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The Container Security Initiative: Balancing U.S. Security Interests with the European Union's Legal and Economic Concerns

Sung Y. Lee*

INTRODUCTION

In response to the September 11th terrorist attacks, the United States Customs Service (Customs) implemented the Container Security Initiative (CSI).¹ The CSI is a partnership program where Customs agents are given access to and are stationed at seaports of foreign nations.² The CSI allows Customs to coordinate efforts with its foreign counterparts to conduct safety inspections of export products headed for the United States.³ Customs developed the CSI because U.S. seaports are ideal targets for terrorism.⁴ This is so primarily because sea-

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1. See, e.g., *HM Customs & US Customs Agree Container Security Initiative*, M2 PRESSWIRE, Dec. 9, 2002, available at 2002 WL 103728017 [hereinafter *HM Customs*]. The CSI is designed to provide Customs with intelligence information concerning sea cargoes headed for the United States. See *id.* This information in turn allows Customs to target the cargoes that could contain terrorist weapons of mass destruction. See *id.*

2. U.S. DEPARTMENT OF HOMELAND SECURITY, *Frequently Asked Questions (FAQs) about CSI*, at http://www.customs.ustreas.gov/xp/cgov/enforcement/interntional_activities/csi/q_and_a.xml (last visited Oct. 30, 2003).

3. See, e.g., *EU: U.S. Port Security Drive Breaks EU Law-Commission*, MACON TELEGRAPH, Dec. 20, 2002, available at <http://www.macon.com/mld/macon/news/politics/4783204.htm> [hereinafter *Breaks EU Laws*] (stating that under this system, the Customs officers and the local inspectors work together).

4. See *infra* notes 17-41 and accompanying text. See also *U.S.-European Officials Meet on Cargo Security; Port Bill Approved*, INSIDE THE PENTAGON, Nov. 21, 2002, available at 2002 WL 20490862 [hereinafter *Officials Meet on Cargo Security*]

ports are vital links to the world economy, security at U.S. seaports is almost non-existent, and the majority of the cargo containers entering the United States through the seaports are not subjected to security inspection.⁵ A terrorist attack at a major U.S. seaport would essentially halt international trade and devastate the world economy.⁶

So far, Customs has signed CSI agreements with eighteen nations,⁷ including eight member states of the European Union (EU): the Netherlands, Belgium, France, Germany, the United Kingdom, Italy, Spain, and Sweden.⁸ However, the legitimacy of these agreements is in question because they conflict with EU law.⁹ The EU is a political organization of fifteen nations¹⁰ that carries out external relations with non-member nations on behalf of its member nations.¹¹ The EU maintains that, under its laws, the United States should have entered into a CSI agreement with the EU, rather than the individual nations.¹² If the

(“Everyone agrees that international shipping containers are a potential delivery means for weapons of mass destruction.”).

5. See *infra* notes 20-41 and accompanying text.

6. See Paul Ames, *Container Bomb Could Push World Trade Back to “Stone Age,” Customs Group Warns*, ASSOCIATED PRESS NEWSWIRE, June 27, 2003, available at LEXIS, News Library, Wire News Services File.

7. Press Release, U.S. Department of Homeland Security, Republic of Korea Implements Container Security Initiative to Begin Targeting and Pre-Screening Cargo Destined for U.S. (Aug. 04, 2003), available at http://www.customs.ustras.gov/xp/cgov/newsroom/press_releases/08042003.xml.

8. See, e.g., *EU/United States—Council Grants Commission Negotiating Brief on Transport Security*, EUROPEAN REP., Mar. 22, 2003, available at 2003 WL 10439733; *Containers—Spain Signs Up to Port Security Initiative*, LLOYD’S LIST INT’L, Jan. 10, 2003, available at 2003 WL 3047668 [hereinafter *Containers—Spain Signs Up*]. The Netherlands, France, Belgium, and Germany were the first European nations to sign the CSI agreement with the United States. Roger Hailey, *Brussels Seeks Consensus on Regulations*, LLOYD’S LIST INT’L, Sept. 10, 2002, available at 2002 WL 26528408. Italy and Britain followed. See *HM Customs*, *supra* note 1. Lastly, Spain and Sweden became the seventh and eighth European nations to agree. See *Containers—Spain Signs Up*, *supra*; see also PORTS WORLD, *EC Legal Action Brings into Question Status of US Initiative*, BUS. TIMES (Malay.), Jan. 6, 2003, available at 2003 WL 2845984 (indicating that the UK and Italian CSI agreements stipulate that “any provisions” of their agreements will be trumped by a subsequent agreement between the European Community and the United States).

9. See discussion *infra* Parts II-III.

10. The EU is also referred to as the European Community. See, e.g., *infra* notes 110-115 and accompanying text.

11. See *infra* notes 122-130 and accompanying text.

12. See *Breaks EU Laws*, *supra* note 3 (stating that the individual agreements “break laws on creating a single EU market by giving some ports competitive advantage in traffic to the United States”); see also *EU Starts Case Vs States With Port Security Pacts With US*, DOW JONES INT’L NEWS, Dec. 20, 2002 (on file with author) (explaining that the Commission believes that a general agreement between the EU

EU alone has the power to enter into such an agreement, then the eight CSI agreements violate EU law and may be invalidated by the EU.

Part I of this Note examines the CSI program in detail, emphasizing the reasons for which maritime trade is a target for terrorist acts and the solution provided by the program. Part II analyzes EU membership and its rules and laws that may prohibit individual states from entering into CSI agreements with the United States. Part III argues that the individual states violated EU laws by signing the CSI. Part IV explores the balance between U.S. security and EU interests, and provides workable solutions that meet the needs of the United States and the EU.

I. THE CONTAINER SECURITY INITIATIVE

A. MARITIME TRADE IS VULNERABLE TO ACTS OF TERRORISM

Following September 11th,¹³ national security became the top priority for Customs.¹⁴ Immediately after the attacks, Customs went on alert and increased security at all U.S. borders.¹⁵

and the United States provides a more effective fight against terrorism than individual agreements). *But see* Press Release, State Department, Custom's Bonner Reacts to the EC Container Security Stance—The Netherlands, Germany, Italy, and France Cited by EC, (Dec. 23, 2002), *available at* 2002 WL 104129413 (denying that the CSI causes trade distortions).

13. On September 11, 2001 Al Qaeda launched a massive terrorist attack on the United States. *See, e.g., September 11: A Memorial*, CNN.COM: IN-DEPTH SPECIAL, *at* <http://www.cnn.com/SPECIALS/2001/memorial> (last visited Sept. 12, 2003). Al Qaeda members hijacked four American commercial airplanes and flew two into the World Trade Center in New York City, one into the Pentagon in Washington, D.C., and one into a field in Pennsylvania. *Id.* As a result of this incident, more than 3,000 people died. *Id.*

14. Robert C. Bonner, Remarks at the Center for Strategic and International Studies (Aug. 26, 2002), *available at* http://www.customs.ustreas.gov/xp/cgov/newsroomcommissioner/speeches_statements/aug262002.xml. [hereinafter Bonner's August Speech] (indicating that the Customs "increased security at . . . [the] borders, and implemented the Container Security Initiative (CSI), the Customs-Trade Partnership Against Terrorism (C-TPAT), Operation Green Quest, a Customs-led multi-agency task force to investigate and attack terrorist financing, as well as other counterterrorism initiatives").

15. Robert C. Bonner, Speech Before the Center for Strategic and International Studies (Jan. 17, 2002), *available at* http://www.customs.ustreas.gov/xp/cgov/newsroom/commissioner/speeches_statements/archivesjan172002.xml. [hereinafter Bonner's January Speech] ("Immediately following the terrorist attacks on September 11th, at about 10:05 a.m. on September 11, Customs went to a Level 1 alert across the country at all border entry points. Level 1 requires sustained, intensive anti-

In particular, Customs concentrated its efforts on safeguarding U.S. seaports.¹⁶ It was feared that seaports were ideal targets for terrorist attacks¹⁷ for two reasons: first, seaports play a major role in global trade;¹⁸ and second, seaport security is almost nonexistent.¹⁹

Seaports are extremely important to global trade because approximately ninety percent of the world's cargo moves by ocean-going sea containers.²⁰ This accounts for over 200 million sea containers that move between major seaports annually.²¹ The United States receives about forty-six percent of its trade imports by containers.²² Although forty-six percent may not seem significant, in 2001 alone more than 214,000 vessels and 5.7 million sea containers entered the 102 U.S. seaports.²³ Furthermore, whereas the United States relies on its land-bordering NAFTA partners for a significant amount of trade,²⁴ there are many nations such as the United Kingdom that rely

terrorist questioning, and includes increased inspections of travelers and goods at every port of entry").

16. See *id.*; see also *infra* notes 17-41 and accompanying text.

17. See, e.g., *Securing Our Ports Against Terror: Technology, Resources, and Homeland Defense: Hearing Before the Subcomm. on Technology, Terrorism, and Government Information of the Senate Comm. on the Judiciary*, 107th Cong. 2 (2002) [hereinafter *Senate Hearing*] (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary).

18. See *Officials Meet on Cargo Security*, *supra* note 4 (noting that "international shipping containers are the foundation of global trade on which all of our prosperity depends").

19. See *Senate Hearing*, *supra* note 17, at 31 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports) (pointing out that port security "ranges from poor to fair"); *infra* note 34 and accompanying text.

20. Press Release, U.S. Customs, U.S. Customs Container Security Initiative Forging Ahead, 2002 Archived Press Releases (Aug. 8, 2002), available at <http://www.customs.ustreas.gov/hot-new/pressrel/2002/0808-00.htm>. [hereinafter *Forging Ahead*]. Sea containers, which were invented by Malcolm McLean in the 1930s, have revolutionized the cargo shipping industry as well as global trade. See Bonner's January Speech, *supra* note 15. Sea containers are large steel boxes that facilitate loading and unloading cargo from ships. See, Rosella Breretti, *Bonner Says Customs Is Making Container Security Initiative a Reality*, 19 INT'L TRADE REP. 12, 484 (2002) (explaining that transport ships are able to stack dozens of stories of cargo containers).

21. See, e.g., *Forging Ahead*, *supra* note 20.

22. Bonner's August Speech, *supra* note 14.

23. E.g., *Forging Ahead*, *supra* note 20.

24. See Bonner's January Speech, *supra* note 15. The United States receives thirty-one percent of its trade goods by truck and rail from its NAFTA partners—Canada and Mexico. *Id.* In addition, air cargo accounts for the remaining twenty-three percent. *Id.*

almost exclusively on sea container trade.²⁵ Therefore, seaports are a critical part of the world's economic activity.²⁶

Terrorists prey not only on lives, but also on the economy. Because seaports play such an important role in global trade, there is no doubt that the U.S. and the world economies will suffer if terrorists launch a successful attack on a U.S. seaport.²⁷ The September 11th attacks reflect the extent of the possible economic damage. Following September 11th, the airline industry halted for almost a week and cost the U.S. economy billions of dollars.²⁸ In the case of maritime trade, Customs would have to shut it down for much longer than a week while the government developed a secure solution.²⁹ Yet, even after reopening, seaports would have to process the cargoes of ships that were unable to enter the ports during the shutdown period.³⁰ Billions would be lost in the United States alone, especially in the cities that depend on seaports for business.³¹ Since the majority of globally traded goods exchange hands at seaports, seaports make very attractive targets for terrorists.³²

25. See *id.* Nations such as the Netherlands, Singapore, Japan, and South Korea carry out the majority of their trade through sea transport. *Id.* For example, South Korea conducts approximately 99.7% of its trade through its seaports. See Seung-Kuk Palik & Prabir K. Bagchi, *Process Reengineering in Port Operations: A Case Study*, 11 INT'L J. LOGISTICS MGMT. 59, 59 (2000).

26. See, e.g., *Senate Hearing, supra* note 17, at 1 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary).

27. See Gary Fields, *The War on Terror: U.S. Tests Terror Preparedness And Finds Economic Catastrophe*, WALL ST. J. EUR., Dec. 5, 2002, available at 2002 WL-WSJE 103489846 (indicating that a terrorist attack would "shut down the world economy"); Bonner's January Speech, *supra* note 15 ("One can only imagine the devastation of a small nuclear explosion at one of our seaports. . . . [t]he shipping of sea containers would stop. The American people, for one, would not likely permit one more sea container to enter the United States . . .").

28. See Bonner's January Speech, *supra* note 15.

29. See *id.*

30. See Fields, *supra* note 27.

31. See Bonner's January Speech, *supra* note 15; see also Fields, *supra* note 27 (predicting \$58 billion in losses: the Dow Jones Industrial average would drop by about 500 points; gas prices would skyrocket because supplies would be cut by the port closures; manufacturing industries would suffer due to the lack of inventory; and factories would close).

32. See *Senate Hearing, supra* note 17, at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary); Don Walsh, *Seaport Security: The Impossible Dream?*, U.S. NAVAL INT. PROC., Feb. 2002, at 89 (noting that the vast amount of economic and industrial activities taking place at the seaports makes them ideal targets); see also *U.S. Transportation Department's Inspector General Looks at Seaport Security*, THE CANADIAN PRESS, Feb. 11, 2002, available at 2002 WL 13837506 [hereinafter *U.S. Transportation Department's Inspector General*] (noting that in some areas seaports are close to industrial sites such as "nuclear

Lack of security at U.S. seaports is another factor that makes them easy targets for terrorism. There are two major deficiencies in seaport security. First, federal agencies do not regulate U.S. seaports.³³ In the absence of such regulation, an inspection by the Seaports Commission reported that the “state of security at seaports generally ranged from poor to fair, with a few exceptions where the security was good.”³⁴ Additionally, access at many seaports is uncontrolled, and unauthorized vehicles can park easily beside docked vessels.³⁵ With such uncontrolled access, there is always “the possibility that a car bomb or a dirty nuclear weapon could be hidden in those vehicles.”³⁶

power plants, chemical plants, [and] oil refineries”).

33. See *Senate Hearing*, *supra* note 17, at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary) (“No Federal agency currently has comprehensive authority to regulate activity at seaports.”); see also Henry L. Hinton, Jr., *Combating Terrorism*, FED. DOC. CLEARING HOUSE, Mar. 12, 2002, available at 2002 WL 25100039 (explaining that since September 11th, various federal agencies and Congress are working to improve security at the seaports); Charles Lunan, *Customs Service Plan Could Prevent Arms Smuggling, But Costs Will Hit Importers*, CHARLOTTE OBSERVER, Sept. 8, 2002, available at 2002 WL 26639896 (noting that the federal government has granted \$93 million to the seaports to increase security); Jonathan Peterson, *INS, Customs May Join Forces Under Bush Plan*, WICHITA EAGLE, Mar. 20, 2002, available at 2002 WL 15660019 (indicating that President Bush proposes combining the INS and Customs to better protect the ports of entry). But see *Port Authority; Legislation to Tighten Security Lagging in Congress*, STATE JOURNAL-REGISTER (Springfield, Ill.), Jan. 13, 2002, available at 2002 WL 9741994 [hereinafter *Port Authority*] (explaining that some port officials are concerned that too much federal control may not be effective because ports will have their own local needs of which the federal government may not be aware).

34. *Senate Hearing*, *supra* note 17, at 31 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports). A notable example of the lax security is that many U.S. seaports do not restrict the carrying of firearms. See *Port Authority*, *supra* note 33. This is in contrast to airports where any sharp objects, including nail clippers, are prohibited past the security gates. See *id.* (noting the large disparity between the level of seaport and airport security).

35. See *Senate Hearing*, *supra* note 17, at 32 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports).

36. *Id.*; “*Dirty Bomb*” Has Low Radiation Risk, THE BATON ROUGE ADVOC., June 26, 2002, available at 2002 WL 5037824 (explaining that Federal authorities suspect that terrorists will attempt to use dirty bombs against the United States); US, Russia, IAEA to Sponsor Vienna Conference on “*Dirty Bombs*”: Officials, AGENCE FRANCE-PRESSE, Nov. 14, 2002, available at 2002 WL 23648874 (noting that authorities discovered “detailed instructions on how to make dirty bombs . . . in al-Qaeda caves [in Afghanistan]”). A dirty bomb is a device containing low-grade materials, such as nuclear waste. See Brian Handwerk, *Nuclear Terrorism—How Great is the Threat?*, NATIONAL GEOGRAPHIC, Oct. 11, 2002, available at

Furthermore, the Seaports Commission has made a set of recommendations for basic safety standards; these recommendations shed more light on current conditions: “[M]inimum physical security standards covering fences, lights, gates, restrictions on vehicle access, restrictions on carrying firearms, the establishment of a credentialing process, considering criminal background checks for those with access to sensitive areas of the port, and development of a private security officer certification program.”³⁷ Thus, in the absence of federal regulations and safety guidelines, U.S. seaports have poor security and are inadequately safeguarded.

Second, Customs agents are unaware of the contents of sea containers arriving at U.S. seaports from overseas.

Due to short staffing and limited technology, inspectors today look at only one or two percent of containers; ninety-eight to ninety-nine percent are just waived through. Hence, virtually every time a ship docks, the only people who know what is in a container are the people who shipped it, maybe, and the people picking it up, maybe.³⁸

As a result of this system, there is significant criminal activity at most of the twelve major U.S. seaports, including “[d]rug trafficking, alien smuggling, [and] export of stolen automobiles.”³⁹

http://news.nationalgeographic.com/news/2002/10/1011_021011_nuclear.html; Miguel Navrot, *Tests Held at KAFB to Find “Dirty Bomb”*, ALBUQUERQUE J., Aug. 27, 2002, available at 2002 WL 25979259. They will usually be made using low-grade isotopes that are often used in hospitals, medicine, and research. See H. Josef Hebert, *“Dirty Bomb” a weapon of Mass Destruction: “Impact More Psychological Than Loss of Life”*, TORONTO STAR, June 11, 2002, available at 2002 WL 21223761. Chances are dirty bombs will not contain enriched uranium or plutonium because such materials are extremely difficult to obtain. See *id.* Thus, dirty bombs will not have an atomic chain reaction or be highly radioactive as are conventional nuclear bombs. See *id.* Therefore, the U.S. Nuclear Regulatory Commission believes that the detonation of a dirty bomb would release limited radiation that would be isolated to the area of the explosion. *Id.*

37. *Senate Hearing, supra* note 17, at 31 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports).

38. *Id.* at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary). See *U.S. Transportation Department’s Inspector General, supra* note 32 (noting that despite the fact that maritime trade will double by the year 2020, Customs only inspects two percent of the containers); see also *Port Authority, supra* note 33 (noting, “agents at the Mexican border near Tijuana will tear the seats out of a car to search for drugs, while a crane just up the coast in Los Angeles lifts thousands of truck-sized cargo containers onto the dock with no inspection”).

39. *Senate Hearing, supra* note 17, at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary); see Walsh, *supra* note 32 (noting that seaport security issues include illegal immigration, organized crime, and smuggling of drugs).

Of more concern, Italian authorities found Amir Farid Rizk, a suspected Al Qaeda member, in a container headed for Canada.⁴⁰ Given this incident, it is possible that other terrorists entered North America in sea containers.⁴¹ Because sea containers are susceptible to tampering and Customs allows entry to most sea containers without inspecting their contents, U.S. seaports are vulnerable to terrorist attacks.

B. CUSTOMS' INSPECTION SYSTEM

Customs defends its low inspection rate stating that it must necessarily strike a balance between national security interests and efficient trade.⁴² It is impossible to inspect every container that enters the United States because such a system would cripple the flow of trade.⁴³ If Customs inspected one hundred percent of its containers, "the ports would be backed up all the way from Los Angeles to Tokyo or New York to London."⁴⁴ According to some estimates, if Customs had to conduct the same type of security search that the airlines conducted following September 11th, checking all the cargoes entering U.S. seaports would take up to four months.⁴⁵ This procedure certainly would require shutting down maritime trade for the entire four-month period.⁴⁶

40. See Lunan, *supra* note 33. The contents of the cargo showed that Rizk was well prepared for his three-week trip: a bed, toilet, portable heater, and water. See *Senate Hearing, supra* note 17, at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary). Additionally, he had a Canadian passport, global satellite phone, cell phone, laptop computer, cameras, identification papers, airport maps, an airline mechanic's certificate, and security passes for airports in Canada, Thailand, and Egypt. *Id.*

41. See *Senate Hearing, supra* note 17, at 2 (statement of U.S. Senator Dianne Feinstein, Member, Comm. on the Judiciary). See also Lunan, *supra* note 33 (noting that although Rizk denies he is a terrorist, this incident has led some officials to advocate a higher inspection rate).

42. See *Prevention and Suppression of Acts of Terrorism Against Shipping: Container Security—U.S. Customs Container Security Initiative (CSI)*, IMO Maritime Safety Committee, 75th Sess., Agenda Item 17, at 1, MSC 75/17/33 (April 12, 2002) (submitted by the United States) [hereinafter *Prevention*] (stating that Customs cannot inspect all cargo shipments because doing so would halt the movement of trade).

43. *Id.*

44. *Senate Hearing, supra* note 17, at 4 (statement of U.S. Senator Charles E. Schumer, Member, Comm. on the Judiciary).

45. *Id.* at 23 (statement of William G. Schubert, Maritime Administrator, U.S. Department of Transportation). Following September 11th, authorities halted airline activity for four days to inspect every single plane for safety. *Id.* Thus, a similar procedure for ship containers would take up to ten times longer. *Id.*

46. *Id.*

Furthermore, Customs presents a different accounting for its two percent inspection figure.⁴⁷ Customs does not randomly pick two percent of the cargo for inspection.⁴⁸ Rather, Customs only examines those cargoes posing the most risk.⁴⁹ This is accomplished by analyzing the “manifest,” or declaration, of cargo that foreign exporters submit to Customs prior to shipping their goods to the United States.⁵⁰ Additionally, Customs Commissioner Robert Bonner assures that the inspection system utilizes strategic and tactical intelligence that incorporates information received from the CIA.⁵¹

However, this system was not functioning efficiently because shippers did not always provide timely or complete manifests to Customs.⁵² Without accurate manifests, Customs was

47. See *U.S. Transportation Department's Inspector General*, *supra* note 32 (noting that more than sixty percent of the cargo is shipped by 1,000 importers with whom the Customs agency is familiar). See also Fields, *supra* note 27 (noting that since September 11th, Customs and over 1,000 companies have agreed to increase manufacturing and shipping security in return for a faster inspection process).

48. See Bonner's January Speech, *supra* note 15 (expressing regret that since September 11th Customs' routine of checking two percent of the cargoes has been under much criticism).

49. See *id.* In a report to the International Maritime Organization, Customs stated:

[W]hat has been incorrectly characterized as random selection is actually a sophisticated risk management approach to targeting. Through this risk management approach, which includes advance manifest and entry information, automated data collection and targeting, and a layered screening and examination methodology aided by non-intrusive technology, Customs is inspecting the highest risk commercial sea cargo shipments that might contain contraband or other products affecting the health, safety and economic well being of our citizens and indeed the world.

Prevention, *supra* note 42, at 2.

50. See *Senate Hearing*, *supra* note 17, at 12 (statement of Bonni Tischler, Assistant Commissioner, Office of Field Operations, U.S. Customs Service); Press Release, U.S. Customs, U.S. Customs to Require Advance Cargo Manifests from Sea Carriers to Protect Global Trade (Aug. 7, 2002), available at http://www.cbp.gov/xp/cgov/newsroom/pres_releases/82002/08072002.xml (noting that Customs uses manifest information to assess terrorist risks associated with the containers headed for the United States). A manifest is a declaration of the cargo headed for the U.S. See *U.S. Customs 24 Hour Advance Manifest Rule*, NYK LINE, Nov. 26, 2002, available at http://www2.nykline.com/nykinfo/whats_new/manifestrule_bot.html (describing the general requirements of the manifest rule). A cargo declaration includes the following information: port of loading, foreign port immediately before heading for the United States, scheduled date of arrival, shipper's identification, carrier code, vessel number, number of containers, etc. See *id.*

51. Bonner's January Speech, *supra* note 15 (noting that intelligence is essential in the operation of Customs' multi-layered strategy to protect the United States from terrorism).

52. See *Senate Hearing*, *supra* note 17, at 32 (statement of Amanda Debusk,

unaware of the contents of some of the sea containers, and thus could not assess risk properly: ⁵³ “a container can be loaded on a ship and be halfway across the Atlantic Ocean before anybody gets any documentation on . . . what is in the container.”⁵⁴ In some cases, exporters or carriers submitted cargo declarations a week after the arrival of the shipment.⁵⁵ Not surprisingly, the manifest system proved unreliable, as a 1999 Seaport Commission study showed a fifty-three percent discrepancy rate between the reported manifests and the cargoes actually arriving in the United States.⁵⁶ After September 11th, it became apparent to legislators and federal officials that security improvements were in order.⁵⁷

C. CSI INCREASES SEAPORT SECURITY WHILE PRESERVING TRADE EFFICIENCY, BUT AT A COST

1. Increasing Security

On January 17, 2002 Customs Commissioner Bonner proposed the CSI as a means to increase safety at U.S. seaports and to increase the overall security of maritime trade.⁵⁸ More specifically, the CSI seeks to facilitate information exchange among the world’s customs authorities, allow Customs to detect suspect

former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports).

53. *See id.* at 21 (statement of Bonni Tischler, Assistant Commissioner, Office of Field Operations, U.S. Customs Service) (explaining that before the new regulations prompted by September 11th, submission of cargo manifests prior to the departure of the vessel carrying the containers for the United States was voluntary).

54. *Id.* at 25 (statement of William G. Schubert, Maritime Administrator, U.S. Department of Transportation).

55. *See id.* at 34 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports).

56. *See id.* at 32 (statement of Amanda Debusk, former Assistant Secretary for Export Enforcement, Department of Commerce, and former Commissioner, Interagency Commission on Crime and Security in U.S. Seaports) (“Over half of the vessels had either more or fewer containers on board than were reported.”).

57. *See generally id.*; Bonner’s January Speech, *supra* note 15.

58. *See* Bonner’s January Speech, *supra* note 15. Commissioner Bonner proposed the CSI during his speech at the Center for Strategic and International Studies in Washington D.C. *Id.* In his original proposal, he called the CSI program “Container Security Strategy.” *Id.* *See also* U.S. Customs 24 Hour Advance Manifest Rule, *supra* note 50 (explaining that the CSI seeks to discourage terrorists from attempting attacks on the global trading system).

cargo, and deter terrorists from exploiting the containerized shipping system.⁵⁹ Customs focuses on signing CSI agreements with nations where “mega ports” are located.⁶⁰ Mega ports are the largest container ports that ship the highest volume of containers to the United States,⁶¹ which account for about two thirds of the cargo entering the United States⁶²

Once the United States and a partner nation enter into a CSI agreement, Customs agents are stationed at the partner nation’s mega port.⁶³ Then, these agents carry out what Customs has named the four core elements of the CSI.⁶⁴ First, Customs agents identify “high-risk” containers.⁶⁵ Customs attempts to identify these containers with the use of “advance information and strategic intelligence.”⁶⁶ Second, Customs agents prescreen containers before they depart from foreign seaports for the United States.⁶⁷ By screening the containers at foreign ports, Customs agents are able to extend the border and better protect the United States.⁶⁸ Third, Customs makes use of technology to

59. See *US and UK Customs Improve Co-operation*, M2 PRESSWIRE, June 3, 2003, available at 2002 WL 56420210.

60. See Bonner’s January Speech, *supra* note 15; cf. *U.S. Customs 24 Hour Advance Manifest Rule*, *supra* note 50 (noting that the partnerships are designed to “target and screen high-risk sea containers in foreign ports before they are shipped to or through the United States”).

61. See Bonner’s January Speech, *supra* note 15.

62. See Bonner’s August Speech, *supra* note 14 (noting that the United States receives almost seventy percent of its containers from the top twenty mega ports). The following are the world’s major trade partner ports and their respective trade percentages: 1. Hong Kong (9.8%), 2. Shanghai, China (5.8%), 3. Singapore (5.8%), 4. Kaohsiung, China (5.6%), 5. Rotterdam, Netherlands (5.1%), 6. Pusan, South Korea (5.0%), 7. Bremerhaven, Germany (4.5%), 8. Tokyo, Japan (2.8%), 9. Genoa, Italy (2.1%), 10. Yantian, China (2.0%), 11. Antwerp, Belgium (2.0%), 12. Nagoya, Japan (1.9%), 13. Le Havre, France (1.9%), 14. Hamburg, Germany (1.8%), 15. La Spezia, Italy (1.7%), 16. Felixstowe, United Kingdom (1.7%), 17. Algeciras, Spain (1.6%), 18. Kobe, Japan (1.6%), 19. Yokohama, Japan (1.5%), 20. Laem Chabang, Thailand (1.4%). Slide Show, Top 20 Mega Ports, U.S. Customs Service, available at <http://www.export-controls.com/regional/presentations/csi/sld006.htm>.

63. See Bonner’s August Speech, *supra* note 14.

64. See *id.* (explaining that the four elements of CSI are designed to effectively secure global trade).

65. See *id.*; Press Release, U.S. Department of Homeland Security, Spain Signs Declaration of Principles to Join U.S. Customs Container Security Initiative, Strengthening Anti-Terror Coalition (Jan. 8, 2003), available at http://www.customs.ustreas.gov/xp/cgov/newsroom/press_releases/012003101082003.xml (outlining the CSI elements). “High-risk” containers are those that terrorists could have filled with weapons or terrorists. See Bonner’s August Speech, *supra* note 14.

66. See Bonner’s August Speech, *supra* note 14.

67. See *id.*

68. *Senate Hearing*, *supra* note 17, at 11 (statement of Bonni Tischler, Assistant Commissioner, Office of Field Operations, U.S. Customs Service). Pushing out

quickly prescreen high-risk containers.⁶⁹ Customs uses technology such as x-ray machines, gamma ray machines, and radiation detection devices to detect lead-shielded materials and people inside the containers.⁷⁰ Such technologically enhanced prescreens seek to maintain trade efficiency.⁷¹ Fourth, Customs develops secure and smart containers.⁷² With smarter containers, Customs will be able to detect tampering with pre-screened containers.⁷³ Although Customs has already developed tamper-proof seals, the smart containers serve as an additional safeguard.⁷⁴ Therefore, the CSI improves Customs' screening and information gathering processes, and allows Customs to better protect U.S. seaports and the maritime trade system from acts of terrorism.⁷⁵

In an effort to give effect to these four elements, Customs also implemented the 24-hour advance manifest rule (24-hour rule) beginning on December 2, 2002.⁷⁶ In order to comply with

the border refers to the expansion of the American "perimeter of security away from our national boundaries and towards foreign points of departure." *Id.* This is a strategic plan that pushes the borders outwards "in kind of a layered defense, viewing our border as a continuum, basically originating from the country of origin all the way here to the *United States*." *Id.* at 17 (statement of Rear Admiral Kenneth Venuto, Director of Operations Policy, U.S. Coast Guard). Extending the border is also referred to as "smart borders." See Robert C. Bonner, Remarks at News Conference on the Transfer of the Customs Service to the Department of Homeland Security (Nov. 21, 2002), available at 2002 WL 31619134. Smart borders make "physical border ports of entry—land borders, seaports, international airports—even more efficient." *Id.* Rather than relying on the physical borders of the United States, smart borders provide an additional layer of defense overseas. *Id.* Customs achieves this by joining efforts with other nations and businesses that export to the United States. *Id.*

69. Bonner's August Speech, *supra* note 14.

70. See *id.* But see *U.S.–European Officials Meet on Cargo Security; Port Bill Approved*, INSIDE THE PENTAGON, Nov. 21, 2002, available at 2002 WL 20490862 [hereinafter *Port Bill Approved*] (noting that the most dangerous materials such as highly enriched uranium will be difficult to detect using the radiation scanning devices because such materials have "a relatively low level of radioactivity").

71. *Id.*

72. Bonner's August Speech, *supra* note 14.

73. *Id.*

74. *Id.* Electronic seals used on the containers "can relay information via satellite about a container's contents, temperature, location and whether it has been opened." According to one estimate, it could cost up to \$10 billion to fit sea containers with these seals. Lunan, *supra* note 33.

75. See generally Bonner's August Speech, *supra* note 14; *Prevention*, *supra* note 422, at 1-3.

76. *FTA Issues US Customs Disruption Alert*, LLOYD'S LIST INT'L, Dec. 2, 2002, available at 2002 WL 26532030; *U.S. Customs 24 Hour Advance Manifest Rule*, *supra* note 50. In order to facilitate exporter compliance with the 24-hour manifest rule, a new computer software market arose for private computer companies. See

the 24-hour rule, the party responsible for shipping a container to the United States must file a cargo manifest with Customs "24 hours prior to loading in the 'foreign port'."⁷⁷ The manifest must include accurate and complete information regarding the shippers, shipment, and vessel.⁷⁸ This allows Customs officers stationed at the foreign ports to analyze the manifest and identify the high-risk containers before they depart for the United States.⁷⁹

Customs also initiated a program called Customs-Trade Partnership Against Terrorism (C-TPAT) to increase the effectiveness of the CSI.⁸⁰ Through this program, businesses take responsibility to increase security.⁸¹ In exchange, Customs gives them faster clearance through seaport inspections.⁸² Customs is already familiar with the major exporters,⁸³ and its goal

Manifest 24, Trade Point Systems, at <http://www.tradepointsystems.com>; *Automated Manifest Service*, Descartes, at http://www.descartes.com/solutions/multimodal/ocean_ams.html. Trade Point Systems, LLC developed "Manifest 24" and Descartes developed "Automated Manifest Service." *Manifest 24*, Trade Point Systems, *supra*; *Automated Manifest Service*, *supra*. Both systems are web-based programs that allow electronic submission of shipment information. *Manifest 24*, *supra*; *Automated Manifest Service*, *supra*. Further, Trade Point Systems promises that its software is "error-free" and the shipper will receive an electronic notification indicating whether Customs accepts or rejects the shipper's filing information. *Manifest 24*, *supra*.

77. *U.S. Customs 24 Hour Advance Manifest Rule*, *supra* note 50.

78. *Id.* (stating that the 24-hour rule requires the following information: name of the foreign port immediately before departure for the United States, carrier code, voyage number, scheduled date of arrival in the United States, quantity of external packaging units in the container, the foreign port where cargo originated from, description and weight of the cargo, identification number of shipper and owner, vessel information, foreign port where cargo is destined, hazardous materials identification codes, container numbers, and seal numbers).

79. Jan F. Wagner, *Ports—Germany Fears Costs of New US Security Measures*, LLOYD'S LIST INT'L, Dec. 12, 2002, available at 2002 WL 26532498 (noting that Customs officials get a twenty-four-hour window to inspect cargoes at the foreign ports). *But see Completion of New Anti-terrorist Logistics System for International Cargo Shipments*, ASSOCIATED PRESS, Feb. 12, 2003 (on file with author) (explaining that the CSI and the 24-hour rule may pose more security concerns because exporters may choose to escape the CSI regulations by shipping cargoes to Canada, and moving them to the United States by truck or rail).

80. See Lunan, *supra* note 33.

81. *Id.*

82. See *Maritime Priorities Reordered for the War on Terror*, LLOYD'S LIST INT'L, Mar. 10, 2003, available at 2003 WL 3050079 [hereinafter *Maritime Priorities Reordered*] (noting that importers who have approved security measures in place can receive faster clearance).

83. *U.S. Transportation Department's Inspector General*, *supra* note 32 (explaining that Customs is familiar with many of the foreign exporters responsible for sixty percent of the cargoes received by the United States).

is to enroll these top businesses in the program.⁸⁴ C-TPAT, which is designed to aid the CSI, has more than 500 businesses participating thus far.⁸⁵

2. Increasing Costs

Foreign ports forecast that participation in the CSI will be very costly.⁸⁶ In order to comply with the CSI requirements, foreign ports must increase security and check containers more carefully.⁸⁷ Additionally, those ports that do not have radiation technology to inspect containers will have to purchase and install it.⁸⁸ Furthermore, because CSI requires that shipments arrive at the port twenty-four hours prior to departure for the United States, foreign port authorities foresee shortage of space and slower processing.⁸⁹ All of these factors will increase costs for the foreign seaports. The ports, in turn, will pass these costs on to consumers, who will pay more for consumer goods.⁹⁰

U.S. seaports must also spend additional funds to increase security.⁹¹ According to the U.S. Coast Guard, seaports will require roughly \$1 billion in the first year to meet the necessary security mandates, and \$535 million per year thereafter.⁹² Currently, federal funding is inadequate. Although the seaports requested \$750 million to finance security, equipment, and personnel costs, port security grants are \$200 million, and only \$92.3 million has been disbursed thus far.⁹³

84. *Maritime Priorities Reordered*, *supra* note 82 (noting that there are 1,000 businesses which account for sixty-one percent of the cargo received by the United States).

85. *Id.*

86. *See Wagner*, *supra* note 79 (explaining that the Association for German Seaports predicts increased port costs).

87. *See id.*

88. Ames, *supra* note 6 (noting that ports in less developed countries will face enormous costs because they require scanners, radioactivity detectors, and other high-tech equipment). *But see* Bonner's August Speech, *supra* note 14 (noting that because the majority of the CSI partners already own sophisticated detection technology, CSI is not a "hugely expensive program").

89. *See Wagner*, *supra* note 79.

90. Lunan, *supra* note 33.

91. *Port Authorities Criticize Lack of Funding for Crucial Security Measures*, LLOYD'S LIST INT'L, Feb. 6, 2003, available at 2003 WL 3048766 [hereinafter *Port Authorities Criticize*].

92. *Gate Marshalling at Hanjin Container Terminal in Oakland*, LLOYD'S LIST INT'L, Apr. 29, 2003, available at 2003 WL 20187616 [hereinafter *Gate Marshalling*]; *Maritime Priorities Reordered*, *supra* note 82.

93. *Gate Marshalling*, *supra* note 92 (noting that according to some critics, although the Bush administration has indicated maritime security is of crucial na-

Furthermore, the 24-hour rule is a source of alarming concern for exporters, importers, shippers, and their insurance providers.⁹⁴ This is because Customs can levy hefty monetary penalties against “any party responsible” that does not comply satisfactorily with the 24-hour manifest rule.⁹⁵ Examples of noncompliance include untimely filing of the manifest, inaccurate manifests, and manifests lacking specific descriptions of shipments.⁹⁶ Also, vessels that fail to provide complete information and passport numbers of all crew members can be detained at the three-mile border off U.S. coasts.⁹⁷ As vessel owners suspect that they will have to change procedures and acquire new equipment to comply with the CSI, ship operators and their insurance companies predict that they will have higher costs.⁹⁸

The 24-hour rule creates additional costs for businesses in the form of losses as well. According to U.S. freight carriers and manufacturers, the advance notification rule is likely to slow down the movement of containerized shipping and disrupt sup-

tional interest, “the administration has repeatedly obstructed efforts to secure federal funding to even the most basic and critical of security enhancements, the conviction being that spending in this and other areas might jeopardise the greater policy goal of massive, enduring tax cuts”); *Maritime Priorities Reordered*, *supra* note 82; *Port Authorities Criticize*, *supra* note 91. Without adequate funding, many necessary security procedures have been overlooked in the United States. *Port Authorities Criticize*, *supra* note 91; *Gate Marshalling*, *supra* note 92. For example, to assess risk and shortcomings properly, the top fifty-vie U.S. seaports require a vulnerability assessment. *Gate Marshalling*, *supra* note 92. Thus far, two years since the September 11th attacks, only five of these ports have gone through such review. *Id.* However, it seems that Tom Ridge, Secretary of Homeland Security, is trying to make the best of the situation. *See id.* He has stated that “[w]e just have to find a way to get it done with little or no money at all.” *Id.*

94. *See Operators Prepare for Rising Price of Fight Against Terrorism*, LLOYD'S LIST INT'L, Jan. 2, 2003, available at 2003 WL 3047365 [hereinafter *Operators*] (explaining that ship operators and insurers have liability concerns); *Security—New US Customs Regulations on Cargo Liability Give Cause for Concern*, LLOYD'S LIST INT'L, Dec. 18, 2002, available at 2002 WL 26532765 [hereinafter *Cause for Concern*] (noting that the 24-hour rule gives rise to liability concerns).

95. *Cause for Concern*, *supra* note 94 (quoting document issued by Customs that states, “[c]ustoms may initiate penalty actions against any party responsible for providing the required information”).

96. *Id.*

97. *Operators*, *supra* note 94 (noting that all crew members must obtain proper documents, such as visas, at their own cost).

98. *See id.*; Toby Shelley, *Squall Brewing Over the Costs of Tighter Maritime Security*, FIN. TIMES, Dec. 6, 2002, at 14, available at 2002 WL 103396576 (noting that implementation of the CSI has been very difficult and quoting Chris Koch, President of the World Shipping Council, as saying compliance with CSI has been like “trying to drink out of a fire hose”).

ply chains of businesses.⁹⁹ Moreover, the International Agency Association claims that the 24-hour rule will create congestion and severe economic damage.¹⁰⁰ A report made by the Santiago Chamber of Commerce of Chile illustrates the extent of the possible economic impact: between March and April of 2003, Chilean exporters lost \$3.75 million, which represents ten percent of their exports to the United States.¹⁰¹ The Chamber of Commerce stated that Customs' new regulations slowed the shipping system and caused monetary losses.¹⁰² There is likely to be a similar effect in the United States because U.S. industries rely on a consistent stream of imports that are used almost immediately, within one or two days of arrival.¹⁰³ But the largest impact will probably be felt by those businesses relying on last-minute delivery of goods.¹⁰⁴ These businesses already have in place a "just-in-time system,"¹⁰⁵ where the inventory is strategically planned to time the arrival of each component as it is needed.¹⁰⁶ When goods do not arrive on time, the entire system is thrown off schedule. Thus, when businesses fail to receive necessary supplies due to delayed shipping, they will not operate efficiently and, as a result, suffer losses.

II. EUROPEAN COMMUNITY MEMBERSHIP AND THEIR COMMON POLICIES

Although the vast majority agrees that the CSI improves security for the United States and global trade, the EU insists that the United States should have struck a single multilateral CSI agreement with the EU.¹⁰⁷ Instead, the United States

99. Rick Brooks, *Shippers Say New Border Rules Could Delay Just-in-Time Cargo*, WALL ST. J., Aug. 29, 2003, at A1.

100. *EU Members Go It Alone on 24-Hour Manifest Deals*, LLOYD'S LIST INT'L, Oct. 30, 2002, available at 2002 WL 26530671 (explaining that the 24-hour rule has both support and opposition from the shipping industry).

101. *Chile Claims New US Security Measures Hurt Chilean Exports*, AGENCE FRANCE-PRESSE, Apr. 7, 2003, available at 2003 WL 2774009.

102. *Id.*

103. See H.D.S. Greenway, *Coast Guard's New Challenge*, BOSTON GLOBE, June 2, 2003, at A23.

104. See Brooks, *supra* note 99, at A10.

105. *Id.* (quoting Kevin Smith, director of trade compliance at General Motors Corp., stating "the just-in-time system has been refined to the point where there is no place to sit").

106. See Daniel Wren, *Just-in-Time Inventory*, KNOWLEDGE MGMT., Sept. 1999, available at <http://www.destinationkm.com/articles/default.asp?ArticleID=165>.

107. See, e.g., *Security—Brussels Puts a Brake on US Drive for Ports*, LLOYD'S LIST INT'L, Sept. 12, 2002, available at 2002 WL 26528531; see also, *US Security*

signed separate bilateral agreements with eight European nations: the Netherlands, Belgium, France, Germany, the United Kingdom, Italy, Spain, and Sweden.¹⁰⁸

All eight nations are members of the EU.¹⁰⁹ The EU is a political union composed of fifteen nations that shares a set of uniform economic policies, laws, and rules.¹¹⁰ Among the key institutions of the EU are the Council,¹¹¹ the Commission,¹¹² and the

Pact Talks Criticised, LLOYD'S LIST INT'L, Oct. 21, 2002, available at 2002 WL 26530269 (noting that some prominent members of the European shipping community believe that "there should have been a global agreement in force between the United States and the Europeans from the start" and "from a political standpoint the Americans acted very badly. The United States should have started discussions with the appropriate party in Europe, which was the Commission. It was a big mistake not to.").

108. See generally *Containers—Spain Signs Up*, *supra* note 8 (explaining that after the Netherlands, France, Belgium and Germany joined, Italy and the United Kingdom followed suit, and Spain joined last); see also *Sweden Joins US Initiative on Container Security*, NORDIC BUS. REP., Feb. 4, 2003.

109. EUROPEAN COMM'N, THE INSTITUTIONS AND BODIES OF THE EUROPEAN UNION: WHO'S WHO IN THE EUROPEAN UNION? 8 (2001) (listing the members of the EC).

110. See generally GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (1992) [hereinafter BERMAN]. The history of the EU dates to the European Economic Community (EEC), which was formed in 1957 when six nations—France, Germany, Italy, Belgium, Luxembourg, and the Netherlands—signed the Treaty of Rome. See generally EUROPEAN COMM'N, *supra* note 109; see also H. Thomas Hefti, *European Union Competition Law*, 18 SETON HALL LEGIS. J. 613, 614 (1994). As the name suggests, the primary objective of the EEC was to establish an economic cooperation among the member nations. See generally EUROPEAN COMM'N, *supra* note 109; see also Hefti, *supra*, at 614. In order to accomplish this goal, the signatory nations transferred several sovereign competences to the EEC, including the power to oversee in the areas of customs, commercial policy in dealing with third countries, transport, and competition. See generally EUROPEAN COMM'N, *supra* note 109; see also Hefti, *supra*, at 614.

The EEC's successor, the EU, signed three additional treaties, the most recent being the Treaty of Nice on December 11, 2000. EUROPEAN COMM'N, *supra* note 109, at 3. The purpose of the Treaty of Nice was to implement changes that will make the EU more effective. *Id.* at 1. Because thirteen additional nations are seeking membership to the EU, increasing the effectiveness of the overall system was important. *Id.* at 3. The thirteen nations are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey. *Id.* Ten of these nations are expected to join the EU by June 2004. EUROPEAN COMM'N, *Enlargement*, available at <http://europa.eu.int/comm/enlargement/enlargement.htm> (noting that EU membership is contingent on the satisfaction of economic and political requirements).

111. The Council represents the governments of the member states. EUROPEAN COMM'N, *supra* note 109, at 9. Each member state has one representative at the ministerial level in the Council. *Id.* The Council is the lead institution in the area of common foreign and security policy. *Id.* All Council decisions are binding on the member states. 2 DAMIAN CHALMERS & ERIKA SZYSZCZAK, EUROPEAN UNION LAW 151 (1998).

Court of Justice.¹¹³ These institutions implement and enforce common policies in the areas of commerce, transport, and security.¹¹⁴ Common policies and other EU laws are binding on all members of the Community.¹¹⁵

The EU maintains that the Commission is the proper party to enter into external agreements such as the CSI.¹¹⁶ Furthermore, the Commission claims that the bilateral CSI agreements are illegal under EU law because they are anti-competitive and distort trade among EU ports.¹¹⁷ The Commission argues that CSI ports will gain an unfair competitive advantage and exporters will divert shipments to CSI ports because CSI ports offer faster clearance through Customs.¹¹⁸ Consequently, the Commission brought legal action against the eight EU members in the Court of Justice.¹¹⁹ If the Commission is successful in the

112. The European Commission is the body that proposes and implements common policies. See EUROPEAN COMM'N, *supra* note 109, at 13. The Commission develops relations and negotiates with non-member countries. See K.P.E. LASOK & D. LASOK, *LAW AND INSTITUTIONS OF THE EUROPEAN UNION* 73 (Butterworths 7th ed. 2001); CHALMERS, *supra* note 111, at 153. Note that this institution has the power to conduct external relations, which is the traditional "prerequisite for the establishment of a federal State." *Id.* at 156.

113. The Court of Justice enforces and interprets community law. EUROPEAN COMM'N, *supra* note 109, at 15. Its jurisdiction extends to resolving disputes among member states, the EU, and individuals. *Id.* However, the Court has an overload of cases and, therefore, obtaining a judgment from the Court of Justice takes a very long time. *Id.* When the EU membership grows to nearly 30 nations, this delay is expected to worsen. *Id.*

114. Troy A. Eid, *The European Union: A Brief Introduction*, COLO. LAW., May 2002, at 11-12; EUROPEAN PARLIAMENT, *European Parliament Fact Sheets* (Dec. 9, 2002), available at http://www.europarl.eu.int/factsheets/default_en.htm.

115. See CHALMERS, *supra* note 111 (explaining that EU members must follow the decisions made by the Council); see generally BERMANN, *supra* note 110.

116. Roger Hailey, *US Security Laws Force a Rethink: America's Stringent New Maritime Container Security Measures Will Provide Challenges for Suppliers*, LLOYD'S LIST INT'L, Nov. 19, 2002, available at 2002 WL 26531538 (noting that the EU opposes the American approach of conducting CSI agreements with individual European member states); see also *Containers—Spain Signs Up*, *supra* note 8 (noting that the EU has begun legal proceedings against the first four member states to join CSI, and has made inquiries of the subsequent agreements).

117. Robin Pomeroy, *U.S. Expands Port Anti-Terror Scheme*, REUTERS ENG. NEWS SERVICE, FEB. 12, 2003 (on file with author); *EU/United States—Council Grants Commission Negotiating Brief on Transport Security*, EUROPEAN REPORT, Mar. 22, 2003, available at 2003 WL 10439733.

118. See *Brussels Calls for New Anti-Terrorism Rules for Ships*, AGENCE FRANCE-PRESSE, May 8, 2003, available at 2003 WL 2798027; *EU Nations Give Commission Mandate for Trans-Atlantic Talks on Port Security*, ASSOCIATED PRESS, Mar. 18, 2003 (on file with author) (noting that the rate of clearance will undoubtedly vary from port to port).

119. Pomeroy, *supra* note 117.

Court of Justice, the Court of Justice may rule the bilateral agreements illegal and invalidate all eight CSI agreements.¹²⁰

A. COMMON COMMERCIAL POLICY (CCP)¹²¹

Article 133 (ex art. 113) of the Treaty Establishing the European Community (EC Treaty) expressly grants the EU power to regulate policy concerning imports, exports, and commercial agreements with non-member nations.¹²² The aim of article 133 (ex art. 113) is to provide a commercial policy that is "based on uniform principles."¹²³ One important aim of this principle is "the elimination of national disparities" that may affect trade with non-member countries.¹²⁴ To best achieve this goal, in Decision 69/494, the Council gave the EU the exclusive power to carry out trade negotiations and agreements with non-member countries.¹²⁵ The Court of Justice also supports this interpretation of EU laws, as it held that "the Community enjoys exclusive competence in the field of commercial policy."¹²⁶ Con-

120. *Containers—Spain Signs Up*, *supra* note 8 ("One official . . . warned that European courts could rule the bilateral agreements illegal under EU law.")

121. The CCP comprises Title IX (ex Title VII) of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 1 (2002) [hereinafter EC TREATY].

122. See P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 1275 (Laurence W. Gormley ed., 3rd ed. 1998).

The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

EC TREATY art. 133 (ex art. 113). "The power granted by article 113 [133] is not limited to tariff and trade agreements but covers all aspects of the Community's common commercial policy, including export aids, credit, and finance, as well as the matters normally forming part of multilateral commodity agreements." T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 156 (4th ed. 1998).

123. EC TREATY art. 133 (ex art. 113).

124. KAPTEYN, *supra* note 122, at 127 (quoting Joined Cases 37 & 38/73, *Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex Ass'n de dait De Belder*, 1973 E.C.R. 1609, 1623, [1976] 2 C.M.L.R. 222, 333 (1973)).

125. Council Decision 69/494, art. 5, 1969 O.J. SPEC. ED. 603, 604-04. The member states were quite reluctant to lose their right to enact commercial policies and carry out trade relationships. KAPTEYN, *supra* note 122, at 1324. In response, the Council adopted Decision 69/494 after a long and laborious process. *Id.*

126. See LASOK, *supra* note 112, at 76; Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 269, [1971] C.M.L.R. 335, 354 (1971) (also known as ERTA); Opinion 1/75, Opinion of the Court Given Pursuant to Art. 228 of the EEC Treaty, 1975 E.C.R. 1355, 1364, [1976] 1 C.M.L.R. 85, 93 (1975). In Opinion 1/75, the Court of Justice ruled that export credit agreements were closely related to trade, and thus within the EEC Treaty and the jurisdiction of the EC. Opinion 1/75, 1975 E.C.R. at 1364, [1976] 1 C.M.L.R. at 93.

sequently, individual member states do not share concurrent power in the area of commerce policy. Thus, individual states are not allowed to conduct trade agreements with non-member states in the absence of EU authorization.¹²⁷

On a theoretical level, “[t]he mere existence of EU competence in principle prohibits Member States from acting in these areas.”¹²⁸ Practically, unilateral action by member states is incompatible with the effective functioning of a single market.¹²⁹ As the Court of Justice explained:

the exercise of concurrent powers by the Member States and the Community in [the area of common commercial policy] is impossible. To accept that the contrary were true would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.¹³⁰

The remainder of article 133 (ex art. 113) spells out the procedures for carrying out trade agreements with non-member nations.¹³¹ First, the Commission makes proposals to the Council.¹³² Second, the Council authorizes the Commission to open negotiations.¹³³ Finally, the Commission and a Council-appointed committee conduct negotiations.¹³⁴ Since the CSI is an agreement concerning trade with a non-member state, the clear implication is that the common commercial policy calls for the Commission and the Council to carry out such agreements.

Furthermore, the CCP outlined in article 133 (ex art. 113) is often regarded as “*the external face*” of the single or common

127. See KAPTEYN, *supra* note 122, at 1322-23. “The power granted by Article 113{133} . . . is exclusive: the Member States are precluded.” HARTLEY, *supra* note 122, at 156.

128. CHALMERS, *supra* note 111, at 178.

129. See KAPTEYN, *supra* note 122, at 1323.

130. Opinion 1/75, 1975 E.C.R.1355, 1364, [1976] 1 CMLR at 93 (European Court of Justice opinion on whether the EU has exclusive power to deal with non-member states in reference to export credits).

131. LASOK, *supra* note 112, at 85.

132. EC TREATY art. 133(2) (ex art. 113(2)) (“The Commission shall submit proposals to the Council for implementing the common commercial policy.”).

133. *Id.* at art. 133(3) (ex art. 113(3)) (“Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.”).

134. *Id.* (“The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.”).

market.¹³⁵ A fundamental aspect of the common market is that it is strictly incompatible with anticompetitive behavior.¹³⁶ The idea is that if the EU is to function as a single market, its members should not implement policies that will disadvantage the markets of other member states. Article 81 (ex art. 85) states that such behaviors include actions that have the effect of distorting competition,¹³⁷ controlling markets,¹³⁸ and giving a competitive advantage to certain trading parties.¹³⁹ Furthermore, article 82 (ex art. 86) prohibits abuse of a dominant position that may affect trade.¹⁴⁰ Thus, if the CSI produces any anticompetitive behavior among the EU member states, or if the states with larger or busier ports take advantage of their position, the CSI is in violation of the EC Treaty.

135. See CHALMERS, *supra* note 111, at 168; U. Everling, *The Law of the External Economic Relations of the European Community*, in *THE EUROPEAN COMMUNITY AND THE GATT* (M. Hilf, et al. eds., 2d ed. 1989). One commentator illustrated this point by stating that if the single or “[common market] were a building, the CCP would be its façade.” See CHALMERS, *supra* note 132, at 168 (quoting P. EECKHOUT, *THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE* 344 (1994)).

136. “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . .” EC TREATY art. 81(1) (ex art. 85(1)). One commentator notes that article 85 kicks in only when anticompetitive behavior affects trade among member nations: “[I]f there is no such effect, EU law does not apply at all.” See Hefti, *supra* note 110, at 622.

137. EC TREATY art. 81(1) (ex art. 85(1)).

138. EC TREATY art. 81(1)(b) (ex art. 85(1)(b)) (stating, “limit or control production, markets, technical development, or investment”).

139. EC TREATY art. 81(1)(d) (ex 85(1)(d)) (stating, “apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”).

140. Article 82 (ex art. 86) states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions . . .

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

EC TREATY art. 82 (ex art. 86).

B. COMMON TRANSPORT POLICY AND THE RULINGS OF THE COURT OF JUSTICE

Even in international trade matters where the CCP of the EC Treaty is silent, the Community can derive implied powers to act in those areas from other provisions of the EC Treaty.¹⁴¹ Because one such area of silence concerns international transport,¹⁴² this further suggests that the CSI agreements conducted by the individual member states are invalid. Although articles 70-80 (ex arts. 74-84) provide the general policies concerning community transport, the articles do not contain express regulations on international transport.¹⁴³ Instead, article 71 indicates that the original signatories of the European Economic Community intentionally left the matter to the initiative of the Council.¹⁴⁴ Thus, the Council was to develop separate policies and regulations concerning air and sea transport.¹⁴⁵ However, the EU has been very slow in bringing this area of the law in line with the rest of the modes of transport.¹⁴⁶

141. See Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 264, [1971] CMLR 335, 354 (1971).

142. G. Porter Elliott, *Learning to Fly: The European Commission Enters Unfamiliar Skies in Review of the British Airways-American Airlines Alliance*, 64 J. AIR L. & COM. 157, 166 (1998).

143. See *id.*

144. See *id.*

[T]he Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, lay down: (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions.

EC TREATY art. 71 (ex art. 75).

145. See Elliott, *supra* note 142, at 166-67.

The Treaty expressly left the fate of air and sea transport to the initiative of the Council of Ministers, leading most Member States to believe that the Treaty provisions, including competition rules, would not cover air [and sea] transport until the Council adopted provisions in this area . . .

. . . .

The Court of Justice of the European Communities held otherwise in its 1986 *Nouvelles Frontières* judgment [T]he Court reasoned that the exclusion of air and sea transport from the Title of the EC Treaty covering transport does not exclude these sectors from the remaining general rules of the Treaty.

Id. at 166-68.

146. See Rossina Petrova, *Cabotage and the European Community Common Maritime Policy: Moving Towards Free Provision of Services in Maritime Transport*, 21 FORDHAM INT'L L.J. 1019, 1057-58 (1998). Nevertheless, the European Court of

As is apparent from the articles of transport policy, the EC Treaty does not contain detailed provisions on the EU's foreign affairs powers.¹⁴⁷ Therefore, the European Court of Justice played a large role in outlining the EU's powers extending to areas dealing with non-member nations.¹⁴⁸ ERTA was the first major case where the Court of Justice reviewed the EU's external relations powers that dealt with matters of international transport.¹⁴⁹ The Court noted that "[t]o determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantial provisions."¹⁵⁰ Furthermore, the Court emphasized that in the absence of an express grant of power the EU's authority may arise from other provisions of the EC Treaty.¹⁵¹

Noting that the Treaty has provisions dealing with a similar internal transport policy,¹⁵² the Court pointed out that the same provision also states "[t]he Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation."¹⁵³ The

Justice ruled on the matter of air transport on November 5, 2002. Case C-466/98, *Commission v. United Kingdom*, 2002 E.C.R. I-9427, 1 C.M.L.R. 6 at 178 (2003) (also known as *Re Open Skies Agreement*). The Court held that individual member states do not have jurisdiction to conduct bilateral agreements relating to air transportation with the United States. *Id.* Rather, only the EU Commission has the proper authority to carry out such negotiations with non-member states. *Id.*

147. See BERMANN, *supra* note 110, at 891.

148. See *id.* at 891-92.

149. See *id.* at 895. See also *Commission v. Council*, (ERTA), 1971 E.C.R. 263 at 264, 1971 C.M.L.R. 335. The issue in ERTA was whether the EU or the individual member states was the proper party to negotiate the European Road Transport Agreement (ERTA) with third countries. See BERMANN, *supra* note 1100, at 895.

150. *Commission v. Council*, (ERTA), 1971 E.C.R. 263 at 264, 1971 C.M.L.R. 335 at 354.

151. *Id.* In a later opinion, the Court of Justice emphasized this point again: "authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions." Opinion 2/91, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty. Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work, 1993 E.C.R. I-1061, 3 C.M.L.R. 800 at 815 (1993); see LASOK, *supra* note 112, at 73.

152. *Commission v. Council*, (ERTA), 1971 E.C.R. 263 at 264, 1971 C.M.L.R. 335 at 335.

153. *Commission v. Council*, (ERTA), 1971 E.C.R. 263 at 264, 1971 C.M.L.R. 335 at 356. This concept came to be known as the ERTA doctrine:

[W]henever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the ab-

Court concluded that the ERTA negotiations fall under the jurisdiction of the EU.¹⁵⁴ Lastly, the Court of Justice held that this power is exclusive to the EU because a different conclusion would violate the uniform principles.¹⁵⁵

C. COMMON FOREIGN AND SECURITY POLICY

It has long been anticipated that the member states will progressively cooperate in their political efforts and develop a common defense policy.¹⁵⁶ All matters relating to the security of the EU are embodied within the Common Foreign and Security Policy (CFSP) contained in the Treaty of European Union (TEU).¹⁵⁷ The TEU commands that the EU and its member

sense of an express provision in that connexion. Opinion 1/76, Opinion of the Court of 26 April 1977. Opinion given pursuant to Article 228 (1) of the EEC Treaty. 'Draft Agreement establishing a European laying-up fund for inland waterway vessels.', 1977 E.C.R. 741 at 755, 2 C.M.L.R. 279 at 295 (1977); see generally KAPTEYN, *supra* note 122, at 1256-58. In essence, the EU has international powers that are necessary to carry out its internal commitments. See *id.* at 1257-58.

154. "Since the subject-matter of the [ERTA] falls within the scope of Regulation No. 543/69, the Community has been empowered to negotiate and conclude the agreement in question." *Commission v. Council*, (ERTA), 1971 E.C.R. 263 at 264, 1971 C.M.L.R. 335 at 356.

155. "These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law." *Id.* The general rule on whether the derived external power is exclusive will depend on whether the source of the same power is exclusive. KAPTEYN, *supra* note 122, at 1259. "A derived external competence will have an exclusive character if competence has also been ceded in the internal sphere." *Id.*

156. See BERMANN, *supra* note 110, at 924; see also CHALMERS, *supra* note 111, at 198. The idea of a common defense policy has been on the table since before the formation of the EEC. *Id.*

As far back as the early 1950s, attempts were made to promote European integration in the fields of defence and foreign policy . . . The Member States agreed to regular consultations and exchanges of information in the hope that this would lead to common positions and joint action in international affairs.

HARTLEY, *supra* note 122, at 24.

157. See HARTLEY, *supra* note 122, at 25. Initially, member states coordinated international efforts in a body known as the European Political Cooperation (EPC). *Id.* at 24. Although the EPC and the EU functioned separately, the two came together when Title III of the Single European Act (SEA) recognized the EPC as an institution of the EC. *Id.* Subsequently, Title V of the Treaty on European Union (TEU) replaced Title III of the SEA. *Id.* at 25. When the Treaty of Amsterdam later amended and restructured the TEU, the Common Foreign and Security Policy was established (CFSP). *Id.* at 25-26. The source of the anticipation that the member states will cooperate politically rests in the distinction between the SEA and the

states implement a common foreign and security policy with the following goals in mind: strengthen the security of the EU and its member nations; strengthen international security; and promote international cooperation.¹⁵⁸

The TEU outlines two specific methods in which the EU may attain these objectives.¹⁵⁹ One, member states inform and consult each other on foreign and security matters of interest,

TEU. See BERMAN, *supra* note 110, at 924. The SEA states that the member nations of the EU “shall endeavour jointly to formulate and implement a European foreign policy.” SINGLE EUROPEAN ACT, June 29, 1987, O.J. (L 169) 13(1987) [hereinafter SEA]. They are also to “inform and consult each other on any foreign policy matters of general interest.” *Id.* art. 30(2)(a). Further, whenever a member nation adopts an individual position, they are to “take full account of the positions” of other members, and “ensure that common principles and objectives are gradually developed and defined.” *Id.* art. 30(2)(c). On the other hand, the TEU states that “[t]he Union shall define and implement a common foreign and security policy.” Treaty on European Union, art. 11(1) (ex art. J.1(1)), Dec. 24, 2002 O.J. (C 325) 33 (2002) [hereinafter TEU].

The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

... They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

TEU art. 11(2) (ex art. J.1(4)).

158. See generally CHALMERS, *supra* note 111, at 201-04. TEU art. 11(1) (ex J.1) states that the objectives of the common foreign and security policy are:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
- to strengthen the security of the Union in all ways,
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,
- to promote international cooperation,
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

TEU art. 11(1).

159. KAPEYN, *supra* note 122, at 56. TEU art. 12 (ex art. J.1(3)) states:

The Union shall pursue the objectives set out in Article 11 by:

- defining the principles of and general guidelines for the common foreign and security policy,
- deciding on common strategies,
- adopting joint actions,
- adopting common positions,
- strengthening systematic cooperation between Member states in the conduct of policy.

TEU art. 12.

and develop a systematic coordination of policy;¹⁶⁰ or two, member states take joint action on an issue of common interest through a gradual implementation process.¹⁶¹ The EU “pursues the CFSP by various means: defining the principles and general guidelines on which it is to be based; deciding on common strategies; adopting joint actions; adopting common positions; and strengthening co-operation between the Member States.”¹⁶²

However, when trade safety issues arise, Reg. 2315/96¹⁶³ provides that member states may provide information and request that the EU implement measures to survey and safeguard trade.¹⁶⁴ The member states begin this procedure first by making the request to the Commission.¹⁶⁵ Next, an Advisory Committee composed of member state representatives discusses the matter.¹⁶⁶ If the Commission finds that sufficient evidence supports it, the Community begins an investigation process.¹⁶⁷ Within nine months of the investigation, the Commission de-

160. See *id.* art. 16; see generally KAPTEYN, *supra* note 122, at 55-62. There is no specific definition or criteria for what constitutes “of general interest.” *Id.* at 56. The Council Ministers have the power to decide that the matter is of general interest and that it is indeed necessary. *Id.* at 55 (citing TEU art. J.2(2)¶1 (now art. 15) (“Whenever it deems it necessary, the Council shall define a common position.”)). Then, upon a unanimous agreement by the Council, the policy will become a common position. See *id.* (citing TEU art. J.8(2)¶2 (now art. 23) (“The Council shall act unanimously, except for procedural questions and in the case referred to in Article J.3(2).”)). Such a policy will be binding on all member states. *Id.* (citing TEU art. J.2(2)¶2) (now art. 15) (“Member States shall ensure that their national policies conform on the common positions.”).

161. See *supra* note 159. See generally, KAPTEYN, *supra* note 122, at 55-62. TEU art. 14 (ex art. J.3) prescribes that the Council must unanimously agree that a particular issue will be subject to joint action. See *id.* at 56 (citing TEU art. J.3(1) ¶1 (now art. 14(1))). The Council can agree by a unanimous vote that certain issues will only be subject to a qualified majority vote. See *id.* (citing TEU Art. J.3(2)¶1 (now art. 23(2))). “The unanimity rule does not apply in all cases: the Council acts by a qualified majority when adopting joint actions, common positions or other decisions on the basis of common strategy, or when adopting a decision implementing a joint action or common position.” HARTLEY, *supra* note 122, at 25.

162. HARTLEY, *supra* note 122, at 25 (citing TEU art. 12).

163. Regulation 2315/96, Council Regulation (EC) No 2315/96 of 25 November 1996 Establishing, Pursuant to Article 1 (7) of Regulation (EEC) 3030/93, the List of Textiles and Clothing Products to Be Integrated into GATT 1994 on 1 January 1998 and Amending Annex X to Regulation (EEC) No 3030/93 and Annex II to Regulation (EC) No 3285/94, 1996 O.J. (L 314) 1.

164. See KAPTEYN, *supra* note 122, at 1300. Reg. 2315/96 is the amended Regulation 3285/94, Council Regulation (EC) No 3285/94 of 22 December 1994 on the Common Rules for Imports and Repealing Regulation (EC) No 518/94, 1994 O.J. (L 349) 53. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1300-01.

cides whether the EU will adopt surveillance and safeguard measures.¹⁶⁸

D. POWERS UNCLAIMED BY THE EU

Finally, in matters where the EU has powers, but it has not yet exercised its competency, member states have the authority to act upon it.¹⁶⁹ In *Kramer*, the Court of Justice held that such power is only transitional in nature, and thus, it will terminate when the EU comes to a resolution on the matter.¹⁷⁰ Further, the Court added that while the member state is exercising this authority, all other community laws and duties bind the state.¹⁷¹ Therefore, the member nation may not enter into agreements that potentially conflict with other EU laws.¹⁷²

III. THE CSI AND THE EU

If the CSI falls under any section of the TEU, the laws of the EU bind the CSI.¹⁷³ If the applicable EU law deems the matter to be of common interest, the Community itself has the authority to handle the CSI.¹⁷⁴ In this case, the EU has exclusive power.¹⁷⁵ The key to solving this problem is to pinpoint the exact provision of the TEU that would govern the CSI. But because the CSI incorporates components of commerce, transport, and security, several sections of the TEU are pertinent.

Although several articles of the TEU are applicable to the CSI, the EU has a strong case under the CCP of the EC Treaty because the CSI distorts uniformity among the EU member states.¹⁷⁶ The EU's position is further strengthened by the recent Court of Justice decision in *Open Skies*, which invalidated

168. *Id.* at 1301.

169. See BERGMANN, *supra* note 110, at 905-07. "[T]he Community not yet having fully exercised its functions in the matter, . . . the Member States had the power to assume commitments, within the framework." Cases 3/76, 4/76, and 6/76, *Cornelias Kramer and Others (In re Kramer)*, 1976 E.C.R. 1279, 2 C.M.L.R. 470 (1976).

170. Cases 3/76, 4/76, and 6/76, *Cornelias Kramer and Others (In re Kramer)*, 1976 E.C.R. 1279, 2 C.M.L.R. 470 (1976).

171. *Id.* ("Member states concerned are now bound by Community obligations in their negotiations within the framework of the Convention and of other comparable agreements.").

172. Member nations are "under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community." *Id.* at 471.

173. See *supra* note 115 and accompanying text.

174. See *supra* note 115 and accompanying text.

175. See *supra* notes 125-26, 155 and accompanying text.

176. See *supra* notes 123-25 and accompanying text.

bilateral open skies agreements that had the effect of distorting competition.¹⁷⁷ Furthermore, the EU derives implied powers from the express provisions of the TEU.¹⁷⁸ Thus, because the EU has both express and implied authority to govern the CSI, the Commission is the proper party to negotiate the CSI with Customs. Therefore, if the EU maintains its legal action, the Court is most likely to declare the eight CSI agreements illegal.¹⁷⁹

A. THE CSI IS WITHIN THE JURISDICTION OF THE EU

1. CCP

The EU can exert its authority over the CSI with its CCP¹⁸⁰ powers under the EC Treaty because the CSI concerns trade with a non-member state.¹⁸¹ First, the CSI is an agreement concerning trade.¹⁸² By signing the CSI, the United States and its trade partner agree that Customs agents will be stationed in the partner's seaport and work alongside the partner's team to improve export procedures.¹⁸³ Furthermore, the focus of the agreement is trade protection.¹⁸⁴ The export products will be subject to further scrutiny,¹⁸⁵ and both parties will work towards developing an efficient and safe trade mechanism.¹⁸⁶ Second, the CSI is an agreement with a non-member state.¹⁸⁷ Only the EU enjoys the power to carry out negotiations with non-EU member nations.¹⁸⁸ Furthermore, since the objective of article 133 (ex art. 113) is to establish "uniform principles"¹⁸⁹ and to eliminate "national disparities,"¹⁹⁰ it is most effective and desirable for the EU alone to negotiate with the United States.

177. See *supra* notes 144-46 and accompanying text.

178. See *supra* notes 151, 153 and accompanying text.

179. See *supra* notes 148-55 and accompanying text.

180. See *supra* notes 122-30 and accompanying text.

181. See *supra* note 122 and accompanying text (noting that the CCP concerns power to regulate imports and exports with non-member states).

182. See *supra* notes 60-75 and accompanying text. See also EC TREATY art. 133 (ex 113) ("trade agreements").

183. See *supra* note 63 and accompanying text.

184. See EC TREATY art. 133 (ex 113) ("measures to protect trade").

185. See *supra* notes 64-70 and accompanying text.

186. See *supra* notes 69-70 and accompanying text.

187. See EC TREATY art. 133 (ex 113) and accompanying text.

188. See *supra* notes 125-26 and accompanying text.

189. See *supra* note 123 and accompanying text.

190. See *supra* note 124 and accompanying text.

Only the uniform application of a single U.S.-EU CSI policy is compatible with the CCP of the EC Treaty.

Furthermore, only a single U.S.-EU CSI agreement can protect the EU's common market status.¹⁹¹ Currently, the eight CSI agreements impair the EU's ability to function effectively as a single market.¹⁹² In a unified market, all seaports should be regulated under the same rules and procedures.¹⁹³ When manufacturers choose a seaport from which to ship their products abroad, they should expect the same procedures from each of the available seaports. Therefore, only market and economic factors influence their decision. These factors include the distance between their plant or warehouse and the port, the cost and the ease of transport between the two locations, and any major differences in the cost of shipping that the ports may assess.

Since the introduction of the CSI into select countries in Europe, the exporter has two choices: (1) ship under the traditional procedures, or (2) ship under the CSI procedures.¹⁹⁴ The container cargoes shipping from CSI ports are subject to more scrutiny, so there may be additional delays at the CSI port.¹⁹⁵ However, upon arriving at the U.S. seaport, the container will pass more expediently through Customs.¹⁹⁶ It is predicted that exporters who ship from CSI ports will enjoy faster shipping to the United States.¹⁹⁷ This incentive is not market-driven.

In that case, normal market forces do not determine the manufacturer's choice. The exporter will weigh the costs and benefits of shipping from a non-CSI and a CSI seaport, and make the decision accordingly. A CSI seaport will replace ports that were previously the best economical choice if the manufacturer wishes to benefit from expedited export to the United

191. See *supra* notes 135-39 and accompanying text.

192. See *supra* notes 129-30 and accompanying text.

193. See *Taxation and Customs Union: The Customs Policy of the European Union*, at http://europa.eu.int/comm/taxation_customs/publications/customs/customs-brochure.html (stating that the "single market can only function properly where there are common rules applied in a common way at its external borders") (last visited Sept. 12, 2003).

194. See *supra* notes 64-74 and accompanying text.

195. See *supra* notes 67-68 and accompanying text.

196. See *supra* note 68.

197. *EU Will Not Tolerate Bilateral Agreements on Maritime Security*, FEPOR NEWSFLASH, July 19, 2002, 2 (stating that CSI ports offer advanced Customs inspections, reduced inspections in the United States, and an advantage over other EU ports); *Prevention*, *supra* note 42 (noting that shipments will clear through Customs rapidly through CSI ports).

States. But many manufacturers who choose to ship from a CSI seaport will be those who can afford to reroute their products. There may be exporters who do not benefit from this option due to high rerouting costs. In this case, a non-market driven factor distorts the manufacturer's business practice, the manufacturer's choice of seaport, and the transport system within the EU. Thus, the current state of CSI also distorts the market, in derogation of the principles of article 133 (ex art. 113).¹⁹⁸

Additionally, competition among the seaports may be distorted.¹⁹⁹ Article 81 (ex art. 85) prohibits distortion of competition.²⁰⁰ Seaports receive much of their financing through fees paid by exporters for use of their facilities. Since it is expected that more manufacturers will prefer to ship from CSI seaports, those seaports will see increased gains. Consequently, non-CSI seaports will be at a significant competitive disadvantage.

Although Customs denies that the CSI has distorted competition within the EU,²⁰¹ actual distortion is not the only standard for violating the CCP of the EC Treaty.²⁰² The CSI violates the CCP of the EC Treaty if the agreement "may affect trade" and its "object or effect" is the "prevention, restriction or distortion of competition."²⁰³ On one hand, it is undisputed that CSI "may affect trade." Customs does not challenge this possibility. On the other hand, because CSI is thus far "only a program on paper"²⁰⁴ that has yet to go into effect, reliable data on its actual influence on the market will not be available for some time. Therefore, one cannot prove the "effect" of distortion as of yet.

However, the EU has a good argument that the eight member states signed the CSI with the "object" of preventing, restricting, or distorting competition.²⁰⁵ All member states understand the competitive advantage of signing the CSI. The addition of Marseilles as a CSI seaport illustrates this point: Customs did not include Marseilles in the initial list of target mega ports because Marseilles is not a top twenty seaport.²⁰⁶

198. See *supra* note 122.

199. See *supra* note 117 and accompanying text.

200. See *supra* notes 136-37 and accompanying text.

201. See *supra* note 12 and accompanying text.

202. See *supra* note 136 and accompanying text.

203. See *supra* note 136 and accompanying text.

204. R. G. Edmonson, *Left Out. European Union Officials Would Like All International Agreements Affecting EU*, TRAFFIC WORLD, Feb. 3, 2003, available at 2003 WL 10213152.

205. See *supra* note 136 and accompanying text.

206. *Marseilles Joins US Box Security Ports*, LLOYD'S LIST INT'L, Apr. 16, 2003, available at 2003 WL 3051873.

But since the publication of the initial list in 2002, Marseilles campaigned to be added, and Customs approved it as a CSI seaport in March of 2003.²⁰⁷ The CSI status gives the Marseilles seaport a competitive advantage because exporters will experience fewer delays in shipping products to the United States.²⁰⁸ The advantage was so clear that the signatory nations went against the mandates of the EU Commission. For example, Sweden does not have a top-twenty mega port, and received its invitation to sign the CSI much later than the seven other EU signatories.²⁰⁹ By the time it received its invitation, the Commission had already begun legal proceedings against the first group of signatories.²¹⁰ Though fully aware that upon signing the CSI the EU Commission would begin legal actions against it, Sweden signed the CSI.²¹¹ The eight member states signed the CSI to gain a competitive advantage over the other EU seaports.

A further issue of competition is that the CSI seaports may have taken advantage of a dominant position.²¹² Since the United States initially only approached the top-twenty mega ports, it is fair to state that mega port status gave the CSI seaports a dominant position. Taking advantage of a dominant position is anticompetitive behavior that is prohibited by article 82 (ex art. 86).²¹³

Therefore, the eight CSI agreements that are currently in effect conflict with articles 133 (ex art. 113), 81 (ex art. 85), and 82 (ex art. 86).²¹⁴ On the other hand, a single multilateral CSI negotiated between the EU and the United States that is uniformly applied to the Community would conform to each of the three aforementioned provisions.

2. Transport Policy

Because the CSI affects maritime transport, it falls within the regulations of maritime transport. Although the EU has authority from the Common Transport Policy (CTP) to regulate internal maritime transport, the same is not true for external

207. *Id.*

208. *See supra* note 118 and accompanying text.

209. *See supra* note 8.

210. *See supra* note 8.

211. *See supra* note 8.

212. *See supra* notes 136-40 and accompanying text.

213. *See supra* note 140 and accompanying text.

214. *See supra* notes 122-40 and accompanying text.

transport.²¹⁵ Although the signatories of the EEC did not grant such express powers to the EU,²¹⁶ the Court of Justice stated that the EU might exercise implied external powers when such is necessary to carry out its express duties.²¹⁷ Thus, if external maritime transport will have an effect on the EU's internal maritime transport, the EU has proper jurisdiction to oversee the former.²¹⁸

More specifically, if the eight separate CSI agreements are likely to have an effect on transport within the EU, the EU can exercise its implied power to regulate external maritime transport.²¹⁹ It is certainly foreseeable that the manufacturers' re-routing of their export products to CSI seaports will affect internal transport. Private transportation service providers such as trucking companies may create additional routes to the CSI seaports. Also, public transportation services, such as trains, may do the same. Therefore, the EU has proper authority to oversee the CSI due to the CSI's effects on internal transport.

Additionally, the *Open Skies* decision of November 5, 2002 will certainly have a significant impact on the outcome of the CSI litigation.²²⁰ This is because both *Open Skies* and the CSI concern bilateral agreements between the United States and individual member states of the EU.²²¹ More importantly, air transport and sea transport, which the *Open Skies* and the CSI deal with respectively, were specifically left to the initiative of the Council.²²² The original members of the EEC viewed air and sea transport to be substantially related as to include them in the same mandate.²²³ Thus, the Court of Justice will probably apply the *Open Skies* decision²²⁴ to the CSI, and most likely rule in favor of the EU. Therefore, transport policy is an additional source from which the EU can derive its exclusive authority to deal with the CSI.²²⁵

215. See *supra* notes 151-55 and accompanying text.

216. See *supra* note 144 and accompanying text.

217. See *supra* notes 153, 155 and accompanying text.

218. See *supra* notes 153, 155 and accompanying text.

219. See *supra* notes 152-54 and accompanying text.

220. See *supra* notes 145-46 and accompanying text.

221. See *supra* note 146 and accompanying text.

222. See *supra* note 144 and accompanying text.

223. See *supra* notes 144-45 and accompanying text.

224. See *supra* note 146 and accompanying text.

225. See *supra* note 155 and accompanying text.

3. Common Foreign and Security Policy (CFSP)

Because one could consider the CSI a defense policy aimed at protecting the EU member states, the EU might also argue that the eight signatories violated the CFSP of the TEU.²²⁶ Such a violation exists on two levels. First, they failed to take joint action on an issue of common interest.²²⁷ Joint action in international affairs is an ideal that the original members of the EEC envisioned.²²⁸ This is true especially in agreements such as the CSI, where it affects other member states' trade interests.²²⁹ Second, the eight states seem to have failed to consider the interests of the other states,²³⁰ an omission at odds with the CFSP of the TEU.²³¹ The eight CSI signatories will have difficulty claiming that they considered the interests of other states since the CSI agreements have the potential to cause significant competition distortions.²³² Thus, the EU can effectively argue that the eight signatories violated the CFSP of the TEU.

The member states may claim that pursuit of CFSP goals²³³ was not possible due to the urgency of trade protection on one hand, and the lengthy CFSP compliance procedure on the other.²³⁴ However, this argument is likely to fail because none of the signatories attempted to take any of the steps prescribed by the TEU²³⁵ or Reg. 2315/96,²³⁶ which outline the procedure for dealing with trade safety issues.

4. Powers Unclaimed by the EU

Since the CSI is such a novel program, the EU may have the authority to act upon it even though it has yet to exercise its powers.²³⁷ In that case, the eight member states that negotiated the CSI with the United States will claim to have exercised

226. See *supra* notes 156-58 and accompanying text.

227. See SEA arts. 30(1), 30(2)(a), 30(2)(c).

228. See *supra* notes 156-58 and accompanying text. Rather than developing individual foreign policies, the member states should first seek to implement common policies. See SEA art. 30(1).

229. See *supra* notes 117-18 and accompanying text.

230. See SEA art. 30(2)(c).

231. See *id.*

232. See *supra* note 117 and accompanying text.

233. See *supra* note 157.

234. See *supra* notes 159-68 and accompanying text.

235. See *supra* notes 159-61 and accompanying text.

236. See *supra* notes 164-68 and accompanying text.

237. See *supra* note 169 and accompanying text.

their transitional powers to act in the absence of collective EU action.²³⁸ The fact that Germany's CSI contains a clause expressing its willingness to defer to an U.S.-EU CSI shows that some member states realize and acknowledge that their authority to conduct the CSI may be transitional.²³⁹ If the EU enters into a CSI agreement with the United States, the eight CSI agreements will become null.²⁴⁰

At the same time, in exercising an unclaimed power, the member states must comply with all other community laws.²⁴¹ The CSI signatory states violated the CCP of the EC Treaty by disrupting uniformity and competition laws.²⁴² Thus, the states failed to make proper use of the EU's unclaimed power.²⁴³ As a result, the Court of Justice may rule that the signatory states did not have authority to use the unclaimed power in the first instance, and may declare the eight CSI agreements invalid.²⁴⁴

The EU's strongest argument is under the CCP of the EC Treaty. The second best argument is under the CTP, and finally, the CFSP of the TEU Treaty is the weakest of the three. Although the signatory states may argue that they acted under the EU's unclaimed powers, the Court of Justice is not likely to agree because the states violated EU laws in the process.

IV. BALANCING THE POSITIONS OF THE UNITED STATES AND THE EU

In order to develop the best possible solution for the United States and the EU, first it is necessary to analyze the positions of each. On the one hand, the United States implemented the CSI in an effort to protect itself and the world trading system from the threat of terrorist attacks.²⁴⁵ The United States reached agreements with the eight EU member nations because the ports providing the largest amount of containers to the United States are positioned in those countries.²⁴⁶ On the other hand, the EU has legitimate legal and economic concerns.²⁴⁷

238. See *supra* note 170 and accompanying text.

239. See *supra* note 170 and accompanying text.

240. See *supra* note 170 and accompanying text.

241. See *supra* note 171 and accompanying text.

242. See *supra* notes 122-24 and accompanying text.

243. See *supra* notes 171-72 and accompanying text.

244. See *supra* note 172 and accompanying text.

245. See *supra* note 58 and accompanying text.

246. See *supra* notes 60-61 and accompanying text.

247. See *supra* notes 86-244 and accompanying text.

The bilateral agreements violate EU laws.²⁴⁸ Additionally, the CSI and the two subsequent programs implemented to give effect to CSI—the 24-hour rule and C-TPAT—are expected to result in increased costs for the trading community, as well as for consumers.²⁴⁹

Both the United States and the EU agree that trade safety is necessary. The EU does not dispute the importance of the CSI.²⁵⁰ However, the parties conflict over the procedures necessary to execute the CSI in the EU.²⁵¹ Therefore, the solution lies in finding a procedural ground that is mutually acceptable to both parties.

A. UNITED STATES: THE IMPORTANCE OF INCREASING SEAPORT SAFETY

Despite the controversy surrounding the *Open Skies* agreements,²⁵² the United States pursued bilateral agreements with individual member states of the EU.²⁵³ Although this seems rather puzzling from a legal perspective, it was certainly a strategic move. The United States had to balance two competing interests: showing respect for EU sovereignty and its laws by following proper procedures in negotiating agreements with EU member states,²⁵⁴ and the urgent need for implementing and increasing costly safety measures.²⁵⁵ Given the disastrous effects of September 11th, the United States chose the latter.

The United States immediately needed to increase safety standards.²⁵⁶ If terrorists were capable of penetrating airports with heightened security, other terrorists would have very few problems penetrating U.S. seaports to facilitate another terrorist strike.²⁵⁷ Unlike airports, seaports have minimal security in

248. See *supra* notes 107-244 and accompanying text.

249. See *supra* notes 94-106 and accompanying text.

250. US Container Security Initiative (CSI)—Meeting of Commission and US Customs Officials, Oct. 22, 2002, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/220|0|RAPID&lg=EN (“The European Community shares the objective of improving maritime transport security and protecting trade against any threat of terrorist attack.”).

251. See *supra* notes 107-08, 116 and accompanying text.

252. See *supra* note 146.

253. See *supra* note 108 and accompanying text.

254. See *generally supra* notes 108-72 and accompanying text.

255. See *supra* notes 13-57 and accompanying text.

256. See *supra* notes 13-57 and accompanying text.

257. See *supra* note 34 and accompanying text.

the absence of federal regulation.²⁵⁸ Although the United States felt an urgent need to heighten its seaports' safety standards, establishing a new federal agency to oversee seaport security was not a viable solution due to time constraints.

Rather than creating a new agency, the United States focused on measures that would most effectively and immediately improve seaport safety. First, seaports were in need of adequate physical barriers to filter out terrorism.²⁵⁹ It was imperative to prevent terrorists already present in the United States from gaining access to the seaports.²⁶⁰ As many seaports did not control access or even have adequate fences and gates, this was a crucial step.²⁶¹ Second, it was important to inspect more thoroughly the cargoes entering the seaports.²⁶² Given that ninety-eight percent of the cargoes were not screened or checked, this provided room for many potential dangers.²⁶³ Although this problem could be fixed by checking every container, such a practice is not viable from a commercial standpoint.²⁶⁴ Trade would be a slower process,²⁶⁵ and industries that depend on it would have to rearrange their practices to accommodate for the wait time. Businesses would be short on supplies and inventories for prolonged periods of time, and many would suffer losses or go out of business. Additionally, costs of consumer goods would undoubtedly skyrocket because the demand would be much higher than the supply. Therefore, the United States sought an efficient solution that would strike a balance between commerce and security.

Customs suggested an innovative plan that would achieve such a goal: the CSI, which would improve Customs' traditional practice of identifying high-risk cargoes.²⁶⁶ As the success of Customs' risk assessment procedure depended on multiple factors, including accurate information on shipments,²⁶⁷ timely receipt of information,²⁶⁸ and ability to detect risk early,²⁶⁹ the

258. See *supra* notes 34-37 and accompanying text.

259. See *supra* notes 34-37 and accompanying text.

260. See *supra* note 36 and accompanying text.

261. See *supra* notes 35-37 and accompanying text.

262. See *supra* notes 38-41 and accompanying text.

263. See *supra* notes 38-41 and accompanying text. *But cf. supra* notes 43-51 and accompanying text.

264. See *supra* notes 43-46 and accompanying text.

265. See *supra* notes 44-45 and accompanying text.

266. See *supra* notes 60-75 and accompanying text.

267. See *supra* notes 53-54, 56 and accompanying text.

268. See *supra* note 55 and accompanying text.

269. See *supra* notes 65-66 and accompanying text.

CSI would focus on improving the effectiveness and the coordination of these factors.

The 24-hour rule and the C-TPAT would further promote the goals of the CSI. The 24-hour rule, which was implemented to aid the first element of the CSI program,²⁷⁰ requires all exporters to provide detailed descriptions of the shipments twenty-four hours before they are loaded on the vessel headed for the United States.²⁷¹ Thus, the manifest rule allows Customs agents in foreign ports twenty-four hours to analyze data and assess risk.²⁷² The third factor, the ability to detect risk early, is addressed by C-TPAT and the CSI.²⁷³ Customs implemented C-TPAT to give effect to the first element of the CSI, and the businesses and industries participating in this program heightened their own security.²⁷⁴ Therefore, Customs can be assured that from the time the shipments' products were manufactured and assembled to the time the products reach the seaports, terrorists have not tampered with them.²⁷⁵ C-TPAT serves to filter out a large percentage of safe cargoes from those that must go through the risk assessment procedure.²⁷⁶ Thus, C-TPAT promotes a more accurate and efficient early detection system.²⁷⁷ Furthermore, the CSI agents in the foreign ports analyze data and scrutinize the cargoes that pose the greatest threat.²⁷⁸

The United States approached the EU member states individually with its CSI proposal, along with the 24-hour rule, for economic reasons. Since the United States received the majority of its cargoes from mega ports,²⁷⁹ it was most efficient for the United States to negotiate only with those countries that had a mega port within its borders. Negotiations with countries lacking a mega port would not be cost-effective because the time and effort required to implement the additional CSI agreements would take away significantly from U.S. safety interests. Thus, the United States did not negotiate directly with the EU.²⁸⁰ Because the EU aims to establish a single market,²⁸¹ the EU would

270. See *supra* notes 76-85 and accompanying text.

271. See *supra* note 76.

272. See *supra* notes 65-66, 75 and accompanying text.

273. See *supra* notes 58-85 and accompanying text.

274. See *supra* notes 79-84.

275. See *supra* notes 79-84.

276. See *supra* notes 79-84.

277. See *supra* notes 79-84.

278. See *supra* notes 63-74 and accompanying text.

279. See *supra* note 61 and accompanying text.

280. See *supra* note 108 and accompanying text.

281. See *supra* note 135 and accompanying text.

have wished to apply uniformly CSI regulations on all of its seaports. However, bringing every seaport of every EU nation up to CSI standards was much more than the United States was willing and able to do. Given the lack of funds available for U.S. seaports, it is unlikely that Customs had the necessary staff or resources to implement such an extensive program so quickly after September 11th.²⁸² With limited funds available, Customs would have had difficulty stationing agents in every EU seaport.

Additionally, conducting negotiations with the EU is often a lengthy procedure that involves approval by the members of the Commission and the Counsel.²⁸³ Because seaports in the United States process 200,000 ships and almost 6 million cargoes a year,²⁸⁴ cargo safety is vital to ensuring national security. Consequently, protecting national security was necessarily more important for the United States than complying with the EU's formal procedures. Given the poor condition of U.S. seaport security, the need for improvements was urgent.²⁸⁵ Furthermore, seaport safety is important for the world economy because seaports serve as convergence points and link the world's largest trading system.²⁸⁶ The cost of disrupting this system could be \$58 billion in the United States alone.²⁸⁷ Many other nations throughout the world would suffer similar losses. Considering that the measurable economic effects of September 11th lasted over a year, the effects of a crippled ship container system would most certainly last much longer than a year.²⁸⁸ Thus, given the urgency to implement safety measures, the United States was not in a position to go through the formalities of EU procedures.

B. EU: ECONOMIC CONSEQUENCES

On the other hand, the EU has legitimate reasons for wanting to negotiate a single U.S.-EU CSI that would apply uniformly to all of its members.²⁸⁹ First, the primary purpose of establishing the EU was to promote economic cooperation among

282. See *supra* notes 92-93 and accompanying text.

283. See *supra* notes 111-12 and accompanying text.

284. See *supra* note 23 and accompanying text.

285. See *supra* notes 34-37 and accompanying text.

286. See *supra* notes 24-26 and accompanying text.

287. See *supra* note 31 and accompanying text; see also notes 28-30 and accompanying text.

288. See *supra* notes 28-30 and accompanying text.

289. See *supra* notes 86-90, 94-106, 116-18 and accompanying text.

its members.²⁹⁰ Therefore, the single market directive goes to the heart of the EU, and thus it is most important to implement common economic policies.²⁹¹ The EU correctly asserts that only a single CSI agreement can accomplish the goal of the single market.²⁹² Any other policy would leave room for variations among the member states, which would be incompatible with the notion of a single market.²⁹³ When eight out of fifteen member states adopt the CSI approach, there is no single market functioning as one.

Most crucial to the single market concept is the distortion of competition.²⁹⁴ Although competition is natural and healthy for a prosperous economy, creating competition by introducing artificial components to the market may lead to unforeseen economic consequences. Even in the absence of disfavored consequences, however, EU principles do not permit distortion of competition by unnatural and non-market driven factors such as the CSI.²⁹⁵ This is because distortion of competition is in derogation of the aims of the single market—the single market should function uniformly as one without allowing one to gain unfair advantages over the other.²⁹⁶ Yet, individual CSI agreements may have given the eight participating states just such an advantage. After September 11th, the mega ports unexpectedly gained an upper hand over the other EU seaports. With CSI status, the mega ports offer a speedier transport to the United States.²⁹⁷

In addition to these theoretical concerns, the EU has more imminent practical concerns that it must address. The trading community has voiced concern over the expected costliness of implementing the CSI and its related initiatives, especially the 24-hour rule.²⁹⁸ The 24-hour rule will affect foreign ports, exporters, businesses, importers, and consumers.²⁹⁹ First, seaports will have to make room for shipments stationed while Customs agents make inspections.³⁰⁰ Because this will slow the

290. See *supra* note 110.

291. See *supra* notes 135-39 and accompanying text.

292. See *supra* notes 135-39 and accompanying text.

293. See *supra* notes 135-39 and accompanying text.

294. See *supra* note 137 and accompanying text.

295. See *supra* notes 135-39 and accompanying text.

296. See *supra* notes 135-39 and accompanying text.

297. See *supra* note 118 and accompanying text.

298. See *supra* notes 86-90, 94-106 and accompanying text.

299. See *supra* notes 86-90, 94-106 and accompanying text.

300. See *supra* notes 62-71.

overall procedure, seaports will have to expend increased processing costs to maintain the flow of trade.³⁰¹ Second, exporters or shipment handlers will have to make certain that their shipments are ready and complete twenty-four hours prior to departure.³⁰² Thus, exporters whose practice was to drop off shipments a few hours before the departure time will have to change their normal business procedures.³⁰³ Third, businesses may face higher costs because exporters will not be able to add new shipments to their cargoes after the twenty-four hour deadline.³⁰⁴ This will result in a more regimented export business that is unable to accommodate last-minute business needs.³⁰⁵ Also, businesses will have to rearrange manufacturing and processing procedures to meet the shipment handlers' deadlines.³⁰⁶ Fourth, importers will have to pay higher prices to ship their goods. Lastly, all of the above costs will funnel down to consumers.³⁰⁷

Another concern for the EU is that there can be additional costs if parties involved in the trading business fail to comply with the 24-hour rule.³⁰⁸ Customs can levy hefty penalties—from monetary fees to shipment detainment.³⁰⁹ Also, failure to comply with the 24-hour rule could lead to unexpected results. For example, an exporter whose shipment is detained would not be able to provide his goods to an importer. If the importer obtains the goods from another source, the exporter may have lost a customer.

C-TPAT creates additional security costs for the businesses and the industries.³¹⁰ Those who participate in the program will have to implement new procedures and/or purchase additional safety or monitoring equipment.³¹¹ Many businesses have joined C-TPAT because Customs promises to give them faster clearance through security.³¹² Businesses understand that faster procedures can save costs. However, it might be that, rather than a faster process, the only benefit businesses will receive is a lesser delay than others in passing through Customs.

301. *See supra* notes 62-71.

302. *See supra* notes 76-77.

303. *See supra* notes 76-77.

304. *See supra* notes 76-77.

305. *See supra* note 70.

306. *See supra* note 70.

307. *See supra* notes 88-89.

308. *See supra* notes 94-99.

309. *See supra* notes 95-97 and accompanying text.

310. *See supra* notes 80-85.

311. *See supra* notes 80-85.

312. *See supra* notes 80-85.

But the most costly policy for the seaports has proven to be the third element of the CSI, which requires that the seaports use radiation technology to screen cargoes.³¹³ Because many foreign seaports did not use such devices prior to the CSI agreements, the seaports expended large amounts of money to purchase such technology.³¹⁴ Also, the CSI requirement that the foreign seaports use heightened scrutiny results in higher costs for the seaports.³¹⁵

Thus, contrary to the Customs Commissioner's statement, CSI is proving to be very costly for those parties directly involved in trade.³¹⁶ These include the manufacturers and other businesses, exporters, importers, and the seaports.³¹⁷ Ultimately, all costs are shifted to the consumers because prices will increase.³¹⁸ Lastly, economists project that the economy will suffer as a consequence of the security measures because businesses will face higher costs of operation.³¹⁹ Given the economic effects of the CSI, the EU has a legitimate interest in negotiating the CSI because one of the aims of the EU is to protect the single market economy.

C. SOLUTION

1. *Obstacles to a Solution*

Although both the United States and the EU have legitimate concerns and interests over the implementation of the CSI, their interests are not aligned. Their interests are different in three respects. First, the United States requires an immediate solution, whereas the EU is in no such hurry for a trade protection program.³²⁰ After the September 11th attacks, the United States needed to increase security without delay because its sea-

313. See *supra* note 70.

314. See *supra* note 88 and accompanying text.

315. See *supra* notes 91-93 and accompanying text.

316. See *supra* notes 86-106 and accompanying text.

317. See *supra* notes 94-106 and accompanying text.

318. See *supra* note 90 and accompanying text.

319. See *supra* note 94-106 and accompanying text. This is certainly not the case for the security market. For example, manufacturers of radiation devices and other security machinery, as well as software companies that produce security-related programs and other CSI compliance programs, such as "Manifest 24," will not suffer as a consequence. See *Manifest 24*, *supra* note 76.

320. See *supra* notes 13-19 and accompanying text.

seaports were at risk of being targeted by terrorists.³²¹ On the other hand, the EU is not in a similar situation, and does not share the same feeling of immediacy to increase security. Consequently, the United States rushed to address the situation, whereas the EU had more time to plan the details of a trade protection program. Second, whereas the United States prefers to negotiate with select member states, the EU favors an agreement applicable to all member states.³²² The most efficient route for the United States was negotiating with the mega ports.³²³ But a single, multilateral CSI is best suited for the EU because the EU seeks to maintain uniformity among its member nations.³²⁴ Third, although the United States would prefer to let the eight bilateral agreements stand, the EU is adamant about annulling them.³²⁵ Since the United States already succeeded in attaining its goal by signing up the major seaports of the EU,³²⁶ it has little or no additional incentives to alter the agreements. The bilateral CSI programs are under way, and modifying them would only result in more costs for the United States. Further, Customs would probably prefer to utilize the available resources to enforce existing programs at the mega ports, rather than spending its funds to initiate new programs at smaller EU seaports. However, the EU has much to gain by invalidating the bilateral agreements because such action would eliminate threats of trade distortion and anti-competitiveness among member states.³²⁷ Additionally, with the bilateral agreements invalidated, the EU would have more leverage in negotiating a single CSI with the United States. Thus, the gap between the interests of the United States and the EU is extensive, and aligning these interests will prove to be a challenging task.

Furthermore, U.S. and EU cooperation may be more difficult because both parties have taken steps that have aroused negative sentiments toward each other. The United States introduced the CSI,³²⁸ the 24-hour rule,³²⁹ and the C-TPAT,³³⁰ all

321. See *supra* notes 13-19 and accompanying text.

322. See *supra* notes 107-08 and accompanying text.

323. See *generally supra* notes 60-62 and accompanying text.

324. See *supra* notes 123-24 and accompanying text.

325. See *supra* notes 119-20 and accompanying text.

326. See *supra* notes 60-62, 108 and accompanying text.

327. See *supra* notes 117-18 and accompanying text.

328. See *supra* notes 58-75 and accompanying text.

329. See *supra* notes 76-79 and accompanying text.

330. See *supra* notes 80-85 and accompanying text.

of which have generated significant costs for the trade community in the EU.³³¹ Although the United States had legitimate reasons for instituting these programs, the current state of these programs gives rise to some questions.³³² First, did the United States sufficiently analyze the feasibility of implementing these programs before negotiating CSI agreements? Furthermore, businesses in the EU are expecting much difficulty meeting the required costs.³³³ This poses a second question: did the United States sufficiently analyze the costs of implementation? And the fact that even the U.S. seaports—which the programs are intended to protect—are significantly short on funds³³⁴ raises a third question: did Customs perform with due diligence and plan adequately? It is possible that Customs may have performed insufficient due diligence in the rush to develop fast solutions on safety.³³⁵ However, it is equally possible that Customs may have performed all the necessary analysis and investigations, but ultimately determined that the benefits of the bilateral CSI agreements outweighed the side effects. It is also possible that the negative effects of the CSI may be temporary and short lived, and that the CSI may be beneficial for global trade in the long run.

The EU also helped create the hostile situation by launching legal proceedings against the eight CSI signatory states.³³⁶ Customs specifically addressed this issue, noting its disappointment with the EU's action.³³⁷ The legal proceedings aroused animosity of some member states as well. For example, British seaport authorities accused the EU of taking legal action in an attempt to take over the CSI.³³⁸ Yet, in bringing litigation against its member states, the Commission seeks to protect the

331. See *supra* notes 86-90, 94-106 and accompanying text.

332. See *supra* notes 86-106 and accompanying text.

333. See *supra* notes 94-106 and accompanying text.

334. See *supra* notes 91-93 and accompanying text.

335. See *supra* note 321 and accompanying text (noting that the United States needed an immediate solution to address the deficiencies in its seaport security).

336. See *supra* notes 119-20 and accompanying text.

337. *EU/US—Row Over Customs Security Agreements Hots Up*, EUROPEAN REPORT, Jan. 18, 2003, available at 2003 WL 10438650 (stating that “On January 14, U.S. Customs Commissioner Robert C. Bonner said it was ‘disappointing’ that the European Commission was trying to annul agreements he had signed with several EU Member States”).

338. See *Ports—Brussels and UK Set for Box Security Court Battle*, LLOYD'S LIST INT'L, Jan. 20, 2003, available at 2003 WL 3047928 (noting that the U.K. feels the Commission has overstepped its bounds by launching legal action to annul the bilateral agreements).

interests of the EU, and not to create an unnecessarily hostile situation.

2. *Workable Solutions*

Bringing legal action in the Court of Justice may not be the most desirable solution for the EU. Even if a favorable Court decision annuls the existing bilateral agreements, the Court proceedings are expected to take quite a long time. Since the Community's main concern is to deter unfair competition and trade distortion,³³⁹ time may be of the essence. Thus, even if annulling the bilateral agreements would give the EU more leverage and probably better terms on a single agreement, the EU should not sacrifice time. Furthermore, even if the EU is interested in obtaining the Court's interpretation on the Community's rights over sea transport,³⁴⁰ trade and competition concerns may be more pressing. Therefore, maintaining legal action to its fruition in the Court of Justice may not be the most desirable solution, and the Commission may make better use of its time by negotiating a CSI agreement with the United States.

Thus, the EU should let the bilateral agreements stand for the moment. This will benefit the United States, the EU, and world trade in general. The United States can keep its safety procedures in place to protect itself and to prevent disruptions to maritime trade. The EU benefits because the current CSI seaports serve as a source where the EU can gather data and information to develop its plans for an EU-wide CSI agreement. Because the EU is composed of many nations, the EU will require more time and planning to develop and coordinate a uniform trade protection program such as the CSI.³⁴¹ Lastly, the use of these figures to develop future solutions might be beneficial for the entire CSI program and the international trade system.

Nevertheless, the United States must do its part as well. The United States must recognize that the increased operating costs have produced a certain level of discontentment in the EU trade community.³⁴² This feeling may have been aggravated by the fact that the requirements of the CSI, the 24-hour manifest rule, and C-TPAT are set fairly high and are difficult to satisfy.

339. See *supra* notes 117-18, 123-24 and accompanying text.

340. See *supra* notes 147-48 and accompanying text.

341. See *supra* note 110 and accompanying text.

342. See generally *supra* notes 86-90, 94-106 and accompanying text.

An ambitious program such as the CSI is not likely to operate at its optimal level when its participants have inadequate funding and increased expenses. A good solution would be to obtain funding from the EU and the United States, but this may not be practicable.

Thus, one possible solution may be to relax the requirements of the programs to a more realistic and feasible level. Given the damage caused by the September 11th attacks, the United States acted reasonably in instituting numerous safety programs. But the EU trade community was suddenly subject to Customs' new requirements with little or no adjustment period. Beginning with lax requirements and progressively increasing them throughout a prolonged time period would have been ideal, but this was not possible. The United States can find a middle ground by relaxing the rules to a point where the programs are better aligned with the currently available funds and the necessary expenses. As soon as the trade community is able to manage the initial costs of meeting the safety standards, Customs should be able to gradually increase the requirements to the present standards, or even higher.

The United States does not necessarily sacrifice safety if Customs strategically limits the requirements. For instance, the United States may consider altering the 24-hour rule slightly. Customs could shrink the twenty-four-hour window of time by a few hours and apply the new window across the board to all exporters. The better option may be to vary the time requirement for different exporters. Thus, if the nature of a particular business is such that last minute additions to cargo are frequent, Customs could cut back on the time requirements even more for those businesses. Customs could separate the exporters into several categories, and assign different time requirements for each. Cutting back on the time requirements would help the exporters quite a bit. And because shipments would arrive at different times, there would be a more constant flow of containers, which would solve the seaports' lack-of-space problems to some extent. However, Customs must increase the efficiency of its operations to preserve the level of security. Customs can achieve this with increased cooperation with foreign customs officials, faster analysis of available data, and development of more efficient inspection procedures. Thus, strategically relaxing the current standards may help decrease the discontentment of the businesses and could even prompt more cooperation from the EU trade community.

Finally, the ideal solution would be for the United States and the EU to enter into a single multilateral CSI agreement as soon as possible. Given the gravity and the urgency of the CSI for the safety of the United States and the continuation of safe international trade, both the United States and the EU must try to cooperate in an expedient manner. The parties should be willing to compromise. The EU could try to take into account the safety concerns of the United States, and the United States could be more willing to negotiate although it lacks a significant incentive. Even though the EU must still follow Treaty procedures,³⁴³ which the United States may have initially feared would take too long, this should not pose a substantial problem anymore: the bilateral agreements are currently in place, and they provide the United States with increased security measures. But at the same time, the EU should try to push this matter through the process faster, if possible.

Given the struggle between the United States' security concerns on one hand and the EU's structure and interests on the other, resolving differences may be difficult. Yet, under the circumstances, both parties must attempt to compromise and enter into a mutually agreeable U.S.-EU CSI agreement. In the meantime, the EU should allow the current bilateral agreements to stand, and permit Customs to operate the programs in place, and the United States should relax the 24-hour rule and other requirements for now but compensate with more efficiency.

CONCLUSION

The United States launched the CSI in its efforts to protect U.S. seaports and maritime trade against threats of terrorism. Due to the immediate need to secure the nation's seaports and cargo containers headed for the United States, the United States signed bilateral agreements only with select EU member states—those whose seaports shipped the largest percentage of cargoes to the United States.

Despite the United States' legitimate reasons for taking this course of action, the bilateral agreements became the source of a substantial conflict between the United States and the EU for several reasons. First, EU laws mandate that the Commission

343. See *supra* notes 131-34, 159-61, 164-68 and accompanying text (detailing the different procedures outlined under the CCP and the CFSP).

is the proper party to carry out the CSI. The EU laws under the EC Treaty and the TEU indicate that the EU has jurisdiction over the CSI. Second, the CSI threatens to distort trade within the EU and give a competitive advantage to the CSI seaports. And third, the CSI and its companion programs—the 24-hour rule and the C-TPAT—are projected to be very costly for the trading community in the EU.

Consequently, the Court of Justice could rule in favor of the Commission and nullify the bilateral agreements. However, in the interests of U.S. security, global trade, and international safety, the United States and the EU should agree on a single CSI as soon as possible. Meanwhile, the EU should allow the bilateral agreements to stand, and the United States should strategically modify its trade protection programs and relax the rules to a level better aligned with the available financial resources.

