed victory.

²³² Ironically, while the terrorists were in part protesting a globalization phenomenon that leaves much of the Middle East behind, their mission could not have succeeded without the advances in telecommunications and other technologies that globalization made possible. See, e.g., Kurt M. Campbell, *Globalization's First War*, WASH. QUARTERLY, Winter 2002, at 10-11.