

A “Secure” Package? Maritime Cargo Container Security After 9/11

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I. BACKGROUND

On September 11, 2001, the world fundamentally changed. The United States witnessed the worst terrorist attack in the nation’s history with the catastrophe at the World Trade Center in New York, the attack on the Pentagon in Washington, D.C., and the tragic airline crash in Pennsylvania. As a result of these senseless tragedies, America was compelled to reexamine its homeland and international security policies and procedures.

After the terrorist attacks against the United States on September 11, 2001, President George W. Bush and the United States Congress determined that the numerous agencies and entities involved in domestic security and preparedness needed to be better coordinated with one another. As a result, President Bush created an Executive Office of Homeland Security to protect the United States against future terrorist threats to the homeland. After realizing that the Office of Homeland Security lacked certain capabilities and powers necessary to be effective in protecting the homeland, the President proposed the creation of a new Department of Homeland Security.¹ On January 24, 2003, former

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1. Office of Management and Budget, *Department of Homeland Security*, available at <http://www.whitehouse.gov/omb/budget/fy2004/homeland.ntml> (last viewed February 24, 2004).

Pennsylvania Governor Tom Ridge was sworn in as the first Secretary of the newly created Department of Homeland Security.²

As discussed on the Department of Homeland Security's website, "[t]he creation of the Department of Homeland Security (DHS) [was] the most significant transformation of the U.S. government since 1947, when Harry S. Truman merged the various branches of the U.S. Armed Forces into the Department of Defense to better coordinate the nation's defense against military threats."³ One of the primary missions of the DHS is to secure and protect the United States' transportation system, including aviation, mass transit, maritime and port security, pipelines, and surface transportation.⁴

Maritime security is a critical component of the homeland security mission. The maritime security mission includes protecting the nation's ports and waterways from a terrorist attack, as well as improving the security of international shipping and commerce. One of the most important components of maritime security, and the topic of this paper, concerns the area of cargo container security.

This paper begins with an introduction to several of the entities involved in maritime security, including an overview of the Maritime Transportation Security Act of 2002. Next, major pragmatic implications, both legal and fiscal, of the new policy will be examined. Finally, the paper concludes with recommendations for enhanced partnership of private and public sector actors to offset the significant cost of these new cargo container security initiatives and programs.

II. OVERVIEW OF ENTITIES AND POLICIES INVOLVED IN MARITIME SECURITY⁵

A) BUREAU OF CUSTOMS AND BORDER PROTECTION AND THE UNITED STATES COAST GUARD

The Bureau of Customs and Border Protection (CBP) and the United States Coast Guard are the two U.S. governmental entities primarily responsible for maritime security, including cargo container security. As a new agency within the Department of Homeland Security, CBP was created to consolidate the various U.S. agencies responsible for border

2. Department of Homeland Security, *Secretary: Tom Ridge*, available at <http://www.dhs.gov/dhspublic/display?theme=11&content=13&print=true> (last viewed February 24, 2004).

3. U.S. Department of Homeland Security, *DHS Organization*, available at http://www.dhs.gov/dhspublic/theme_home1.jsp (last viewed February 24, 2004).

4. Office of Management and Budget, *Department of Homeland Security*, available at <http://www.whitehouse.gov/omb/budget/fy2004/homeland.nml> (last viewed February 24, 2004).

5. U.S. Department of Homeland Security, *Maritime Mobility*, available at <http://www.dhs.gov/dhspublic/display?theme=21&content=908&print=true>

protection and security. The agencies now within CBP include U.S. Customs, the Border Patrol, the Immigration and Naturalization Service, and agriculture inspectors from the U.S. Department of Agriculture.⁶

The Coast Guard is responsible for protecting more than 361 ports and 95,000 miles of coastline.⁷ The Coast Guard's homeland security role includes the need to:

- Protect ports, the flow of commerce, and the marine transportation system from terrorism;
- Maintain maritime border security against illegal drugs, illegal aliens, firearms, and weapons of mass destruction;
- Ensure that we can rapidly deploy and resupply our military assets, both by keeping Coast Guard units at a high state of readiness, and by keeping marine transportation open for the transit assets and personnel from other branches of the armed forces;
- Protect against illegal fishing and indiscriminate destruction of living marine resources, prevention and response to oil and hazardous material spills—both accidental and intentional;
- Coordinate efforts and intelligence with federal, state, and local agencies.⁸

In the area of homeland security:

The Coast Guard serves as: (1) the lead federal agency for Maritime Homeland Security when responses require civil authorities; (2) the Federal Maritime Security Coordinator in U.S. ports as designated by the Maritime Transportation Security Act of 2002; (3) a supporting agency to the Federal Emergency Management Agency for declared disasters or emergencies under the Federal Response Plan; (4) a supporting agency to the lead federal agency for specific events under the provisions of the current *U.S. Government Interagency Domestic Terrorism Concept of Operations Plan* and its projected replacement by the *Federal Incident Management Plan*; and (5) as a supporting or supported commander for military operations conducted under Title 10.⁹

The Coast Guard occupies a unique role in homeland security because of its dual role as both an armed force and a law enforcement agency. "Since the Coast Guard is simultaneously, and at all times, both an armed force of the United States (14 U.S.C. 1), and a law enforcement

6. *Department of Homeland Security*, available at <http://www.whitehouse.gov/omb/budget/fy2004/homeland.html> (last viewed February 24, 2004).

7. U.S. Coast Guard, *The Coast Guard & Homeland Security*, available at http://www.uscg.mil/hq/g-cp/history/Homeland_Security.html (last viewed February 24, 2004).

8. *Id.*

9. The U.S. Coast Guard, *Maritime Strategy for Homeland Security*, (December 2002) p. 1-2., available at http://www.uscg.mil/news/reportsandbudget/Maritime_strategy/USCG_Maritime_Strategy.pdf

agency (14 U.S.C. 89), its capabilities are extremely relevant, valuable, and needed for Maritime Homeland Security, whether the threat is termed a military or terrorist attack.”¹⁰

B) INTERNATIONAL MARITIME ORGANIZATION

In addition to the domestic entities involved in maritime security, the International Maritime Organization (IMO) provides an international forum for cooperation and coordination in the maritime industry. The IMO, an agency of the United Nations, was established during an international conference in 1948.¹¹ The IMO is one of the smallest United Nations’ agencies with a staff of approximately 300 people.¹² The major missions of the IMO are:

[T]o provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.¹³

The IMO also handles administrative and legal matters related to these missions, including security and safety issues.¹⁴

The September 11, 2001 terrorist attacks on the United States created a much stronger emphasis on improving international security coordination in all modes of transportation, including international shipping. Through a recent diplomatic conference, the IMO created a new, comprehensive security regime for international shipping that will enter into force in July 2004.¹⁵ The focus of this new security regime is strengthening maritime security, while also preventing and suppressing acts of terrorism in the shipping industry.¹⁶ On December 12, 2002, “[t]he diplomatic conference of the IMO. . . modified the SOLAS [Safety of Life at Sea, one of the most important international maritime treaties] and initiated the ISPS [International Ship and Port Facility Security] Code.”¹⁷ As a leading

10. *Id.*

11. International Maritime Organization, *Introduction to IMO*, available at http://www.imo.org/About/mainframe.asp?topic_id=3 (last viewed February 24, 2004).

12. *Id.*

13. *Id.*

14. *Id.*

15. International Maritime Organization, *Enhancing Maritime Security*, available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=582 (last viewed February 24, 2004).

16. *Id.*

17. Press Release, European Commission, *Fight against terrorism: Security of European Maritime transport to be strengthened*, (May 8, 2003), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/651—0—AGED&lg=EN&display= (last viewed February 24, 2004).

maritime organization, the IMO has an important role to play in the global war on terrorism, and in strengthening security measures in the international shipping industry.

C) THE EUROPEAN UNION

The European Union has also recognized the devastating impact that an act of terrorism could have on the maritime industry. In a recent press release, the European Commission stated that "[t]here is a need to enhance the security of the entire maritime transport chain, from the supplier to the consumer."¹⁸ As a result, the European Commission also recently "[a]dopted a communication and a proposal for a regulation to ensure the obligatory application throughout the European Union (EU) of the highest security standards on maritime transport, as agreed in the International Maritime Organization applicable to international commercial shipping, and to port facilities serving them."¹⁹

D) MARITIME TRANSPORTATION SECURITY ACT OF 2002

On November 25, 2002, President Bush signed the Maritime Transportation Security Act (MTSA) of 2002.²⁰ This landmark legislation was passed to protect the nation's ports and waterways by minimizing the risks of a terrorist attack. Among other things, the MTSA requires security plans for facilities and vessels that may be involved in any type of transportation security incident; an increase in the inspection level and use of technology for containerized cargo; the pursuit of international cooperation in enhancing maritime security; and the use of a risk-based system to better target those sectors of the maritime industry that have a higher risk of involvement in a transportation security incident.²¹

The MTSA is focused on improving maritime security throughout the world, due to the unique international nature of the shipping industry. The MTSA discusses the implementation of an automatic identification system, the use of a long-range vessel tracking system, the importance of secure systems of transportation, as well as the effective sharing of maritime intelligence.²² The MTSA also specifically states that, "[c]urrent inspection levels of containerized cargo are insufficient to counter potential security risks. . . [and] technology is not currently adequately deployed to

18. *Id.*

19. *Id.*

20. U.S. Coast Guard, *Maritime Transportation Security Act of 2002*, available at <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/MTSA2002.htm>

21. *Id.*

22. U.S. Coast Guard, *Automatic Identification System (AIS)*, available at <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/AIS.html> (last viewed February 24, 2004).

allow for the non-intrusive inspection of containerized cargo.”²³ CBP and the Coast Guard have taken the lead roles in implementing the MTSA. CBP has taken the primary role in implementing improvements in cargo container security and inspections. The Coast Guard has taken the main role in implementing security improvements to protect America’s ports and waterways.

E) BUREAU OF CUSTOMS AND BORDER PROTECTION INITIATIVES

CBP has taken a lead role in strengthening maritime security, especially cargo container security. CBP has developed several specific programs, including the Container Security Initiative (CSI), the Customs-Trade Partnership Against Terrorism (C-TPAT), and Operation Safe Commerce (OSC). These programs were created to address potential security vulnerabilities created by ocean container trade and to deal with the possibility that potential terrorists could exploit these vulnerabilities to covertly transport, and potentially detonate, Weapons of Mass Destruction (WMDs) in the United States.²⁴ Originally announced in January 2002, CSI allows CBP personnel to assist their foreign counterparts in screening cargo containers at CSI-designated foreign seaports.²⁵ The main goal of these inspections is to identify and examine high-risk containers prior to their arrival at U.S. ports.²⁶

U.S. Customs initiated C-TPAT in November 2001, with the goal of improving the physical security of containers as they move through international commerce.²⁷ As the U.S. Customs Service has defined it, “[u]nder C-TPAT, Customs officials work in partnership with private industry by reviewing supply chain security plans and recommending improvements.”²⁸ In exchange for their participation, C-TPAT member businesses receive the benefit of a reduced likelihood that containers traveling along their international supply chains will be stopped and inspected for WMDs or held up for additional inspections.²⁹

In February 2002, the Department of Homeland Security as a test project to recognize and identify any potential security risks in an end-to-end supply chain initiated Operation Safe Commerce (OSC).³⁰ The initial pilot project was conducted along a shipping route between the New

23. H.R. Con. Res. 1214, 107th. Cong. (2001) (enacted), WL 2001 CONG US S 1214

24. U. S. General Accounting Office, *CONTAINER SECURITY: Expansion of Key Customs Programs Will Require Greater Attention to Critical Success Factors*, GAO-03-770, (July 2003), p. 2, available at <http://www.gao.gov/new.items/d03770.pdf>

25. *Id.*

26. *Id.*

27. *Id.* at 2-3

28. *Id.* at 3.

29. *Id.*

30. Transportation Security Administration, *Business Opportunities: Operation Safe Com-*

England area of the United States and Eastern Europe.³¹ OSC was designed as a cooperative effort between the business community, the federal government, and the maritime industry to evaluate and develop best practices for the safe and efficient transportation of containerized cargo.³²

1. Container Security Initiative (CSI).

The Container Security Initiative (CSI) is a program created by CBP. The goal of CSI is to extend the United States' zone of security outward from the United States' coasts by increasing the security of cargo containers and ships before they physically enter U.S. ports. Under CSI, maritime cargo containers that are identified as high-risk containers are examined at foreign ports before these containers are shipped to the United States. CSI consists of four core elements:

1. Establish security criteria for identifying high-risk containers based on advance information.
2. Pre-screen containers at the earliest possible point.
3. Use technology to quickly pre-screen high-risk containers.
4. Develop secure and "smart" containers.³³

Increased security is critical in the area of containerized shipping, since "[a]bout ninety percent of the world's trade is transported in cargo containers."³⁴ In the United States alone, "[a]lmost half of incoming trade (by value) arrives by containers onboard ships. Nearly seven million cargo containers arrive on ships and are offloaded at U.S. seaports each year."³⁵

The initial phase of CSI worked to implement the program at the top twenty foreign ports, as determined by the volume of containers shipped to the United States.³⁶ The initial phase of CSI focused on these ports specifically because "[a]bout two-thirds of all the containers that are transported to the U.S. by sea come from or through. . ." these top twenty ports.³⁷ CBP sends their inspectors to these foreign seaports to develop productive partnerships between CBP officials and their host nation

merce, available at <http://www.tsa.gov/public/display?content=090005198006aa1e> (last viewed February 24, 2004).

31. *Id.*

32. *Id.*

33. Press Release, U.S. Customs & Border Protection, *CSI In Brief*, (October 7, 2003), available at http://www.cbp.gov/xp/cgov/enforcement/international_activities/csi/

34. *Id.*

35. *Id.*

36. *Id.*

37. Press Release, U.S. Customs & Border Protection, *Frequently Asked Questions (FAQs) about CSI*, (October 7, 2003), available at http://www.cbp.gov/xp/cgov/enforcement/international_activities/csi/q_and_a.xml

counterparts to target high-risk cargo containers.³⁸ CBP has had great success in developing relationships with other countries, which helps secure the participation of these countries in the CSI program. Currently, "CSI is the only formal program in operation today designed to detect weapons of mass destruction and to deter terrorists from exploiting the vulnerabilities of containerized cargo."³⁹ At present, CSI is currently operational in numerous foreign port locations.⁴⁰ CSI has been successful in improving the security of maritime cargo containers coming into United States' ports, and, as the program continues to expand, maritime security will continue to improve.

2. *Customs-Trade Partnership Against Terrorism (C-TPAT)*

The Customs-Trade Partnership Against Terrorism (C-TPAT) is an initiative to build cooperative relationships between private business industries and the government. The major purpose of C-TPAT is to improve the overall economic security of both the United States and the global communities by protecting the worldwide supply chain and

38. *CSI In Brief*, available at http://www.cbp.gov/xp/cgov/enforcement/international_activities/csi/ (last viewed February 26, 2004).

39. *CSI In Brief*, available at http://www.cbp.gov/xp/cgov/enforcement/international_activities/csi/.

40. *Id.* CSI PORT LOCATIONS:

IN THE WESTERN HEMISPHERE:

Montreal, Vancouver & Halifax, Canada

IN EUROPE:

Rotterdam, The Netherlands

Bremerhaven & Hamburg, Germany

Antwerp, Belgium

Le Havre, France

Goteborg, Sweden

La Spezia and Genoa, Italy

Felixstowe, United Kingdom

IN ASIA AND THE EAST:

Singapore

Yokohama, Japan

Hong Kong

Busan, South Korea

Ports that are coming to CSI soon include:

IN EUROPE:

Algeciras, Spain

IN ASIA AND THE EAST:

Tokyo, Nagoya, Kobe and Osaka, Japan

Shanghai & Shenzhen, China

Laem Chabang, Thailand

Port Kelang and Tanjung Pelepas, Malaysia

Colombo, Sri Lanka

IN AFRICA:

Durban, South Africa

strengthening the United States' border security. C-TPAT is unique because it recognizes that the highest level of security can best be achieved through close cooperation with the ultimate owners of the supply chain — importers, carriers, brokers, warehouse operators and manufacturers.⁴¹ C-TPAT businesses assist in improving economic security by reviewing the integrity of their security practices and communicating their security guidelines to their business partners within their supply chains. C-TPAT members receive the following benefits:

- A reduced number of inspections (reduced border times);
- An assigned account manager (if one is not already assigned);
- Access to the C-TPAT membership list;
- Eligibility for account-based processes (bimonthly/monthly payments, e.g.);
- An emphasis on self-policing, not Customs verification.⁴²

There are several steps that a company must take to become a C-TPAT member firm. The first step consists of a company signing an agreement with CBP.⁴³ Through this agreement, a company signifies its commitment to enhancing its supply chain security by embracing C-TPAT security recommendations.⁴⁴ A C-TPAT company also agrees to work closely with its service providers throughout its supply chain to enhance overall security procedures and processes.⁴⁵ After signing the agreement, the second step a company must take is to review its supply chain security practices, using the C-TPAT industry security recommendations as a guideline.⁴⁶ A company must document its observations in a security profile.⁴⁷ The security profile is intended to be an executive summary of the company's current and future supply chain security practices and vulnerabilities, as well as an indication of how these recommendations were communicated to its business partners overseas.⁴⁸ After successfully completing all of these steps, a company is eligible to become a certified C-TPAT member business.

The C-TPAT program has thus far been successful in actively involv-

41. Press release, U.S. Customs & Border Protection, *C-TPAT Validation Process Guidelines*, (October 7, 2003), available at http://www.cbp.gov/ImageCache/cgov/content/import/commercial_5enforcement/ctpat/validation_5fprocess/validation_5fprocess_5fguidelines_2epdf/v1/validation_5fprocess_5fguidelines.pdf

42. Press Release, U.S. Customs & Border Protection, *C-TPAT Fact Sheet and Frequently Asked Questions*, (October 7, 2003), available at http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/fact_sheet.xml

43. *CONTAINER SECURITY*, available at <http://www.gao.gov/new.items/d03770.pdf>

44. *Id.*

45. *Id.*

46. *Id.* at 14-15.

47. *Id.* at 15.

48. *Id.*

ing private businesses in the improvement of cargo security. According to C-TPAT officials, in January 2003, approximately 1,700 companies had signed C-TPAT agreements, becoming C-TPAT members and receiving the benefits of a partially reduced risk score.⁴⁹ By May 2003, the number of agreements signed nearly doubled to 3,355.⁵⁰ The C-TPAT program should continue to grow, thereby improving the overall security of the global maritime supply chain. A companion program, Operation Safe Commerce, is designed to benefit both the CSI and C-TPAT programs.

3. *Operation Safe Commerce*

In February 2002, the Department of Homeland Security initiated a test project in New England called Operation Safe Commerce (OSC).⁵¹ The OSC pilot project was designed to recognize and identify any potential security risks in an end-to-end supply chain.⁵² OSC examined the security procedures and vulnerabilities in an end-to-end supply chain for a containerized shipment entering the New England area of the United States from an Eastern European point of origin.⁵³ With the tremendous success of the preliminary OSC pilot project, an Executive Steering Committee (ESC) was formed to manage and coordinate additional maritime container security efforts.⁵⁴ This ESC is made up of numerous federal agencies, including the Transportation Security Administration, the United States Coast Guard, Customs and Border Protection, the Department of Commerce, the Justice Department, the State Department, and the Department of Transportation.⁵⁵ Also, due to the success of the New England OSC project, Congress provided funds for additional OSC pilot projects at the three largest U.S. container loading centers. These three centers are the Port Authority of New York and New Jersey, the Ports of Los Angeles and Long Beach, and the Ports of Seattle and Tacoma.⁵⁶

The OSC project is designed as a cooperative public-private partnership between the business community, the federal government, and the maritime industry to develop and share best practices for the safe and efficient transportation of containerized cargo.⁵⁷ A major goal of OSC is to improve the security of the global supply chain while facilitating the

49. *Id.*

50. *Id.* at 23-24.

51. *Operation Safe Commerce*, available at <http://www.tsa.gov/public/display?content=090005198006aa1e>

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Transportation Security Administration, *Operation Safe Commerce*, at <http://www.tsa.gov/public/display?content=090005198006aa1e> (Last viewed February 15, 2004).

57. *Id.*

efficiency of maritime commerce.⁵⁸ OSC projects are designed to examine existing technologies and current business practices, and to discover important and beneficial information on container supply chain security deficiencies from point of origin to point of destination.⁵⁹ For example, these projects evaluate and analyze supply chain security through the use of container tracking and tracing technology, non-intrusive detection strategies (such as x-rays and thermo-imaging), and improved security seal concepts.⁶⁰ Integrating other container security programs currently in operation, such as CBP's Customs Trade Partnership Against Terrorism (C-TPAT) and Container Security Initiative (CSI), and the U.S. Department of Transportation's Intelligent Transportation System, is of particular importance in developing a synergistic focus on container security.⁶¹ The other main entity involved in maritime security, the U.S. Coast Guard, also has initiatives designed to improve and strengthen U.S. homeland security, as discussed below.

4. United States Coast Guard Initiatives

The United States Coast Guard defines its homeland security mission as "[t]o protect the U.S. Maritime domain and the U.S. Marine Transportation System and deny their use and exploitation by terrorists as a means for attacks on U.S. territory, population, and critical infrastructure."⁶² The Coast Guard has implemented two specific initiatives, the 24-Hour Rule and the Automatic Identification Systems.⁶³ These initiatives were created to address potential security vulnerabilities created by ocean container trade in the maritime industry.

a. 24-Hour Rule

The 24-Hour Rule is designed to provide U.S. authorities, especially the Coast Guard, with detailed information concerning the contents of the cargo that is on board any vessel coming to a U.S. port, prior to that vessel's arrival in port. For any vessel, "manifests listing the contents of containers must be submitted to federal officials 24 hours before those containers are loaded onto ships" bound for U.S. ports.⁶⁴ The main purpose of the 24-Hour Rule is to push the United States' borders outward

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. U.S. Coast Guard, *Maritime Strategy for Homeland Security*, 3 (Dec. 2002), available at www.uscg.mil.

63. Press Release, U.S. Customs and Border Protection, 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/press_releases/82002/08072002.xml.

64. Deborah Schoch, *Los Angeles; Hahn Calls for U.S. Funds to Shore Up Waterfront Secur-*

by providing a much better opportunity for the Coast Guard to intercept any vessel of interest prior to that vessel's arrival in a U.S. port.⁶⁵ Additionally, the 24-Hour Rule assists legitimate maritime commerce by providing vessels that have followed the proper reporting procedures with an efficient process once such vessel arrives in a U.S. port.

b. Automatic Identification Systems

Automatic Identification Systems (AIS) provide detailed vessel information to agencies, such as the Coast Guard, for use in tracking and monitoring maritime vessels. The Coast Guard has been a strong advocate of AIS equipment because it is a system that automatically sends detailed ship information to other ships and shore-based agencies.⁶⁶ The Coast Guard believes that "[i]ninstalling AIS equipment on certain vessels traveling in [both U.S. and international] waters will allow comprehensive, virtually instantaneous vessel tracking and monitoring, increasing security and safety in shipping channels."⁶⁷ Again, like the 24-Hour Rule, the use of Automatic Identification Systems will increase U.S. homeland security, while also maintaining the efficiency of legitimate, international maritime commerce.

III. LEGAL AND FINANCIAL IMPLICATIONS OF COMPLIANCE WITH CBP INITIATIVES

A. LEGAL IMPLICATIONS OF NON-COMPLIANCE

There are significant legal implications associated with complying with CBP programs and initiatives. If a business fails to comply, the legal implications can be serious, potentially resulting in both civil and criminal penalties. As previously mentioned, Customs is one of the main governmental agencies responsible for legal compliance with maritime security programs and initiatives.

Since the founding of the Federal government under the U.S. Constitution in 1789, the enforcement of the Customs, navigation and related laws has been an important function of the Customs Service.⁶⁸ Today, Customs has full authority to assess penalties and liquidated damage

ity; The mayor responds to an investigation by ABC News in which it smuggled uranium into Los Angeles Harbor on a ship from Indonesia, LOS ANGELES TIMES, Sept. 12, 2003, § B, at 3.

65. U.S. Customs and Border Protection, *supra* note 63.

66. Press Release, U.S. Department of Homeland Security, *Protecting America's Ports - Maritime Transportation Security Act of 2002*, 7 (July 1, 2003) available at http://www.dhs.gov/interweb/assetlibrary/MTSA_Presskit.doc.

67. *Id.* at 12.

68. U.S. Customs Service, *What Every Member of the Trade Community Should Know About: Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages*, 1, revised October, 2001. (December 1, 2003), available at <http://www.cbp.gov>.

claims, seize merchandise for violation of Customs or other laws enforced by Customs, remit forfeitures, mitigate penalties, decide petitions, and cancel claims.⁶⁹ Willful negligence makes an individual or business subject to significant penalties, as contained in 19 U.S.C. 1618.⁷⁰ Customs has the authority to publish guidelines relating to the terms and conditions, as well as the penalties, for violations of Customs' laws, as contained in 19 U.S.C. 1623(c).⁷¹ Under these laws, Customs has a significant ability to enforce the customs laws of the United States against any potential offenders and a meaningful role to play in the enforcement of CBP programs and initiatives.

In addition to Customs, the U.S. Coast Guard is the other chief enforcement agency with jurisdiction and authority to enforce compliance with laws related to maritime commerce. Under Title 33 of the Code of Federal Regulations, which concerns Navigation and Navigable Waters, the Coast Guard may pursue civil or criminal penalties against an offender, as outlined below:

(a) Civil and criminal penalty. Violation of any order or other requirement imposed under section 101.405 of this part is punishable by the civil and criminal penalties prescribed in 33 U.S.C. 1232 or 50 U.S.C. 192, as appropriate.⁷²

(b) Civil penalty. As provided in U.S.C. 70117, any person who does not comply with any other applicable requirement under this subchapter, includ-

69. *Id.*

70. Tariff Act of 1930, 19 U.S.C.S. § 1618 (Law. Co-op. 2003) ("Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Commandant of the Coast Guard or the Commissioner of Customs, as the case may be, if under the navigation laws, before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, the Commandant of the Coast Guard, or the Commissioner of Customs, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition").

71. Tariff Act of 1930, 19 U.S.C.S. § 1623(c) (Law. Co-op. 2003) ("The Secretary of the Treasury may authorize the cancellation of any bond provided for in this section, or of any charge that may have been made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient. In order to assure uniform, reasonable, and equitable decisions, the Secretary of the Treasury shall publish guidelines establishing standards for setting the terms and conditions for cancellation of bonds or charges thereunder").

72. 33 C.F.R. § 101.415 (2004).

ing a Maritime Security Directive, shall be liable to the U.S. for a civil penalty of not more than \$25,000 for each violation. Enforcement and administration of this provision will be in accordance with 33 CFR 1.07.⁷³

Additionally, there are penalties for violations of arrival, reporting, entry, and clearance requirements relating to maritime commerce discussed in the Tariff Act of 1930.⁷⁴ The Tariff Act defines unlawful acts as follows:

Unlawful acts

It is unlawful — (1) to fail to comply with section 1431, 1433, or 1434 of this title or section 91 of the Appendix to Title 46; (2) to present or transmit, electronically or otherwise, any forged, altered or false document, paper, information, data or manifest to the Customs Service under section 1431, 1433(d), or 1434 of this title or section 91 of the Appendix to Title 46 without revealing the facts; (3) to fail to make entry or to obtain clearance as required by section 1434 or 1644 of this title, section 91 of the Appendix to Title 46, or section 1509 of the Appendix to Title 49; or (4) to fail to comply with, or violate, any regulation prescribed under any section referred to in any of the paragraphs (1) through (3).⁷⁵

Civil penalty

Any master, person in charge of a vehicle, or aircraft pilot who commits any violation listed in subsection (a) of this section is liable for a civil penalty of \$5,000 for the first violation, and \$10,000 for each subsequent violation, and any conveyance used in connection with any such violation is subject to seizure and forfeiture.⁷⁶

Criminal penalty

In addition to being liable for a civil penalty under subsection (b) of this section, any master, person in charge of a vehicle, or aircraft pilot who intentionally commits any violation listed in subsection (a) of this section is, upon conviction, liable for a fine of not more than \$2,000 or imprisonment for 1 year, or both; except that if the conveyance has, or is discovered to have had, on board any merchandise (other than sea stores or the equivalent for conveyances other than vessels) the importation of which into the United States is prohibited, such individual is liable for an additional fine of not more than \$10,000 or imprisonment for not more than 5 years, or both.⁷⁷

Additional civil penalty

If any merchandise (other than sea stores or the equivalent for conveyances other than a vessel) is imported or brought into the United States in or aboard a conveyance which was not properly reported or entered,

73. 33 C.F.R. § 101.415 (2004).

74. Tariff Act of 1930, 19 U.S.C.S. § 1436 (2003).

75. *See id.* § 1436 (a).

76. *See id.* § 1436 (b).

77. *See id.* § 1436 (c).

the master, person in charge of a vehicle, or aircraft pilot shall be liable for a civil penalty equal to the value of the merchandise and the merchandise may be seized and forfeited unless properly entered by the importer or consignee. If the merchandise consists of any controlled substance listed in section 1584 of this title, the master, individual in charge of a vehicle, or pilot shall be liable to the penalties prescribed in that section.⁷⁸

It is apparent from these various laws that there are significant civil and criminal legal implications associated with failing to comply with CBP programs and initiatives. If a business or vessel fails to follow these laws related to maritime commerce, there are also significant financial implications associated with non-compliance.

B. FINANCIAL IMPLICATIONS OF NON-COMPLIANCE

The financial implications of compliance with CBP programs are significant, since ninety-five percent of U.S. international cargo by volume is transported on the ocean.⁷⁹ As a starting point of analysis, the sheer volume of international shipping commerce conducted carries with it a heavy price tag for even incidental cost outlays. For example, thirty years ago, imports and exports accounted for only eight percent of U.S. Gross Domestic Product, or GDP.⁸⁰ By 1999, foreign trade was almost twenty seven percent of GDP.⁸¹ Economists predict that trade will double by 2010.⁸² Also, according to U.S. Customs, the volume of important cargo moving through U.S. ports will more than double by the year 2020.⁸³ Port activity contributed \$74.8 billion to U.S. GDP, and personal income of \$52.7 billion in 1996.⁸⁴ Also, Customs revenues collected in FY 2000 totaled \$24.4 billion.⁸⁵ Roughly seventy percent, or \$17.1 billion, is attributable to seaport activity.⁸⁶

The CBP programs reviewed in this paper are fairly recent developments. As a result, most of the information concerning the financial implications of compliance with these programs is still being gathered and compiled. The one area in which sufficient information is currently available is the financial impact of compliance with the 24-Hour Rule.

78. *See id.* § 1436 (d).

79. American Ass'n of Port Authorities, *Current Issues Facing the Industry*, at <http://www.aapa-ports.org/industryinfo/currentissues.html> (last visited Feb. 15, 2004).

80. *Id.*

81. *Id.*

82. *Id.*

83. Position Paper of the American Ass'n of Port Authorities *U.S. Public Port Facts*, American Ass'n of Port Authorities, at <http://www.aapa-ports.org> (last visited Feb. 15, 2004).

84. *Id.*

85. *Id.*

86. *Id.*

Compliance with the 24-Hour Rule is considered a matter of National Security.⁸⁷ As a result, on May 4, 2003, CBP ports were authorized to assess monetary penalties for serious and flagrant violations of the timely submission of cargo information.⁸⁸ Each individual CBP seaport is responsible for reviewing and enforcing the timeliness of these cargo declaration submissions.⁸⁹ CBP ports have also been responsible for initiating “Do Not Load” messages for cargo whenever an “invalid” cargo description is used.⁹⁰ A “Do Not Load” message essentially prevents the cargo in question from being loaded onto a vessel until the cargo can be properly inspected to ensure that it does not contain prohibited or dangerous items.

CBP ports are also authorized to issue monetary penalties for questionable cargo that has been loaded on board a vessel without providing CBP a 24-hour time frame in which to place a “Do Not Load” message on the questionable cargo.⁹¹ Vessels found to be in violation of the 24-Hour Rule may be subject to CBP penalties and liquidated damages for violation of manifest requirements.⁹² These penalties are enforceable against both masters of vessels and Non-Vessel Operating Common Carriers (NVOCCs). Masters of vessels may be assessed penalties under 19 USC 1436 (penalties of \$5,000 per first violation and \$10,000 for any subsequent violation attributable to the master).⁹³ NVOCCs may incur claims for liquidated damages of \$5,000 per vessel in accordance with 19 CFR 113.64(c) and 19 CFR 4.7(b) and/or 19 CFR 4.7a(c).⁹⁴

The financial implications associated with non-compliance with CBP programs and initiatives can be significant. A business that receives a “Do Not Load” message on its cargo stands to lose hundreds of thousands, if not millions, of dollars. A business or vessel that fails to comply with CBP programs and policies can be fined substantial amounts. While exact figures are still being compiled, it is reasonable to say that the overall financial implications are considerable.

87. U.S. Customs & Border Protection, *Frequently Asked Questions: 24-Hour Advance Manifest Rule*, Department of Homeland Security, available at http://www.cbp.gov/ImageCache/cgov/content/import/carriers/24hour_5frule/24hour_5ffaq_2edoc/v4/24hour_5ffaq.doc (revised December 16, 2003).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

IV. WHO SHOULD BEAR THE BURDEN OF PAYING THE INCREASED COSTS OF THESE PROGRAMS?

A. MAGNITUDE OF FUNDING FOR MARITIME SECURITY PROGRAMS AND INITIATIVES

One of the most serious criticisms leveled in the area of maritime security relates to the funding, or what some see as the lack thereof, for new programs and initiatives. A recent *Atlanta Journal* article stated that, "[t]he homeland security budget provides \$125 million in port security grants. Coast Guard officials say they need \$1 billion, though they aren't sure because they won't be finished assessing security needs at the nation's 55 major ports until the end of next year."⁹⁵ In a *Los Angeles Times* article, Peter Dailey, the maritime director of the Port of San Francisco said, "[f]rom our standpoint, we're glad the Coast Guard released their interim rules for security requirements. A lot's been done in American ports to upgrade their security plans. [However], the big question is going to be funding."⁹⁶ A *New York Times* article from June 2003, written by Paul Krugman, stated, "[p]ort security, identified as a top concern from the very beginning, has so far received only one-tenth as much money as the Coast Guard says is needed."⁹⁷ The Coast Guard, which spearheads port safety, estimates that ports will need to invest \$1.125 billion in the first year alone and \$5.399 billion over the next decade."⁹⁸

At present, more than ninety-five percent of all international trade is conducted by ship, with approximately \$738 billion of cargo moving through U.S. ports each year.⁹⁹ For example, the ports of Los Angeles and Long Beach are the nation's busiest container seaports, with approximately three million containers entering the country annually.¹⁰⁰ Only an estimated two to four percent of those containers are opened and searched by hand."¹⁰¹ As Rear Admiral Larry Hereth, the Coast Guard's director of port security recently said, "[p]orts are big, complex, diverse operations that have lots of opportunities and lots of targets there because of the hazardous nature of cargo moved, [and] because of the peo-

95. *OUR OPINIONS*: Don't let nation's security fall prey to fickle funding, *ATLANTA JOURNAL-CONSTITUTION*, Editorial, Sept. 26, 2003 at 14A.

96. Susannah Rosenblatt, *THE NATION*; *Rules Aim to Make Ports More Secure; Facility officials worry about paying for the changes requiring emergency drills, screening and more to minimize terror risk*, *LOS ANGELES TIMES*, Jul. 2, 2003, § 1, at 14.

97. Paul Krugman, *Dereliction of Duty*, *N. Y. TIMES*, Jun 17, 2003 at A27.

98. John Schmid, *Feds announce huge security upgrade for nation's ports; Cost to plug holes in U.S. defenses will reach many billions*, *MILWAUKEE JOURNAL SENTINEL*, Jul. 2, 2003, at 01D.

99. Susannah Rosenblatt *supra* note 96.

100. Deborah Schoch, *supra* note 64.

101. *Id.*

ple involved.”¹⁰² The fact that such a small percentage of containers are inspected at the nation’s two busiest ports should raise some homeland security concerns.

B. WHO BEARS THE COST?

There is a philosophical debate regarding the most appropriate entity to pay for the increased costs of these new CBP programs. Should the government, both at the federal and state levels, (and indirectly taxpayers), find dedicated funding to finance these programs? Or, should the individual businesses that utilize these CBP programs be responsible for paying the financial costs?

The federal government is directly responsible for the creation and implementation of the new CBP programs through the U.S. Department of Homeland Security. These programs were created to strengthen the homeland security of the United States, and few would argue that these programs have not been successful in improving U.S. national security. Also, every U.S. citizen benefits from the enhanced domestic and international security that these programs create in the United States and abroad. However, it can be argued that not every U.S. citizen is directly involved in the maritime industry, although few would argue with the idea that most U.S. citizens are *indirectly* involved in this industry through their use and/or purchase of goods that move through the maritime commerce supply chain.¹⁰³ Therefore, since the majority of Americans benefit in some degree from international commerce, there is a strong argument that the government should pick up the costs of these new government-initiated programs.

As a competing variable, the business community, especially those businesses involved in maritime commerce, arguably face the greatest impact from the new regulations. CSI and C-TPAT have changed the way that companies must do business. The 24-Hour Rule and AIS have also fundamentally changed the way that shippers, and those involved in maritime commerce, must conduct their business affairs and practices. These new programs have already added significant expenses to the cost of doing business in an industry. The implementation of these new programs requires a significant amount of investment in equipment, in addition to compliance assurance and review. It is important to be aware of the costs associated with complying with these CBP programs so that current and prospective businesses are not priced out of being competitive and profitable as a result of new program regulations and reporting requirements. It is also important to note that most businesses will ultimately pass along

102. Susannah Rosenblatt, *supra* note 96.

103. See generally American Ass’n of Part Authorities, *supra* note 78.

any additional costs to consumers. This could have a negative impact on the overall U.S. economy if consumers are unable to purchase the same volume of good due to increased prices for these goods.

Since the area of enhanced maritime cargo container security is still in its early development stage, it may prove helpful to look at other programs in evaluating the most appropriate funding allocations for improved security. The best area of comparison in the transportation sector is enhanced airline security. On November 19, 2001, President George W. Bush signed into law the Aviation and Transportation Security Act (ATSA).¹⁰⁴ The ATSA created the Transportation Security Administration (TSA), a new agency with primary responsibility for aviation security.¹⁰⁵ As part of its new duties, the TSA took over responsibility for passenger screening and overall airline security from private security contractors hired by the airlines.¹⁰⁶

To help fund the costs of enhanced airline security, the ATSA created the September 11th Security Fee (Security Fee) and the Aviation Security Infrastructure Fee (ASIF).¹⁰⁷ As part of its new duties, the TSA was required to impose a uniform Security Fee on passengers of domestic and foreign air carriers.¹⁰⁸ As an example of this cost-sharing arrangement, the ASIF was established to reimburse the TSA for passenger and baggage screening costs, items previously the fiscal responsibility of the airlines.¹⁰⁹

The cost-sharing between the TSA, the airlines, and airlines travelers has been fairly successful. People have continued to fly and airline security has been enhanced since September 11, 2001. A similar cost-sharing program could work in the maritime cargo container industry. Costs could be shared between the shippers, the businesses that utilize the shippers' services, the government, and even the end consumers.

However, one significant difference between maritime and aviation is the much smaller number of passengers in the maritime industry than in the airline industry. As a result, the most appropriate funding balance between government funding and user fees will look much different in the maritime industry than the balance does in the airline industry. Businesses could be responsible for a minimum user fee based on their respective use of the programs, but the larger share would need to be

104. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

105. *See id.* § 101.

106. *See id.* § 108.

107. Press Release, Transportation Security Administration, Instructions for Paying the September 11 Security Fee, <http://www.tsa.gov/public/display?content=090005198004439f&> (last visited Feb. 26, 2004).

108. Passenger Civil Aviation Security Service Fee, 49 C.F.R. § 1510.5 (2004).

109. Aviation Security Infrastructure Fee, 49 C.F.R. § 1511.5 (2004).

funded by the government. This funding allocation would likely provide the most appropriate environment to ensure that the programs are funded in an equitable and fair manner, while also encouraging a pro-growth and pro-job creation economy.

V. CONCLUSION

There has been a very visible commitment to provide funding for aviation security improvements and upgrades. The emphasis on aviation security is a natural focal point as a result of the tragedies of September 11, 2001, and the use of aircraft in the worst terrorist attack in the history of the United States. While the same level of financial commitment has not yet been made to the area of maritime security, significant progress in improving maritime security, specifically cargo container security, is occurring through programs and initiatives like CSI, C-TPAT, OSC, the 24-Hour Rule, and the installation and use of Automated Identification Systems. The legal and financial implications of CBP programs on businesses and other entities involved in maritime commerce are significant, and the impacts of these programs must be carefully evaluated and reviewed by both the business community and the governmental sector to make sure that the programs are achieving the desired balance between increased security and efficient commerce.

While additional funding will be required to further strengthen our homeland security in the area of maritime commerce, the appropriate source of this additional funding is still being debated. With the United States' multi-modal system of transportation, it is critical to examine and implement a comprehensive solution to cargo container security in order to truly strengthen U.S. homeland security and domestic preparedness. Hopefully, the successful accomplishments of CBP and Coast Guard programs as possible precursors for an integrated security system can serve as models for cargo container security initiatives in the other modes of transportation.