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## Securing the Transatlantic Maritime Supply Chains from Counterterrorism: EU–U.S. Cooperation and the Emergence of a Transatlantic Customs Security Regime

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### ABSTRACT

This article offers an analysis of the cooperation between the European Union (EU) and the United States on customs security in the context of the two actors' fight against terrorism. While other aspects of EU–U.S. counterterrorism cooperation have received some scholarly attention, not so much research has focused on security cooperation in the EU–U.S. customs and supply chain. To investigate the emergence of transatlantic cooperation in this field this article employs regime theory in examining the 2004 EU–U.S. customs security agreement, the 2012 EU–U.S. mutual recognition decision, and the transatlantic disagreement on the U.S. 100 percent scanning rule.

### ARTICLE HISTORY

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Following the terrorist attacks of 11 September 2001, cooperation between the European Union (EU) and the United States on counterterrorism expanded significantly with the negotiation and conclusion of the Passenger Name Record (PNR) agreements, the mutual legal assistance and extradition agreements, the Europol–U.S. agreements, the Eurojust–U.S. agreement, and the EU–U.S. agreements in the area of customs and supply chain security. This article focuses on the area of customs security, which has received less scholarly attention compared with the case of the PNR agreements;<sup>1</sup> and it seeks to examine the question of how the two sides' cooperation emerged in this policy field.

This question is important given that it touches upon both the security and the economic aspects of the EU–U.S. relationship. The EU and the U.S. economies account for almost a third of world trade flows.<sup>2</sup> A large part of this trade is conducted through the transatlantic shipping line with maritime cargo vessels; in 2001 the container traffic between Europe and the United States amounted to 5.1 million containers while in 2006 this number rose to 6.1 million containers.<sup>3</sup> Less than two percent of these containers were inspected for security purposes.<sup>4</sup> This was one of the customs security gaps that officials from both the EU and the United States identified after the 9/11 attacks.

Moreover, given the large volume of containerized transatlantic trade, customs security measures related to cargos could potentially impede this trade. Such was the case, for example, of the U.S. 100 percent scanning rule, which, according to the EU, would, if

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implemented, affect EU–U.S. trade negatively. Additionally, failure of the two parties to agree on common security standards for international supply chains would increase the costs for companies and, as a result, for transatlantic trade.

This article employs regime theory to trace the negotiation and conclusion of two EU–U.S. agreements on customs security (the EU–U.S. 2004 customs security agreement and the 2012 mutual recognition decision) and to analyze the transatlantic conflict over the 100 percent scanning rule. The focus of regime theory on international cooperation means that this theoretical approach can provide insights into the emergence of transatlantic customs security cooperation. The EU–U.S. negotiations and discussions are conceptualized as a regime formation process in which the two sides sought to establish the rules for their customs security cooperation; the social factors of power, interests, and knowledge, as well as contextual factors and exogenous events, are hypothesized to have played a role in this process. The data for this article was collected from secondary sources and media sources (through the Nexis news database) and from six semi-structured elite interviews.

It is shown in this article that transatlantic customs cooperation emerged only after the 9/11 attacks. In the context of the changed security environment, the EU and the United States perceived international supply chains as particularly vulnerable to terrorist attacks. It is also argued that the transatlantic customs security regime was not a purely U.S.-imposed regime: the EU–U.S. customs security cooperation was rather based on common interests, and it was akin to a process of institutional bargaining in which all factors (power, interests, and knowledge) played a role. Additionally, while literature on EU–U.S. counterterrorism relations often presents the EU as a reactive and passive actor,<sup>5</sup> this article presents the argument that the EU took a proactive role in several instances.

One of the main themes that emerge from the examination of transatlantic cooperation on customs security is that while the EU and the United States did not have significant differences on the required security measures, they clashed over the issue of the form that transatlantic cooperation would take. On the one hand, the United States initially demonstrated a desire to work separately with individual member states rather than with the EU. On the other hand, the EU insisted that any cooperation on customs security should be based at and start from the EU level. Using regime theory this article shows how this difference was resolved and how the EU managed to change U.S. calculations.

In the next section the topic of regime formation is discussed. The article continues with a presentation of the context of the EU–U.S. customs security relations and an examination of the two agreements of 2004 and 2012 and the 100 percent scanning issue. Finally, the article concludes with a discussion of the findings from the three cases examined.

## Theories of International Regimes

The most famous definition of regimes came from Stephen Krasner in what was named in the literature the “consensus definition” of regimes: “regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”<sup>6</sup> Krasner’s definition has been one of the most widely used definitions and researchers continue to employ it for analyzing international cooperation.<sup>7</sup>

Given the above definition, the EU–U.S. customs security cooperation is conceptualized in this article as a regional transatlantic regime in the issue-area of customs security. There

are three customs security principles around which the EU and the United States have converged: multilayered risk management, international cooperation, and trade facilitation.<sup>8</sup> These principles were incorporated into the EU–U.S. 2004 agreement, the 2011 EU–U.S. joint statement on supply chain security, and the 2012 mutual recognition decision. The customs security norms that were established included the obligation of the two parties to share and exchange best practices and information, to develop common security standards, and to coordinate their positions in international forums.<sup>9</sup> Further, more specific rules began to emerge over time, such as those related to the implementation of the mutual recognition decision. Finally, the decision-making procedures of the regime include the Joint Customs Cooperation Committee (JCCC), the Transport Security Group, and the customs security working groups established through the EU–U.S. agreements. Decisions in these groups take place through the exchange of views and joint deliberation with the aim of reaching consensus.<sup>10</sup>

The presence of a nascent EU–U.S. customs security regime raises the question of how this regime was established and what the regime formation process reveals about the EU–U.S. relationship. Regime theorists approached the issue of regime formation through three main theoretical approaches, a power-based, an interest-based, and a knowledge-based.<sup>11</sup> Initially regime theorists relied predominantly on single-variable analyses of regime formation. At a later stage however scholars argued in favor of synthetic models of regime formation which included all three variables of power, interests, and knowledge; such a synthetic model is used in this article.

This article uses Oran Young's taxonomy of political leadership<sup>12</sup> as well as the synthetic model of regime formation proposed by Oran Young and Gail Osherenko, according to which the social forces of power, interests, and knowledge "feed into a process of institutional bargaining."<sup>13</sup> In the case examined in this article, the additional cross-cutting factors of leadership and context direct or channel the operation of these social forces.<sup>14</sup> The participants in this model can be state actors as well non-state actors (for instance, international organizations, international nongovernmental organizations, and private companies).

In Young's model, leadership can take three forms. Structural leaders are negotiators who translate power in the sense of material resources into bargaining leverage during the negotiations.<sup>15</sup> Entrepreneurial leaders devise innovative and mutually acceptable deals, set the agenda, and popularize the issue under question.<sup>16</sup> Finally, intellectual leaders disseminate knowledge to policymakers and negotiators in order to change the perceptions of the negotiating parties regarding the problems at stake.<sup>17</sup>

In this article the negotiations between the EU and the United States are conceptualized as a bargaining process for the establishment of a nascent regime. It is expected that the social forces of power, interests, and knowledge would influence this process, which can be divided into the two stages of agenda setting and negotiations.<sup>18</sup>

According to the power-based approach, the EU and the United States would seek to impose their preferences through sanctions and coercion, and the negotiators would exercise structural leadership.<sup>19</sup> According to the interest-based approach, the EU and the United States would initiate negotiations voluntarily to realize joint benefits, and the agreements would reflect both sides' concerns. The negotiators would influence each other through side-payments and compensations and they would thus devise equitable results (entrepreneurial leadership).<sup>20</sup> Finally, according to the knowledge-based approach consensual knowledge regarding the suitable response to customs security problems would be the catalyst and

driver of the EU–U.S. cooperation.<sup>21</sup> The EU and the United States would change their interests or/and their means to pursue these interests under the influence of new knowledge about the broader political and social environment or about the problems at stake.<sup>22</sup> Negotiators and officials would disseminate new ideas, thus exercising intellectual leadership.<sup>23</sup>

Moreover, contextual factors are expected to have influenced the regime formation process.<sup>24</sup> These factors range from global events and crises to domestic and national developments and events. Finally, interaction effects between the three social forces of the model presented here are expected to have been present during the negotiations: power can be used for devising equitable results, ideas can be used tactically for the advance of certain interests and positions, power can be used for the imposition of rules reflecting certain ideas, and knowledge can shape the way interests are defined and/or means are chosen.<sup>25</sup>

In the next sections, an analysis of the emergence of the EU–U.S. customs security regime is undertaken, using the above regime formation model. This model, which focuses on the role of power, interests, knowledge, and contextual factors, will be applied to the negotiations for the 2004 and 2012 agreements and to the transatlantic conflict over the 100 percent scanning rule.

## **The Context: Customs Security Before and After the 9/11 Attacks**

### ***Customs Security Before the 9/11 Attacks***

Before the 9/11 attacks the antiterrorism aspect of customs security was not considered a high-priority area; rather, the efforts of customs authorities were focused on counternarcotics and antismuggling activities. The threat of terrorist use of the international supply chains did not loom large given that there was not any precedent for such an attack.<sup>26</sup> The terrorist attacks against the marine transportation system had mainly been of the cruise/ferry vessel-bombing or cruise/ferry vessel-hijacking kind.<sup>27</sup>

As a result, only a minuscule percentage of containers were inspected<sup>28</sup>—less than two percent of cargo containers<sup>29</sup>—and little advance information on the content of cargos was available when shipments were arriving at U.S. ports.<sup>30</sup> The cargo vessels were required to file vessel manifests concerning the content of the cargo only forty-eight hours before the arrival of the vessels at a U.S. port,<sup>31</sup> and the decision on whether a shipment was legitimate was taken only on the basis of the requisite documentation. This approach was not very reliable since the documents-related requirements were nominal; the shippers, for example, were not required to identify the originator or the recipient of the shipments or to itemize the contents of the cargo.<sup>32</sup> Additionally, the rationale behind cargo inspections was the collection of customs duties, and in the balance between trade facilitation and trade security the emphasis was clearly on the trade facilitation aspect of customs.<sup>33</sup>

In conclusion, the prevalent characteristic of supply chain security at that period was the “almost complete absence of any security oversight in the loading and transporting of a box from its point of origin to its final destination.”<sup>34</sup> After the 9/11 attacks the 9/11 Commission Report highlighted this absence of security controls in the customs and cargo sector and urged the government to take drastic action in order to reduce the vulnerabilities in this area.<sup>35</sup>

Similarly to the United States, before 9/11 the use of the international supply chains for terrorist purposes was not considered as a threat by either the EU or its member states.

Rather, the focus was on the fight against customs fraud and customs law infringements and on the smuggling of prohibited goods (such as drugs, arms, counterfeit goods, and endangered species goods).<sup>36</sup> This focus can be seen for example in the 1998 “Naples II Convention on Customs Cooperation.”<sup>37</sup>

Given that neither the EU nor the United States viewed the terrorist exploitation of supply chains as a high-risk threat, no initiatives were taken by either side toward transatlantic cooperation in this field. The result of this lack of political prioritization was that a customs security regime formation process did not start prior to 9/11.

### ***Customs Security After the 9/11 Attacks***

The altered security environment after the 9/11 attacks spurred a learning process both in Europe and the United States, in which the priorities and the threat perceptions of both the United States and the EU changed. While the 9/11 attacks were related to aviation security rather than to maritime security, they nonetheless prompted security officials on both sides of the Atlantic to assess a multitude of scenarios and attempt to identify and plug security gaps across numerous areas. Concerning the United States, the international supply chains of goods were seen not only as an essential part of U.S. trade, but also as a potential security liability, in the sense that terrorists could exploit the maritime trade system and use it as a means to execute their plans. Similar threat perceptions were prevalent in the EU after the 9/11 attacks.<sup>38</sup>

In particular, policymakers were concerned about a number of threats that could materialize in the uncertain post-9/11 security environment. First, the containers that arrived at ports could contain conventional explosive devices or materials related to weapons of mass destruction that could be used for terrorist attacks (such as chemical, biological, radiological, and nuclear agents).<sup>39</sup> Additionally, the international supply chain could be used for the smuggling of persons (terrorist organizations’ operatives) into U.S. or European territory. Second, sea containers could conceal explosive devices, including “dirty bombs” (radiological dispersal devices), programmed to set off or be remotely detonated when the vessels containing the containers arrived at their destinations.<sup>40</sup> Alternatively, terrorists could use a cargo ship’s legitimate load (such as chemicals, petroleum, and liquefied natural gas) as the means to conduct an attack. Thirdly, significant costs and disruption would be caused not only in the case of an actual attack but also in the case of a credible threat of an explosive device.

U.S. and EU strategic documents and policy papers during this time period reflected the above threat perceptions. On December 2002 the U.S. Coast Guard adopted its maritime strategy for homeland security, in which the threat emanating from a possible exploitation of the U.S. marine transportation system for terrorist purposes was highlighted.<sup>41</sup> The EU’s policy and strategic documents similarly reflected the new threat perceptions. For instance, in the maritime transport security communication of the Commission it was highlighted that any ship could be used as means for terrorist attacks, and that this threat made a focus on maritime security necessary.<sup>42</sup> In a similar vein, the Council resolution of 2003 on a strategy for customs cooperation identified terrorist and organized crime attacks against supply chains as one of the main threats to the EU’s safety and security.<sup>43</sup>

To sum up, this section examined how customs security was conceptualized before and after the 9/11 attacks. Given that the terrorist threat against containers was not identified as a problem by either side no regime was formed prior to 9/11.

## The Container Security Initiative and the 2004 EU–U.S. Customs Security Agreement

In the immediate aftermath of the 9/11 attacks the role of knowledge, as a social factor influencing regime formation, was prominent in two senses. First, as a result of the changed threat perceptions mentioned previously, customs functions in the United States were re-conceptualized in terms of the new emergency stemming from the fight against terrorism. The new security environment together with a new set of perceived threats prompted the United States to give an antiterrorist mission and role to customs. Second, apart from this re-conceptualization, U.S. security officials and practitioners also converged around the concept of “smart borders;”<sup>44</sup> these officials held the professional belief that applying this new idea about border controls to the customs area was the best solution to the customs security gaps identified.<sup>45</sup>

The above indicates that a learning process took place wherein the United States redefined its interests under the influence of new knowledge about the country’s security environment and about the optimal U.S. response. At the heart of this process was a U.S. group of security professionals, experts, and policymakers that included officials from the U.S. Customs Service and from other organizations such as the U.S. Coast Guard and the U.S. Border Patrol, and members of the academic and scientific community.<sup>46</sup> The object of this group was to reduce uncertainty for the U.S. administration in the face of this new threat environment. First, it promoted the idea of treating the area of customs as a predominantly antiterrorist and security-oriented space and, secondly, it incorporated customs functions into the broader homeland security plan of creating smart borders.

As a response to the customs security vulnerabilities mentioned previously, the U.S. Customs and Border Protection (CBP) Unit established a plan based on five pillars: (1) the use of advance information, (2) the use of automated risk targeting, (3) the use of sophisticated detection technology at ports of entry, (4) the Container Security Initiative (CSI), and (5) the launch and expansion of Customs-Trade Partnership Against Terrorism (C-TPAT).

This five pillar system was part of the broader U.S. homeland security strategy and in particular of the U.S. plan for the establishment of “smart borders,” which appeared in the first U.S. strategy for homeland security in 2002.<sup>47</sup> In the latter it was envisioned that the “border of the future” would be a continuum framed by land, sea, and air and built on concentric circles of defense.<sup>48</sup> In this layered approach to border controls the first line of defense would be overseas. When people or goods passed through the various layers the relevant U.S. security bodies would screen and filter these people and goods with the help of risk management techniques.

The application of the smart borders concept into the customs area meant in practice that the U.S. customs security functions would be “exported” and take place abroad.<sup>49</sup> In other words, functions like the collection of information regarding the content of cargos and the screening and inspection of containers would take place overseas rather than at the U.S. ports of arrival.

The Container Security Initiative together with the 24-hour advance vessel manifest rule (24h rule) were two of the measures that were introduced by the U.S. Customs for the implementation of the smart borders plan into the customs area. Through these measures the U.S. initiated a customs security regime formation process: having been the recent victim of terrorist attacks, it was the United States that moved first to shape the security agenda. With these initiatives, the U.S. officials exercised all forms of leadership (structural, entrepreneurial, and intellectual). The role



of knowledge was evident in the fact that the U.S. customs security rules were based on the idea and conceptual framework of smart borders; in this sense the U.S. officials were trying to shape the “intellectual capital”<sup>50</sup> of its partners and allies. At the same time, the unilateral imposition of the extraterritorial 24h rule, accompanied by penalties for non-complying shippers, was an exercise in structural leadership where the U.S. officials deployed threats in order to ensure the compliance of third actors. Finally, entrepreneurial leadership was evident in the promotion of the CSI program, which depended on the consent and active involvement of third countries; the U.S. made an effort to popularize and draw attention to the CSI, and it also offered a number of side-payments and benefits to the countries as well as to the ports that would participate in the program.

The CSI was initiated in January 2002 and it concerned the foreign ports from which shippers exported goods to the United States. The CSI had the following elements: (1) shippers would provide advance information about the content of the containers before the cargo vessel left the port of origin, (2) U.S. Customs would establish risk criteria and risk indicators to enable the identification of the containers that posed the greater risk, (3) containers would be pre-screened at the ports of origin (rather than at the U.S. ports of arrival), on the basis of the cargo information given in advance and on the basis of the risk criteria mentioned previously, and (4) technology would facilitate the scanning of high-risk containers and the development and use of “smart” containers.<sup>51</sup>

For the implementation of the CSI, U.S. Customs planned to sign agreements firstly with the ports and governments that were sending the highest volume of cargo traffic to the United States.<sup>52</sup> U.S. Customs officials would be placed in these ports in order to pre-screen the containers; in case the U.S. customs agents thought that a container needed further inspection they would instruct local customs authorities to conduct a physical or other inspection.<sup>53</sup> This was a highly significant aspect of the CSI program because it touched on the sensitive issue of state sovereignty; the United States was requesting through this feature of the CSI that a country cede part of its sovereignty by allowing U.S. customs officials to be stationed on its soil.<sup>54</sup>

The benefit that the United States offered to these ports was that the containers that originated from the CSI ports would have expedited clearance through U.S. customs.<sup>55</sup> Additionally, the countries that participated in the CSI could also station customs officials in U.S. ports. In other words, the United States tried to achieve the compliance of other actors through the provision of compensations and rewards. The ports that participated in the CSI would become more competitive and this would also economically benefit the countries in which these ports were based.

The 24h rule, which was related to the CSI, emerged with the Maritime Transportation Security Act of 2002.<sup>56</sup> This document legislated that information about inbound containers should be provided in advance, that is before the arrival of cargos at the U.S. ports. The 24h rule became compulsory for third parties through the U.S. legislation on October 2002. The CSI, which was initiated on January 2002, was, however, a voluntary program and the United States depended on co-operation with third countries on this issue given that the CSI included the stationing of U.S. Customs officials on the soil of third parties.<sup>57</sup> Therefore, the United States approached a number of EU member states in order to gain their approval for the CSI, in this way stimulating the demand for a customs security regime; the ultimate aim of the United States was to sign with these member states “declarations of understandings,” which would incorporate these countries’ ports into the CSI.<sup>58</sup> It was through these two



movements, on the one hand the unilateral legislation of the 24h rule and on the other hand the entrepreneurial promotion of the CSI, that customs security emerged in the EU–U.S. agenda. Both initiatives were based on and backed by the intellectual underpinnings of the smart borders concept, pointing to the existence of interaction effects between the social factors of knowledge on the one hand and power and interests on the other hand.

During this agenda formation stage, the United States adopted an approach based on bilateralism and on approaching individual member states rather than the EU institutions. In its interactions with member states the United States acted as a “champion”<sup>59</sup> of the CSI, drawing attention to the problem of supply chain security and at the same time shaping the way this problem was framed for discussion. The entrepreneurial leadership of the U.S. officials was indeed successful, and by September 2002 Belgium, Netherlands, Germany, and France signed memorandums of understanding with the United States regarding the implementation of the CSI at five ports (Rotterdam, Antwerp, Hamburg, Bremerhaven, and Le Havre).<sup>60</sup> By January 2003 Spain, Britain, and Italy followed.<sup>61</sup>

The reason for this bilateral approach lay in the fact that there was a genuine atmosphere of urgency at that time, and the U.S. officials believed that starting negotiations with the EU, which was perceived as a slow-moving and cumbersome organization, would take too much time. Approaching member states individually was perceived as more expedient.<sup>62</sup> The U.S. Customs spokesman justified the U.S. approach saying that the CSI was an issue of national security and therefore Washington did not “have the luxury of time.”<sup>63</sup>

On their part, the countries that signed memorandums with the United States were motivated by economic and trade concerns;<sup>64</sup> in other words, the entrepreneurial efforts of the U.S. officials were successful. In particular, these countries were afraid that if they did not implement the CSI, their ports would be perceived as less safe than ports with CSI status.<sup>65</sup> The shippers would choose the safer option of moving their goods through CSI ports and this would result in economic losses for the ports that were not part of the U.S. program. Therefore, the response of the member states to the U.S. initiative was generally positive.<sup>66</sup>

Similarly, European shippers and ports were generally supportive of the CSI though there were concerns about the uneven application of CSI standards to European ports.<sup>67</sup> Regarding the 24h rule, shipping companies were more critical, noting that this rule might entail economic costs for the private sector.<sup>68</sup> The ports and the shippers did not, however, initiate any serious opposition to the U.S. measures given the U.S. determination to implement its customs security programs without any delays.

In terms of the regime formation process, the entrepreneurial initiatives of the U.S. officials were an example of the interest-based accounts of regime emergence that highlight the importance of side-payments and common interests. At the same time, the U.S. officials disseminated through their contacts with ports and member states officials the principles of risk management and trade facilitation. Additionally, these first U.S. initiatives show the importance of the negotiation arithmetic and the potential influence of private actors in the regime formation processes. Regarding the first, Young has stressed that the identity of participants in institutional bargaining is often fluid and a matter of bargaining in itself; indeed the initial effort of the United States to override the EU created strong resistance by the latter, as will be demonstrated subsequently. Finally, the involvement of private actors (shippers and ports) in the customs security measures discussed highlights the growing importance of private actors for international regimes and for security governance.<sup>69</sup>

The U.S. initiatives generated mixed feelings in the European Commission. On the one hand, the Commission accepted and approved the ideas that formed the basis of the U.S. customs security measures.<sup>70</sup> These ideas and principles included the advance provision of cargo information and the establishment of risk management techniques for the pre-screening of containers. On the other hand, the Commission had strong disagreements with the U.S. preference for concluding separate deals with European states. The Commission's position was that for both legal and efficiency-related reasons an EU–U.S. agreement was necessary.<sup>71</sup> This disagreement about the form that transatlantic customs cooperation would take and about the role of the EU in the CSI was the main issue of contention between the Commission and the United States.<sup>72</sup>

With regard to the first issue, the European Commission did not have any significant objection to the actual content of the U.S. measures;<sup>73</sup> from the perspective of the Commission officials the U.S. initiatives “made sense” in the context of the post-9/11 security environment.<sup>74</sup> This European acceptance of the U.S. customs security program, rather than resulting from a process of mere U.S. imposition, points toward a process of imitation. Indeed, the Commission's reforms regarding EU's own customs security system were to some extent based on the U.S. plans for customs security mentioned previously.<sup>75</sup> The Commission saw the value in the U.S. supply chain security program and benefited from the experience of the United States, which moved first in this area.<sup>76</sup>

Concerning the second issue, the fact that the Commission embraced the U.S. principles on customs security did not lead automatically to the emergence of an EU–U.S. regime. Rather, the initial preference of the United States was to conclude deals with individual member states rather than with the EU. This initial difference confirms Young's remark that in processes of regime formation the identity of participants is often fluid and a matter of negotiations in itself.<sup>77</sup>

The European Commission opposed the bilateral deals of the United States and proposed instead the negotiation and conclusion of an EU–U.S. agreement on customs security that would include the expansion of the CSI at all EU ports. The Commission's argument against the U.S. bilateralism was that the EU's common internal market and common customs area were affected by the U.S. memorandums with member states. The containers that were shipped from the EU's CSI ports would have preferential treatment in the U.S. ports compared to the cargo shipments coming from the EU's non-CSI ports; this in turn gave an advantage to certain EU ports and it created as a result distortions in the function of the EU internal market.<sup>78</sup>

The main aim of the Commission was therefore to transform the bilateral approach that the United States was following into an EU–U.S. regime formation process.<sup>79</sup> Exploratory talks between the Commission and the United States started in July 2002 and during these talks as well as during the subsequent negotiations the Commission had a strong strategic position that stemmed from the fact that customs issues were part of the first pillar of the EU. On first pillar issues the Commission had strong competencies and the European Court of Justice played a greater role;<sup>80</sup> for customs agreements with third countries in particular it was the Commission that had the competency to negotiate and conclude such agreements. In other words, the bilateral approach of the United States clashed with the EU *acquis* and the fact that member states did not have the competency to negotiate customs agreements.<sup>81</sup>

The Commission used a number of tactics in order to make the United States accept an EU-wide solution regarding the CSI and customs security. First, the Commission initiated

legal action starting an infringement procedure in the European Court of Justice against the member states that joined the CSI and signed memorandums with the United States.<sup>82</sup> Through this action the Commission wanted to ensure and safeguard the Union's political coherency and consistency; this in turn would send a signal to the United States about the EU's concerns and about the real possibility that the European Court of Justice could render the bilateral deals illegal since these deals violated the EU law and treaties.<sup>83</sup> Second, the Commission framed the EU–U.S. clash not only in terms of competencies and legality but also in terms of efficiency; the argument that the Commission officials were advancing in their talks with their U.S. counterparts was that the U.S. aims could be achieved in a more efficient way at an EU level.<sup>84</sup> An EU-wide agreement would ensure for example that all EU ports had the same risk assessment and screening criteria, and this in turn would be beneficial from both a security and an industry perspective.<sup>85</sup> In other words, the Commission officials did not only use threats (structural leadership) but also pointed to common benefits (entrepreneurial leadership).

The U.S. officials realized gradually that the EU Commission had competencies for issues related to the CSI; hence they could not bypass the Commission on that matter as they tried to do initially.<sup>86</sup> This realization illustrates how even strong actors cannot fully control the issue of the participants in regime formation negotiations.<sup>87</sup> Additionally, the Commission's legal action against member states played a role in changing the U.S. stance.<sup>88</sup> Indeed, a U.S. Customs spokesman admitted that the Commission's legal action "could slow the agency's [U.S. Customs] plans to expand the CSI to more European ports by deterring countries from completing security agreements with the U.S."<sup>89</sup> In other words, the United States changed its position under the threat of the political costs it would otherwise incur. The Commission managed therefore to transform the bilateral approach of the United States into a regime formation process that would take place at an EU level.

After the United States accepted the EU as its main interlocutor on customs security and CSI issues the Council of the EU gave a negotiation mandate to the Commission, and negotiations between the two sides started on March 2003. The negotiations were concluded very quickly (on November 2003), as no major differences emerged on the content of the agreement.<sup>90</sup> The EU and the United States agreed on the guiding principles for customs security: multilayered risk management, trade facilitation, and international co-operation.<sup>91</sup> These principles were essentially those included in the CSI and the bilateral memorandums with member states. Regarding the decision-making procedures of the regime, the agreement established a working group which would examine and make recommendations on a number of priority issues related to customs security.

The agreement between the EU and the United States was finally signed on 28 April 2004.<sup>92</sup> The scope of the deal was not limited to issues related to the CSI, and it went beyond what was previously agreed on the U.S.–member states memorandums: the EU aimed and managed to include in the scope of the agreement broader issues related to customs security.<sup>93</sup> Such issues included the exchange of best practices in the field of customs security and the establishment of minimum standards for risk-management programs, for the identification of high-risk shipments, for the screening of high-risk cargos, and for industry-partnership programs.<sup>94</sup>

To summarize, customs functions were re-conceptualized in the post-9/11 security environment, acquiring an antiterrorist role. The United States moved first, initiating the regime formation process through the exercise of structural, entrepreneurial, and intellectual

leadership. While the European Commission shared the concerns of the United States, it sought the conclusion of a deal at the EU level. The 2004 agreement that was finally concluded reflected the common interests and principles of the EU and the United States in the issue-area of customs security.

### The Mutual Recognition Decision

Part of the U.S. plans for customs security was the launch and expansion of the C-TPAT program. The C-TPAT program was based on the idea that the private sector should be taken into account in the establishment and implementation of security measures. Accounting for the private sector was natural given the large role played in the international supply chains system by private actors and companies, such as importers, shippers, and customs brokers.<sup>95</sup> The involvement of the private sector in supply chain security was especially crucial in the context of the customs security gaps that were identified after the 9/11 attacks.

The U.S. C-TPAT program was launched in 2001 and was authorized in 2006 with the “Security and Accountability for Every Port Act” of 2006.<sup>96</sup> Through this program, U.S.-based companies that were involved in importing goods from overseas could voluntarily adopt a number of security measures. In return, U.S. Customs would offer these companies a number of benefits, such as faster security clearances and less security inspections. The similar concept of Authorized Economic Operator (AEO) was adopted by the World Customs Organization (WCO) in the organization’s 2005 “SAFE Framework of Standards to Secure and Facilitate Global Trade.”<sup>97</sup> Finally, the EU, inspired by both the American C-TPAT and the WCO standards, initiated in 2005 its own AEO program.<sup>98</sup>

A particular issue that the WCO highlighted was the mutual recognition of the various AEO systems. In other words, the WCO stressed that customs authorities and governments should recognize each other’s systems and security measures regarding AEOs as equivalent, and therefore grant the same benefits on those AEOs.<sup>99</sup> This process of mutual recognition would be especially beneficial for industry, given that companies could benefit from a broadened array of trade facilitation measures.<sup>100</sup>

Taking into account WCO’s SAFE Framework, the European Commission proposed the opening of talks with the United States in 2005 to achieve mutual recognition of the two sides’ programs for authorized companies.<sup>101</sup> In this way, the Commission officials exercised a form of entrepreneurial leadership popularizing and drawing attention to the issue of mutual recognition. At the same time, the Commission promoted and favored a particular form of this recognition process, framing the problem as an EU–U.S. issue rather than as an issue for member states to coordinate separately with the United States. The Commission was pointing to the benefits that the mutual recognition would bring about in both the EU and the United States.

By initiating talks for the mutual recognition of the European AEO and the American C-TPAT, the Commission took the lead in the EU–U.S. regime formation process. This alone was a significant development, given that the EU was frequently portrayed in the literature as being led by the United States on security issues. However, it was only in 2007 that the United States agreed to engage in talks with Europeans about the feasibility of an EU–U.S. mutual recognition; the two sides decided in January 2007 to create a working group. The aim of the group was to devise a roadmap toward mutual recognition, and the drafting of proposals and suggestions for an EU–U.S. agreement thereon.<sup>102</sup> Despite the

creation of this group, U.S. support for such an agreement remained lukewarm until at least 2008 and early 2009.<sup>103</sup>

The main reason behind U.S. reluctance and the principal obstacle to the further development of the EU–U.S. customs security regime was again an initial American insistence on working with member states rather than with the EU as a whole. The United States preferred to recognize the business-to-government programs of only certain countries, for example, Germany, France, and the United Kingdom.<sup>104</sup> The United States was reluctant to recognize the AEO programs of the new eastern European member states, whose customs security measures it did not fully trust.<sup>105</sup> Additionally, the United States insisted that there was no point in having substantial discussions with the Commission on the issue of mutual recognition until the EU's AEO program was implemented and fully functional and until the EU ensured that the AEO scheme was applied equally in all member states.<sup>106</sup> In 2007 some EU member states still had yet to implement the relevant regulations of the AEO plan, despite its having been launched in 2005.<sup>107</sup>

For the European Commission, however, a bilateral approach was a “red line” and it could not, therefore, be accepted.<sup>108</sup> Similarly with the CSI, the selective recognition of the AEOs of only some countries would create trade distortions for the EU internal market, given that the AEOs of those countries would be in an advantageous position compared with other AEOs. Additionally, U.S. bilateralism clashed with the EU competencies on customs.<sup>109</sup>

Both sides agreed on the norm of the mutual recognition of standards for the customs security business-to-government programs. The point of contention was whether this norm would be applied to all EU member states or only to some of them and whether the European Commission would have any voice in this process. In other words, similarly with the CSI case, the main point of contention was the form that transatlantic customs cooperation would take rather the principles and norms of this cooperation.<sup>110</sup>

The breakthrough came with the start of the implementation of the EU's AEO scheme on 1 January 2008. This satisfied the U.S. demand that the EU's AEO should become operational before the EU–U.S. recognition process started. The two sides agreed as a result on March 2008 on a “Roadmap towards Mutual Recognition of Trade Partnership Programs.”<sup>111</sup> This document was crucial as it “set the way forward” for mutual recognition by identifying the steps that the EU and the United States had to take to achieve this aim.<sup>112</sup>

The recognition roadmap included a number of technical, operational, legal, and evaluation areas of action that needed completion for recognition to be achieved. Such areas included, for example, the data elements that customs authorities would exchange and the proper legal framework for the implementation of recognition.

The Mutual Recognition decision was finally signed on 4 May 2012, and full implementation started on 31 January 2013.<sup>113</sup> The initiative for this agreement came from the European Commission, which in this way played an important role in shaping the agenda of the EU–U.S. customs security cooperation. More importantly, the mutual recognition decision served as a catalyst for a change in the American C-TPAT program and this in turn points towards a process where the United States was partially influenced by the EU and adopted EU standards.

When the C-TPAT was established it covered only companies which imported goods from overseas to the United States; in other words, C-TPAT covered U.S. importers. On the contrary, the EU's AEO program had both an imports and an exports aspect. When the

mutual recognition process started an important element in the EU–U.S. talks was that of the reciprocity of the final agreement;<sup>114</sup> for the final mutual recognition decision to be reciprocal the United States had to expand C-TPAT to exporters and, indeed, such an expansion was included in the EU–U.S. recognition road map.<sup>115</sup> Following the adoption of the road map, U.S. Customs started planning the expansion of C-TPAT to exporters in 2013.<sup>116</sup>

The mutual recognition case was also an example of the potential linkages between the internal coherency of the EU and the regime formation process of the EU with the U.S. Indeed, the refusal of the U.S. to enter into substantive talks with the Commission on mutual recognition until the EU's authorized operators plan was fully functional in all member states points towards the existence of such connections. According to the EU officials interviewed, U.S. bilateralism could be neutralized if the EU member states stood loyal to the EU policies.<sup>117</sup> The more consistent and coherent the EU was internally the more credible it appeared to the United States, and the EU's credibility, in turn, affected U.S. calculations.

### The 100 Percent Scanning Rule

The emergence of the transatlantic customs security regime was not without problems. This section presents the 100 percent scanning issue, which emerged through an initiative of the U.S. Congress, as an example of how political contextual factors can influence processes of regime formation. The European Commission officials were opposed to this measure and tried to dissuade the U.S. officials from implementing it through a combination of threats (structural leadership) and a persuasion campaign (intellectual leadership).

In 2006 the U.S. Congress passed the "Security and Accountability for Every Port Act."<sup>118</sup> Among other measures, the act instructed the U.S. Department of Homeland Security to test the feasibility of scanning all U.S.-bound containers in foreign ports for nuclear and radiological materials. This testing was initiated in December 2006 with the Secure Freight Initiative (SFI) that was implemented in three ports (Southampton in the United Kingdom, Port Qasim in Pakistan, and Puerto Cortes in Honduras).<sup>119</sup> In 2007, however, the new Democratic Congress passed the so-called 9/11 Commission Act, which, among other things, amended the 2006 act.<sup>120</sup> The Congress legislated that by 2012 all U.S.-bound cargo should be scanned with radiological and nuclear detection equipment at overseas ports; otherwise, the shipping vessels would be prohibited from entering the United States.

The 100 percent scanning requirement was another extraterritorial and unilateral measure along the lines of the 24h rule. The 100 percent scanning legislation did not, however, have the full support of the U.S. administration and the Department of Homeland Security; rather, it was a politically motivated initiative of the Congress.<sup>121</sup> In particular, the new Democratic Congress wanted to demonstrate through its first act (the 9/11 Commission Act) that it was as committed to the security of the United States as the Republican administration.<sup>122</sup> Additionally, the 9/11 Commission Act served the purpose of criticizing the Republican Bush administration for shortcomings in the area of homeland security.<sup>123</sup>

The European Commission was fiercely opposed to such a measure for a number of reasons: in particular, the Commission conducted three technical studies to examine the impact of the 100 percent rule with regard to trade, maritime transport, and security.<sup>124</sup> These studies formed the basis of the Commission officials' intellectual campaign, in which they tried to persuade their U.S. counterparts about the huge costs and disadvantages that 100 percent



scanning would have. First, according to these studies, the 100 percent scanning rule would have huge investment and operational costs for European countries.<sup>125</sup> European ports would have to spend money on new equipment and technology, on changing their procedures and regulations, and on expanding their facilities. Regarding operational costs, the implementation of the 100 percent rule would require an increase in port personnel while maintenance and energy consumption costs would increase too.<sup>126</sup> Second, according to the Commission, the 100 percent scanning rule would disrupt the EU–U.S. maritime transport and trade given that the direct and indirect transport costs of containers would increase.<sup>127</sup> Additionally, there would be trade distortions in the EU internal market since small ports would not be able to invest in the necessary equipment and therefore they would lose the U.S.-related part of their business. Thirdly, the 100 percent rule would also affect other sectors of the economy: the increased transport costs would be transferred to the prices of the final products, affecting consumers' purchasing capacity. Finally, according to the Commission reports, the 100 percent rule would not improve security: especially for the EU, implementation of the 100 percent legislation would incur huge opportunity costs given that scarce resources and personnel in European customs authorities would be diverted from their projects into trying to implement the U.S. legislation.<sup>128</sup>

More broadly, the U.S. measure departed from the principle of multilayered risk management according to which containers would be screened on the basis of risk criteria and only the high-risk containers would be scanned. This principle formed the basis of the U.S. and EU approach to customs security, as was shown previously. It was a principle that was also shared by the international community in general, especially through the initiatives of the WCO.<sup>129</sup> The 100 percent rule created the possibility of having globally diverging and incompatible standards for customs security, which in turn would cause trade disruptions and losses.

The Commission officials used the above arguments as the basis for an intellectual campaign which aimed to influence the U.S. Congress and to promote the alternative customs security model of risk-management. In particular, the EU Commission sent its reports and studies regarding the 100 percent rule to the Department of Homeland Security, in order for the latter to present these studies to the U.S. Congress.<sup>130</sup> Indeed, in a Senate Hearing on the 100 percent rule the U.S. administration presented the Commission's view on the issue along with the views of the WCO and the industry; the U.S. officials themselves expressed in this hearing their concern about the feasibility of the rule.<sup>131</sup> At the same time, the Commission officials exercised intellectual leadership on a second front, arguing against the 100 percent rule in the context of the WCO.<sup>132</sup>

Apart from the above action, the Commission officials also exercised a form of structural leadership, raising threats to the United States in two areas. First, the Commission made clear that the possibility of initiating legal action against the United States in the context of the World Trade Organization was open:<sup>133</sup> according to the EU Commissioner for Taxation and Customs Kovács, the 100 percent rule "might pave the way for an EU complaint with the World Trade Organization that the U.S. has violated the international rules of free and fair trade."<sup>134</sup> Second, the Commission left open the possibility of demanding reciprocal measures from the United States on customs security, for which the United States was not ready.<sup>135</sup> According to Commissioner Kovács, "following the logic of international trade, if any major player introduces measures unilaterally, it could be followed by reciprocal measures."<sup>136</sup>



The Commission threats of legal action against a U.S. security measure give a picture of an EU as a more assertive actor than is normally assumed in the literature. This assertiveness was related to the fact that the EU had a strong strategic position in the area of trade and economy and therefore the Commission could capitalize on this area of strength to bring bargaining leverage into the talks with the United States. Additionally, the strategic position of the EU was strengthened by the fact that the shipping industry opposed the 100 percent rule and started pressuring the U.S. Congress to change its stance. For example, in April 2007 two business groups (U.S. Chamber of Commerce and Business Europe), which represented the vast majority of the companies involved in transatlantic trade wrote to the U.S. Senate calling for the removal of the 100 percent scanning legislation.<sup>137</sup>

The 100 percent rule was never implemented. The relevant legislation gave the Department of Homeland Security the authority to extend the July 2012 deadline for the start of the program set by the 9/11 Commission Act. By 2012 the leadership of the Department of Homeland Security made clear that it did not intend to implement the 100 percent rule, and it extended the deadline by two years.<sup>138</sup> The U.S. officials remained evidently committed to the previous approach based on the principle of risk-management.<sup>139</sup> This approach was a core element of the U.S. National Strategy for Global Supply Chain Security published in 2012, in which there was no mention of the 100 percent scanning requirement.

## Conclusions

This article traced the emergence of the EU–U.S. customs security regime, employing a regime theory conceptual framework. This regime is based on the 2004 customs security agreement and the 2012 mutual recognition decision and on the principles of multilayered risk management, international co-operation, and trade facilitation.

The regime emerged mainly through a process of institutional bargaining based on common interests which the EU and the United States aimed to fulfill. In this sense, we cannot talk of a U.S.-imposed regime. While it is true that the initiative was at the beginning taken by the United States, the European Commission subsequently showed initiative and had a proactive role, proposing, for instance, the mutual recognition and threatening to undermine the U.S. CSI through legal action against member states. In the first two cases the main point of contention was not the customs security norms and principles but rather the form that transatlantic customs cooperation would take.

Additionally, the findings of this article confirm previous findings that instances of pure imposition are rare in global politics and that in regime formation processes all three social factors of power, interests, and knowledge are important.<sup>140</sup> In the cases examined here, the role of knowledge was especially important in the early agenda-formation stage, when the 9/11 crisis initiated a learning process among EU and U.S. actors and the U.S. officials converged around the idea of smart borders. Power (in the form of threats) and interests (in the form of side-payments and entrepreneurial leadership) were more important subsequently.

Compared with other cases of EU–U.S. counterterrorism cooperation, such as the EU–U.S. PNR agreements, the mutual legal assistance and extradition agreements, and the Terrorist Finance Tracking Program (TFTP) agreement, the EU–U.S. customs security talks and negotiations were less contentious. This was partly due to the fact that data protection was not a significant issue in customs security. Data protection issues and concerns were directly relevant for the EU–U.S. counterterrorism agreements mentioned previously, and

the transatlantic differences on data protection made the negotiations for these agreements difficult. As of October 2015, the EU and the United States are on the final stages of concluding a “Data Protection Umbrella Agreement,” which will cover all transfers of personal data between the EU and the United States for law enforcement purposes. Such an agreement will make transatlantic law enforcement and counterterrorism cooperation easier, removing one of the main impediments to this cooperation.

The importance of the EU–U.S. customs cooperation moves beyond the two actors’ bilateral relations. The security measures and standards that the EU and the United States negotiated and adopted could potentially serve as international models and be exported globally in the form of international standards. Given that the EU and its member states and the United States are the biggest and most influential actors in the field of internal security and counterterrorism, they could adopt a leadership role by engaging more actively with third states and international organizations. Through the combined weight of the EU and the U.S. states with lagging standards could be persuaded to implement counterterrorism instruments and measures adopted by the United Nations or other organizations. Therefore a potential area of further research is the export of global standards by the EU and the United States in the area of customs security. Questions that could be examined are to what extent the two sides cooperate and coordinate their positions in international and multilateral forums such as the World Customs Organization or the United Nations, or to what extent the adoption of U.S. rules by the EU legitimizes these rules and facilitates their adoption by third countries.

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## Notes

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  4. United States Senate, "Cargo Containers: The Next Terrorist Target?" United States Senate Hearing, 108-55, 20 March 2003.
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31. *Ibid.*, p. 200.
32. United States Senate, "Cargo Containers: The Next Terrorist Target?" Stephen Flynn, a former U.S. Coast Guard Commander and homeland security expert, has given testimony in this Senate hearing criticizing the pre-9/11 customs security arrangements.
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