

JUGGLING COUNTER-TERRORISM AND TRADE, THE APEC WAY:  
APEC'S LEADERSHIP IN DEVISING COUNTER-TERRORISM  
MEASURES IN COMPLIANCE WITH INTERNATIONAL TRADE NORMS

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*And so yes, there are terrorists out there, yes they do their evil deeds. But they cannot stop the efforts that we see underway around the world to break down barriers to trade. Trade is what gives people jobs. Trade is what creates wealth for average people.<sup>1</sup>*

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<sup>1</sup> Interview by Maria Luisa Martinez of Univision TV of Chile with Colin Powell, U.S. Sec'y of State, after the APEC Ministerial Meeting in Santiago, Chile (Nov. 19, 2004), available at [http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=November&x=200411201533491\\_notrelluftrebor0.7532617&t=livefeeds/wf-latest.html](http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=November&x=200411201533491_notrelluftrebor0.7532617&t=livefeeds/wf-latest.html).

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## I. INTRODUCTION

The tragic terrorist attack in London on July 7, 2005 effectively shattered a slowly growing sense of stability and safety in the international community. The attack vividly reminded people around the world how vulnerable the international community is to international terrorism and how important it is to continue to develop a reliable international security network to cope with such heinous attacks.<sup>2</sup> The attack also increased the sense of urgency for the

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<sup>2</sup> See APEC, *Social Safety Net Capacity Building Network*, [http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/apec\\_social\\_safety.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/apec_social_safety.html) (last visited Feb. 13, 2006) [formatting this and subsequent cites from APEC website as articles only available on internet – see R18.2.3(b)]. The APEC considers it important to strengthen the “social safety net” of member economies in order to address the root cause of international terrorism. It believes that the enhancement of standard of living in the developing member economies, for instance in the areas of health care, education, distribution of wealth, gender equality, would eventually

member economies of the Asia Pacific Economic Cooperation (“APEC”).<sup>3</sup> As it stands now, anti-terrorism is one of the key priorities<sup>4</sup> of the APEC and its member economies since the September 11 attack.<sup>5</sup> Indeed, there is consensus among APEC member economies that terrorism poses one of the most significant challenges to the attainment of APEC’s fundamental goal of creating “open and prosperous economies”<sup>6</sup> and to the realization of the entity’s fundamental values of “free, open and prosperous

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contribute to the establishment and expansion of a long-term international security network in the region. See generally Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183 (2003).

<sup>3</sup> As of this writing, the member economies are: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Korea, Taiwan, Thailand, the United States, and Vietnam. See APEC, *Member Economies*, [http://www.apec.org/content/apec\\_member\\_economies.html](http://www.apec.org/content/apec_member_economies.html) (last visited Feb. 13, 2006).

<sup>4</sup> See APEC, *Counter Terrorism*, [http://www.apec.org/apec\\_groups/som\\_special\\_task\\_groups/counter\\_terrorism.html](http://www.apec.org/apec_groups/som_special_task_groups/counter_terrorism.html) (last visited Feb. 13, 2006) (“In 2005 [APEC Summit Meeting in Busan, Korea] Leaders and Ministers renewed APEC’s commitments to dismantle transnational terrorist groups, to eliminate the danger posed by the proliferation of weapons of mass destruction, their delivery systems and related items, as well as to confront other direct threats to the security of our region in the future. They encouraged APEC economies to develop new initiatives in these areas and to implement existing commitments to eliminate the danger of terrorism and secure trade unilaterally, bilaterally, multilaterally and in APEC, building on the comparative strengths of APEC.”) [hereinafter *Counter Terrorism*].

<sup>5</sup> See, e.g., AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, COSTS OF MARITIME TERRORISM AND PIRACY AND THE BENEFITS OF WORKING TOGETHER 3-4, 11-12 (2003) (Australian Government’s paper presented to the APEC High-Level Meeting on Maritime Security and Cooperation on Sept. 9, 2003); *APEC Unites Against Terrorism*, BBC (Oct. 21, 2001), available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1611674.stm> (“Leaders of Asia and Pacific countries have condemned the 11 September attacks in the United States as ‘murderous deeds’ and urged international cooperation in fighting terrorism.”); Press Release, Office of Int’l Info. Programs, U.S. Dep’t of State, APEC Leaders Issue Unequivocal Condemnation of Terrorism (Oct. 23, 2001), available at <http://usinfo.org/wf-archive/2001/011022/epf107.htm>.

<sup>6</sup> APEC, *APEC Leaders’ Statement on Counter-Terrorism* (Oct. 21, 2001), [http://www.apec.org/apec/leaders\\_declarations/2001/statement\\_on\\_counter-terrorism.html](http://www.apec.org/apec/leaders_declarations/2001/statement_on_counter-terrorism.html). With regard to the goals of APEC, “APEC Leaders agreed to implement the Secure Trade in the APEC Region initiative (“STAR”) to secure and enhance the flow of goods and people through measures to protect cargo, ships, international aviation and people in transit.” See APEC, *Secure Trade in the APEC Region (“STAR”)*, [http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/counter\\_terrorism/secure\\_trade\\_in\\_the.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/counter_terrorism/secure_trade_in_the.html) (last visited Feb. 16, 2006 [hereinafter *Secure Trade in the APEC Region (“STAR”)*]).

economies.”<sup>7</sup> It is essential, therefore, to continue the current discussion in order to more effectively deal with the ever-increasing threats of terrorism in the APEC region and the “practical” necessity to devise effective counter-terrorism measures.

Furthermore, terrorism is not simply a temporary headache, but is becoming a perennial threat to common prosperity for the APEC member economies and overall international trade activities in the APEC region. As such, terrorism will be an unwelcome, constant ingredient in formulating and implementing various APEC projects in the future, affecting national policies of member economies. The APEC needs a new paradigm that provides practical guidance for its member economies.<sup>8</sup> The new paradigm should be based on a combination of “practical” necessity and “legal” legitimacy.<sup>9</sup> Up until now, the discussion on counter-terrorism measures at the APEC, as with any other international forum discussing the topic, has been focused on how to enhance the “immediate deterrence effect” based on the “practical necessity” of such security measures.<sup>10</sup> Practical

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<sup>7</sup> *Id.* (In the final statement at the end of two days of talks in Shanghai in October 2001, Chinese Prime Minister Jiang Zemin stated on behalf of the APEC leaders that terrorism is a serious threat to the security and progress of all peoples, and “a direct challenge to APEC’s vision of free, open and prosperous economies.”); see also Alex Frew McMillan, *APEC Unites Against Terror*, CNN, Oct. 22, 2001, available at <http://edition.cnn.com/2001/WORLD/asiapcf/east/10/21/apec.finalstatement/>; Adam Brookes, *APEC Unites Against Terrorism*, BBC News, Oct. 21, 2001, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1611674.stm>.

<sup>8</sup> Compared to APEC, for example, the UN Counter-Terrorism Committee (“CTC”), consisting of all 15 members of the Security Council. The CTC has run well-organized, system-wide counter-terrorism mechanisms since 2001. See United Nations, *Counter-Terrorism Committee*, <http://www.un.org/Docs/sc/committees/1373/composition.html> (last visited Feb. 13, 2006). The CTC has received reports from U.N. member states with respect to their respective domestic efforts in the counter-terrorism area. See U.N. Security Council, Counter-Terrorism Committee, *Country Reports*, <http://www.un.org/sc/ctc/countryreports.shtml> (last visited Mar. 21, 2006). The CTC also implements various “work programs” to monitor the existing U.N. resolutions in the counter-terrorism area and encourages member states to perform their respective obligation. See U.N. Security Council, Counter-Terrorism Committee, *Counter-Terrorism Committee Work Program*, <http://www.un.org/sc/ctc/workprogramme.shtml> (last visited Mar. 21, 2006). It is noteworthy that the CTC makes significant efforts to evaluate the legitimacy of counter-terrorism measures in terms of public international law. See U.N. Security Council, Counter-Terrorism Committee, *International Law and Terrorism*, <http://www.un.org/sc/ctc/law.shtml> (last visited Mar. 21, 2006).

<sup>9</sup> See APEC, *Counter Terrorism Action Plans*, [http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/counter\\_terrorism/counter\\_terrorism\\_action\\_plans.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/counter_terrorism/counter_terrorism_action_plans.html) (last visited Feb. 13, 2006).

<sup>10</sup> See G8 Counter-Terrorism Cooperation since September 11, [http://www.g8.gc.ca/2002Kananaskis/counter\\_terrorism-en.asp](http://www.g8.gc.ca/2002Kananaskis/counter_terrorism-en.asp) (last visited Feb. 13,

necessity, however, needs to be supported by “legal” legitimacy for a new paradigm with “durable” and “persuasive” effectiveness in discussing counter-terrorism measures. The “legal” legitimacy inquiry, in fact, may involve various fields of international law – international human rights law, international maritime law, international airspace law, international criminal law, or a state’s inherent rights, including the right of self-defense, for example. All of these areas directly implicate international trade law.

So far, it is true that the counter-terrorism discussion at the APEC has not examined other aspects of the issue, such as the legal legitimacy of the measure encompassing compliance with international trade norms under the *de facto* emergency situation, since the September 11th tragedy. For there to be a long-term solution, it is important to introduce a system with “legal” legitimacy. Otherwise, certain aspects of present and future counter-terrorism measures would be challenged at various international forums by aggrieved member economies (or other non-APEC countries for that matter).<sup>11</sup> This is a more likely scenario in international trade law as trade law litigation at the World Trade Organization (“WTO”) is increasing, and more and more countries are resorting to the WTO dispute settlement procedure whenever their trade interest is negatively affected. Given the unquestionable practical necessity for anti-terrorism security measures, a legal dispute surrounding such a “just cause” would be truly embarrassing. Such embarrassment has the potential of endangering the unity of APEC member economies in this front, and ultimately undermining the collective effort to fight terrorism. One would need legal legitimacy to continuously persuade governments and businessmen from other member economies (and non-APEC countries) into readily accepting the significant burden of complying with new counter-terrorism measures.

This paper is not meant to criticize or discount the APEC or member economies’ efforts to detect and prevent international

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2006) (The G8 Leaders confirm “common commitment to fight terrorism” and discuss various ways to “root out terrorists and their networks,” but they fail to address various incidental effects arising from these global efforts.)

<sup>11</sup> See, e.g., Request for the Establishment of a Panel by the United States, *European Communities-Selected Customs Matters*, WT/DS315/8 (Jan. 14, 2005). In the Request filed with the World Trade Organization’s Dispute Settlement Body, the United States claims that the European Communities are violating relevant WTO agreements by administering its customs laws, regulations and practices in a non-uniform, impartial and unreasonable manner. The dispute is currently being reviewed by a WTO panel. The claims and defenses raised in the dispute could equally apply to customs regulation imposed by an importing country in the context of counter-terrorism measures.

terrorism. Clearly, the APEC and its member economies should mobilize all means available to deter and counter all forms of international terrorism. This paper simply attempts to call attention to international trade norms with respect to the APEC's future counter-terrorism discussions. Nor does this paper argue that "legalization" or "formalization" of the APEC or its counter-terrorism discussion is appropriate; rather it argues that adequate consideration of "legal" issues in discussing counter-terrorism measures will allow the APEC and its member economies to adopt more durable and effective counter-terrorism measures.

APEC's dominance in terms of the total volume of world trade simply stands out: its member economies take up almost sixty percent of GDP of all countries in the world combined, and most of the busiest international ports and airports are located and operated within the bloc.<sup>12</sup> Furthermore, APEC member economies include a mixture of developed and developing countries. Thus, any discussion at the APEC about counter-terrorism may well represent the general views and tensions of the entire international community in regards to this issue. Proper direction and guidance from the APEC can set a new standard for other international organizations and countries to follow. APEC should show its leadership by helping the entire international community navigate a new frontier.

## II. STATUS OF COUNTER-TERRORISM DISCUSSION AT THE APEC

### A. *A Brief Overview of APEC's Counter-Terrorism Discussion*

As a first counter-terrorism move, Senior APEC Officials established the Counter-Terrorism Task Force ("CTTF") in February 2003 to initiate an APEC-wide collective effort to address the ever-increasing threat of terrorism in the bloc.<sup>13</sup> Since then, the CTTF has held meetings in the margins of the annual APEC Senior Officials' Meetings<sup>14</sup> and provided an effective forum for informal discussions on a wide range of counter-terrorism issues.<sup>15</sup> Thus far, the CTTF seems to have carried out its various tasks relatively successfully,<sup>16</sup> including assisting member economies in identifying counter-terrorism needs,

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<sup>12</sup> See Secure Trade in the APEC Region ("STAR"), *supra* note 6.

<sup>13</sup> Counter-Terrorism, *supra* note 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

coordinating capacity-building projects among member economies and facilitating cooperation between APEC entities and relevant international and regional organizations.<sup>17</sup>

In yet another effort to deal with the increase in international terrorism and its impact on trade, in October of 2002 APEC Leaders agreed to implement the Secure Trade in the APEC Region Initiative (“STAR”)<sup>18</sup> to “secure and enhance the flow of goods and people through measures to protect cargo, ships, international aviation networks and people in transit.”<sup>19</sup> Since its inception, the STAR

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<sup>17</sup> Id.

<sup>18</sup> See *APEC, 2002 Leaders’ Declaration: APEC Leaders’ Statement on Fighting Terrorism and Promoting Growth*, available at [http://203.127.220.67/apec/leaders\\_declarations/2002/statement\\_on\\_fighting.html](http://203.127.220.67/apec/leaders_declarations/2002/statement_on_fighting.html) (last visit Feb. 6, 2006). In the document, the APEC implies that the STAR initiative consists of the following four objectives:

APEC aims to protect cargoes by implementing expeditiously a container security regime that would assure in-transit integrity of containers, identify and examine high-risk containers, and working within international organizations to require the provision of advance electronic information on container content to customs, port, and shipping officials as early as possible in the supply chain, while taking into consideration the facilitation of legitimate trade.

APEC aims to protect ships engaged in international voyages by promoting ship and port security plans by July 2004 and installation of automatic identification systems on certain ships by December 2004.

International aviation will be protected by improving airline passenger and crew safety by introducing highly effective baggage screening procedures and equipment in all APEC international airports as soon as possible, and in any case by 2005; accelerating implementation of standards for reinforced flight deck doors for passenger aircraft by April 2003 wherever possible; and supporting International Civil Aviation Organization (“ICAO”) mandatory aviation security audits. Enhancing air cargo security by promoting adoption of the guidelines developed by ICAO and the International Air Transport Association (“IATA”) will also be undertaken.

People in transit will be protected by implementing as expeditiously as possible a common global standard based on UN EDIFACT for the collection and transmission of advance passenger information or by adopting standards for application of biometrics in entry and exit procedures.

The four objectives as outlined above demonstrate that the main theme of the STAR initiative is “protection” of the transportation system and people, rather than “facilitation” of flow of goods and people. This protection-driven concept, although necessary to some extent, apparently has led to the increasing concern on the part of traders in some countries, who claim that the facilitation aspect has been unduly ignored in the course of counter-terrorism measure discussions.

<sup>19</sup> The following description of the outcome of the Second STAR Conference (“STAR II conference”) held in Chile in 2004 provides an illustration of the STAR activities:

A clear example is the need to *balance the costs associated to increased security with our goals to reduce transaction costs* within the APEC Region by 5% by the year 2006, through the APEC Trade Facilitation Action Plan. Although this efficiency

conference has been held annually. The Third STAR Conference (“STAR III conference”), which provided key momentum to achieve these objectives, was held in Incheon, Korea in 2005 with broad participation of all interested parties, including government officials from the APEC member economies, officials from relevant international organizations and representatives from relevant private sectors.<sup>20</sup> The main purposes of the STAR III conference in Seoul were to: (i) re-evaluate previous discussions and conclusions from the STAR I and II conferences,<sup>21</sup> (ii) continue to explore an appropriate mechanism to achieve both security and trade facilitation in the APEC networks of maritime and aviation transportation,<sup>22</sup> and (iii) discuss

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improvement is anticipated to stimulate an additional increase in trade of around US\$ 280 billion, we must be able to identify if increased security measures will allow developing economies to benefit from these reductions. *Growing costs may represent a heavy burden on smaller economies and also could become a barrier to trade with a strong impact on SMEs.* APEC, *The Second APEC STAR Conference (Vina del Mar, Chile, 5-6 March 2004): General Coordinator’s Summary Conclusions*, at 22-23, [http://www.apec.org/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2004.html#STAR](http://www.apec.org/apec/documents_reports/counter_terrorism_task_force/2004.html#STAR) (last visited Feb. 13, 2006) (emphasis added). This statement indicates that not only “protection” but also “facilitation” has been an important element of contemplating counter-terrorism measures in the APEC level since the initial stage. Despite such basic concern expressed early on, however, the balancing formula does not seem to have received adequate attention so far. The above statement also signals that there is growing concern as to the possible negative implication on the facilitation of international trade flowing from the “protection-driven” counter-terrorism measures. As such, the outcome of the STAR II clearly shows that protection-driven counter-terrorism measures would have difficulty in garnering support among APEC member economies.

<sup>20</sup> See APEC, *Chair’s Summary Report and Recommendations of the APEC STAR III Conference*, at 1, [http://www.apec.org/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.MedialibDownload.v1.html?url=/etc/medialib/apec\\_media\\_library/downloads/taskforce/cttf/mtg/2005/pdf.Par.0058.File.v1.1](http://www.apec.org/apec/documents_reports/counter_terrorism_task_force/2005.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/taskforce/cttf/mtg/2005/pdf.Par.0058.File.v1.1) (last visited Feb. 16, 2006) [hereinafter *Chair’s Summary Report*].

<sup>21</sup> See *id.* at 16 (identifying five broad conclusions from the STAR II conference in Chile).

First, trade does not occur in a vacuum: there is a need to acknowledge the cross-cutting nature of present day threats to human security as recognized by the UN Secretary General’s High Level Panel on Threats, Challenges and Change. Secondly, human security, which includes trade security, requires both government and public sector involvement. Thirdly, multilateral action and remedies are the best means of confronting threats to human security. Fourthly, APEC needs to fully utilize its greatest asset, that is its diversity, and transform it into a powerful weapon to confront human security threats. And, fifthly, there is a need to preserve balance while confronting human security threats.

<sup>22</sup> Specifically, the following issues in this area were discussed at the conference.



relevant policy implications for the STAR initiative to adjust its future course of action so as to fulfill its main objectives.<sup>23</sup> Overall, the STAR III conference provided a precious opportunity to contemplate the necessity of a more balanced approach to this delicate issue, namely, how to achieve a balance between “protection” and “facilitation” in the long run. During the conference, representatives from member economies, international organizations and private sectors had opportunities to discuss more effective measures to deter the current surge of international terrorism while minimizing the negative impact on the flow of goods, and to address other related “practical” issues such as capacity-building projects, compliance with other applicable international norms, and “best practices” presentations by relevant private parties in various areas. These interactions among interested parties further proved the complexity these issues entail, which could only be addressed through lengthy and comprehensive discussions among member economies, relevant international organizations and business entities in the APEC region.<sup>24</sup> Upon the completion of the STAR III conference, the APEC and member economies could confirm the core problem in churning out counter-terrorism measures: more inspection and thorough monitoring, while necessary, could inevitably cause a significant burden on trade. Thus, any long-term success of counter-terrorism measures could only be attained by adequately addressing the two conflicting themes: how to enhance the level of inspection in the international trading system, while avoiding imposing unnecessary burden on international trade. Although reliable practical guidance has yet to be offered, the obvious consensus was that there must be equilibrium between the two conflicting themes somewhere on the scale and that the APEC should continue its

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With regard to aviation security, three topics were raised; that is, first, “Measures to Improve Safety of Airline Passengers and International Airports,” second, “Addressing MANPADS (Man Portable Air Defense System) Threats to Civil Aviation” and third, “Business Mobility.” The following discussions about maritime security include “Implementation of ISPS Code and Utilization VMS for Marine Security,” “Implementing a Container Security Regime in the APEC Region” and “Protection of Sea Lane of Communications (SLOC) from Terrorist Threats including Acts of Piracy.” *See id.* at Annex A.

<sup>23</sup> *See id.* at 1.

<sup>24</sup> *See Counter Terrorism, supra* note 4. In this document, the status of relevant international organizations related to APEC in dealing with the counter-terrorism problem is mentioned. The CTTF is also pursuing closer cooperation with international organizations such as the IMF, the Asia Development Bank, the World Bank, the UN Counter Terrorism Committee, the Inter-American Committee against Terrorism and ASEAN to identify capacity building needs; provide training and assistance; promote best practices; and exchange information.

collective effort at STAR to address this touchy problem.

Lastly, the current discussions at the CTF and STAR do not seem to pay adequate attention to the question of “legal” legitimacy of various counter-terrorism measures. Most of the policy discussions and the suggestions focus mainly on the “deterrence effect” and “effectiveness,” while other aspects of these issues are sidelined. It is unlikely that relevant international legal norms have been properly contemplated in this process. Likewise, it is also unlikely that counter-terrorism negotiators have adequately considered compliance with relevant trade norms directly on point. As noted above, a more comprehensive and durable counter-terrorism measure would require consideration of “legal” legitimacy as well as “practical” necessity. This is particularly the case with international trade law operating under the current WTO regime, which directly regulates all types of barriers to international trade. If future discussions at the CTF and STAR take into consideration this thus-far-ignored aspect of counter-terrorism measures, in all likelihood more effective and reliable measures will be devised and adopted in the future. With this in mind, this paper discusses the possible “legal” legitimacy issues that counter-terrorism measures may confront with regard to WTO-specific trade norms, followed by suggestions for the APEC and member economies to guarantee compliance with such relevant trade norms in WTO Agreements.<sup>25</sup>

#### *B. Why is the APEC a Viable Forum for This Issue?*

As of now, how to balance free trade and security is a critical concern for all related international entities. The APEC’s unique characteristics position it better than any other international organization to discuss this complicated issue and introduce a paradigm to address it. First, APEC’s twenty-one member economies span the complete spectrum of economic development, including both developing and developed countries.<sup>26</sup> Second, the member economies also possess different trading structures and economic framework,

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<sup>25</sup> For example, APEC’s Electronic Commerce Steering Group has made a concerted effort to introduce a predictable and reliable customs procedure within member economies. See APEC, *Electronic Commerce Steering Group*, [http://www.apec.org/apec/apec\\_groups/som\\_special\\_task\\_groups/electronic\\_commerce.html](http://www.apec.org/apec/apec_groups/som_special_task_groups/electronic_commerce.html) (last visited Feb. 13, 2006).

<sup>26</sup> See Thomas Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?* 13 *DUKE J. OF COMP. & INT’L L.* 337, 339, 342 (2003).

including both market and non-market economies.<sup>27</sup> Third, the member economies comprise different cultural and historical backgrounds from the West and East.<sup>28</sup> Finally and most importantly, as an “open” entity without formal legal obligation, the APEC provides a forum where these kinds of new, emerging issues can be liberally discussed and experimented.<sup>29</sup> Taking advantage of these unique traits, the APEC could function as a “laboratory in which to develop initiatives to address third-generation trade problems.” This could include balancing the counter-terrorism initiative and trade.<sup>30</sup> APEC’s leadership in this area would provide a unique and crucial first step in this uncharted territory.<sup>31</sup> This endeavor by the APEC would be quite timely—it’s exploration in this issue could have a profound impact on the current Doha Development Agenda (“DDA”) negotiations of the WTO.<sup>32</sup> At the DDA negotiation tables, the APEC and the WTO will be able to work “synergistically” on trade-related matters such as this, rather than competing with one another.<sup>33</sup>

Furthermore, the trade norm-consistency is not foreign to the APEC, which has repeatedly made it clear that all of its tasks should be carried out in accordance with applicable international legal norms. For example, APEC member economies have confirmed that the need to combat terrorism must be carried out “in accordance with the purposes and principles of *the Charter of the United Nations and international law*.”<sup>34</sup> International law also includes international trade law as codified in the WTO norms. In this spirit the APEC member

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<sup>27</sup> *See id.* at 342.

<sup>28</sup> *Id.* at 339.

<sup>29</sup> *Id.* at 342, 363 (“As much as APEC has been called a toothless ‘talking shop’ by some, it has proved to be an essential forum for leveraging market reforms in the world’s largest trading community; it is a place for national leaders to strike sensitive deals”).

<sup>30</sup> *See id.* at 337, 339, 342.

<sup>31</sup> For example, the World Customs Organization (“WCO”) has established a taskforce to examine ways and means of enhancing the “security and facilitation of the international trade supply chain.” *See* Llew Russell, CEO, Shipping Austl. Ltd., Address on the Industry Perspective: Regulation and Security Effectiveness at the National Security Australia 2005 Conference 5 (Feb. 23, 2005), transcript available at <http://www.shippingaustralia.com.au/Portals/57ad7180-c5e7-49f5-b282-c6475cdb7ee7/2005NSACFebruary.pdf>.

<sup>32</sup> *See* Fischer, *supra* note 26, at 337.

<sup>33</sup> *See id.* at 338.

<sup>34</sup> *See* APEC, *Joint Statement of the Sixteenth APEC Ministerial Meeting* (Nov. 17, 2004), [http://203.127.220.112/content/apec/ministerial\\_statements/annual\\_ministerial/2004\\_16th\\_apec\\_ministerial.downloadlinks.0001.LinkURL.Download.ver5.1.9](http://203.127.220.112/content/apec/ministerial_statements/annual_ministerial/2004_16th_apec_ministerial.downloadlinks.0001.LinkURL.Download.ver5.1.9) (emphasis added) [hereinafter *Joint Ministerial Statement* (2004)].

economies have frequently stressed the importance of complying with the WTO norms in implementing various APEC mandates.<sup>35</sup> The APEC Business Advisory Council (“ABAC”) has stated, “the strengthening of the multilateral trading system, underpinned by the WTO, should remain APEC’s top priority.”<sup>36</sup>

### III. POSSIBLE LEGAL ISSUES INVOLVED IN COUNTER-TERRORISM MEASURES UNDER CURRENT INTERNATIONAL TRADE NORMS

Preventing terrorism is probably the most important objective for the international society right now. But, this objective does not force us to ignore all other objectives, including abiding by applicable international law. All APEC member economies are already bound by various international legal norms, including international treaties like the United Nations Charter and WTO Agreements,<sup>37</sup> while other norms remain customary. An international law-violating counter-terrorism measure proposed by the APEC and adopted by its member economies individually may be justified on “exigency” grounds, such as an emergency situation where swift action is required to save lives in a member economy. Such emergency action, however, is not a *carte*

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<sup>35</sup> Ministers of APEC member economies “reaffirmed their commitments to improvement of and liberalization within the multilateral trading system,” while fully endorsing “the July Package adopted by the WTO General Council, recognizing it as a breakthrough for the Doha Development Agenda negotiations.” *See id.* The Osaka Action Agenda (OAA) also declared the Bogor Declaration objectives should be pursued in accordance with the member economies’ commitments under the Uruguay Round of GATT (*i.e.*, the WTO). *See APEC, The Osaka Action Agenda: Implementation of the Bogor Declaration*, [http://www.apec.org/apec/about\\_apec/how\\_apec\\_operates/action\\_plans\\_.html](http://www.apec.org/apec/about_apec/how_apec_operates/action_plans_.html) (follow “Osaka Action Agenda 2001 Update” hyperlink under Downloads) (last visited Mar. 12, 2006).

<sup>36</sup> APEC Business Advisory Council, *Facing Globalization the APEC Way: Report to the APEC Economic Leaders* (2000), [http://www.apec.org/content/apec/business\\_resources/apec\\_business\\_advisory.html](http://www.apec.org/content/apec/business_resources/apec_business_advisory.html) (follow the hyperlink “2000 Report – Facing Globalization the APEC Way” under Previous ABAC Reports to APEC Leaders).

<sup>37</sup> For more explanation about the co-relationship between counter-terrorism measure and WTO norms, *see, e.g.*, Won-Mog Choi, *How to Make Container Control Measures Using RFID Consistent with WTO Jurisprudence* (2005), [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”); Alan Boyd, *APEC: A Fruitless Exercise, Again*, ASIA TIMES ONLINE (Oct. 30, 2002), [http://atimes01.atimes.com/atimes/Asian\\_Economy/DJ30Dk01.html](http://atimes01.atimes.com/atimes/Asian_Economy/DJ30Dk01.html); Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS 319, 329-30 (2005); Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L. L. 424, 431 (1999).

*blanche*; it would still be regulated by international law. For example, both the U.N. Charter and customary international law regulate a country's right of self-defense against an outside aggression. Similarly, Articles twenty and twenty-one of the 1994 General Agreement on Tariffs and Trade ("GATT 1994") provide public safety and national security exceptions, whereby a country can derogate from its obligation under the WTO trading system.<sup>38</sup>

Therefore, any discussion on counter-terrorism measures must also focus on other basic legal principles and norms applicable in the respective areas. Although, as explained above, a counter-terrorism measure could involve various elements and aspects of international law – including international criminal law, international human rights law, international maritime law,<sup>39</sup> international airspace law, international environmental law as well as international trade law – this paper focuses on those legal issues raised by international trade law. In this regard, it should be noted that the APEC has been particularly cooperative with the World Trade Organization ("WTO") and attentive to overall objectives and goals of the WTO. For example, APEC ministers expressed their full endorsement of the currently on-going WTO Doha Development Agenda ("DDA") and trade liberalization and facilitation to be achieved from the DDA.<sup>40</sup>

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<sup>38</sup> See General Agreement on Tariffs and Trade, Oct. 31, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), Annex 1A, art. XX (General Exceptions) and art. XXI (Security Exceptions), contained in World Trade Organization, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS*, at 17, 455-56, 1867 U.N.T.S. 187 (1994), 33 I.L.M. 1153 (1994) (Cambridge Univ. Press, 1999) [hereinafter "The WTO Legal Texts"]. See also a decision of the WTO's Appellate Body in *United States-Import Prohibition of Shrimp and Shrimp Products*, ¶¶ 111-122 WT/DS58/AB/R (Oct. 12, 1998) (In a trade dispute between the United States and Asian shrimp exporting countries, which arose from the 1989 U.S. law prohibiting shrimp imports from countries that failed to adopt certain designated sea turtle protection device, the Appellate Body reaffirmed the underlying spirit of Article XX of GATT 1994 as an exception to basic GATT rules under which a Member can adopt an otherwise WTO-inconsistent measure in certain enumerated situations, such as for the purpose of protecting environment or exhaustible natural resources).

<sup>39</sup> That is, various legal principles contained in the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>40</sup> See e.g., *Joint Ministerial Statement* (2004), *supra* note 34; see also APEC, *Joint Statement of the Fifteenth Ministerial Meeting* (2003), [http://www.apecsec.org.sg/apec/documents\\_reports/annual\\_ministerial\\_meetings/2003/MedialibDownload.v1.html?url=/etc/medialib/apec\\_media\\_library/downloads/ministerial/annual/2003.Par.0032.File.v1.1](http://www.apecsec.org.sg/apec/documents_reports/annual_ministerial_meetings/2003/MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/ministerial/annual/2003.Par.0032.File.v1.1).

Consequently, unless there is a particular reason to the contrary, it is incumbent on the APEC to evaluate its various activities from the perspective of the WTO framework. Such being the case, addressing counter-terrorism measures in the APEC also requires thorough analyses of relevant provisions of WTO Agreements. Following trade law issues seem to be relevant in this respect.

#### A. GATT 1994

A maritime or aviation counter-terrorism measure could constitute a violation of Article I of GATT 1994<sup>41</sup> when such a measure *de jure* or *de facto* discriminates products from a certain country or a certain group of countries (note that the wording “country” or “state” as used below is interchangeable with “member economy” in the APEC context). It is hard to imagine that a counter-terrorism measure explicitly targets a specific country or a group of countries. However, if member economies implement the measure, though neutral on its face, in a manner that discriminates products from a certain country or group of countries or imposes an unreasonable logistical burden on product from a certain country or group of countries, it is possible that such a measure can be challenged by aggrieved countries as an Article I violation.

A maritime or aviation counter-terrorism measure affecting international trade may also touch upon Article V of GATT 1994.<sup>42</sup> If

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<sup>41</sup> GATT, *supra* note 38. A couple of provisions may be considered in this respect. For example, Article I of GATT provides Most-Favored-Nation privilege for all WTO members by stipulating that:

##### Article I: General Most-Favoured-Nation Treatment

... with respect to all rules and formalities in connection with importation and exportation..., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

<sup>42</sup> *Id.* art. V provides freedom of transit in international trade by stipulating that:

##### Article V: Freedom of Transit

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

member economies adopt and implement a measure that unreasonably obstructs the general freedom of transit or discriminates maritime or aviation traffic from a particular state, it may also constitute a violation of Article V.

Article VIII of GATT 1994 also imposes an obligation on an importing country not to unduly restrict import through fees and formalities.<sup>43</sup> An unreasonably overreaching counter-terrorism measure that hinders legitimate trade thus may well constitute a violation of the provision.

Likewise implicated in this discussion is the recent global popularity of Free Trade Agreements (“FTAs”), under which like-minded countries form a mutually preferential trading block. Article XXIV of GATT 1994 stipulates that an FTA should not subject other countries not part of the FTA to worse treatment than before the formation of the FTA.<sup>44</sup> Therefore, if two countries create an FTA

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5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

<sup>43</sup> *Id.* art. VIII:

Article VIII: Fees and Formalities connected with Importation and Exportation

1. (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

<sup>44</sup> *Id.* art. XXIV:

Article XXIV: Territorial Application — Frontier Traffic — Customs Unions and Free-trade Areas

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area...; *Provided* that:

adopting a security monitoring and checking process that provides for an expedited clearance procedure for the inside-the-bloc trading while subjecting the outside-the-block trading to stricter regulation, the Article XXIV may have to be considered.

Although violations of GATT provisions can be justified under the General Exceptions of Article XX<sup>45</sup> or the Security Exception of Article XXI<sup>46</sup>, the measure should nonetheless be consistent with basic

(a) with respect to a customs union...the duties and other regulations of commerce imposed at the institution of any such union...in respect of trade with contracting parties not parties to such union...shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union...;

(b) with respect to a free-trade area...the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area...to the trade of contracting parties not included in such area...shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area...

<sup>45</sup> *Id.* art. XX:

Article XX: General Exceptions

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

(b) necessary to protect human, animal or plant life or health...

<sup>46</sup> *Id.* art. XXI:

Article XXI: Security Exceptions

Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

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

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



requirements to invoke such exceptions. Invocation of exceptions does not mean conferral of a *carte blanche*. Other countries can still challenge such invocation of exceptions if it is simply an attempt to disguise an arbitrary or unreasonable trade measure. Such inquiry should be a case-by-case analysis based on factual information from each case.

Finally, in the case that there is no direct conflict with the provisions, the member country could still argue that benefits accruing to it under GATT have been nullified or impaired as provided in Article XXIII of GATT 1994. This provision confers a WTO member country the right to bring a legal challenge against a measure adopted by another member country if the former's legitimate trade interest is "nullified or impaired," directly or indirectly, by the measure of the latter even in the absence of any explicit violation of a provision contained in the GATT. This provision is basically to fill in any possible legal vacuum, where a wrongdoing member country gets away with its bad-faith measure simply because of the absence of direct conflict with a relevant GATT provision.

As shown above, various GATT provisions can be implicated when it comes to counter-terrorism measures. Therefore, if a WTO member country finds a counter-terrorism measure adopted by an APEC member economy to be negatively affecting its trade interests, the WTO member may well start reviewing the measure under these GATT provisions to evaluate the strength of their prospective claims.

### *B. Agreement on Technical Barriers to Trade*

These new counter-terrorism measures could also be challenged under the Agreement on Technical Barriers to Trade of the WTO ("TBT Agreement"). The WTO created the TBT Agreement to ensure that technical regulations and standards including packaging, marking and labeling requirements and procedures used for assessing conformity with such regulations, requirements and standards are not formulated or applied in a way that creates an unnecessary barrier to trade.<sup>47</sup> As such, the agreement is relevant to counter-terrorism measures which require related processes and specifications for

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<sup>47</sup> See Agreement on Technical Barriers to Trade, The WTO Legal Texts, *supra* note 38, at 121, 1868 U.N.T.S. 186 (1994) [hereinafter "TBT Agreement"], available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf); International Trade Center/Commonwealth Secretariat, *Business Guide to the World Trading System* 87 (2d. ed. 1999).

product manufacturing, packaging, or labeling.<sup>48</sup> Article 2.1 of the TBT Agreement also requires that technical regulations and standards be applied in accordance with the Most-Favored Nation (“MFN”) principle, so as not to discriminate among foreign exporters, and the National Treatment (“NT”) principle, to not discriminate between domestic producers and foreign producers.<sup>49</sup> An argument can be made that a measure may be in violation of the TBT Agreement if it mandates a particular type of manufacturing, packaging or labeling process which imposes an unreasonable burden on foreign exporters or discriminates against producers from certain countries *vis-à-vis* those from other countries.

### C. General Agreement on Trade in Services

Provisions in the General Agreement of Trade in Services of the WTO (“GATS”) are also implicated in reviewing the legality of counter-terrorism measures. As some counter-terrorism measures involve restrictions on travel and immigration, they may conflict with a country’s obligation under GATS. The GATS provides “general obligations” such as MFN treatment<sup>50</sup> and “specific commitments,” such as NT preference<sup>51</sup> or Market Access pledges.<sup>52</sup> Depending on the specific details of each counter-terrorism measure, some of them may constitute a deviation from a country’s GATS obligation. Although the GATS also contains a General Exception Clause and a Security Exception Clause, which may be invoked by a country implementing counter-terrorism measures as a grounds for

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<sup>48</sup> See Choi, *supra* note 37.

<sup>49</sup> See TBT Agreement, *supra* note 47, art. 2.1:

Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

<sup>50</sup> See General Agreement on Trades in Services, The WTO Legal Texts, *supra* note 38, at Annex, 1B, 284, 1869 U.N.T.S. 183 (1994), 33 I.L.M. 1167 (1994), art. II (Most-Favored-Nation Treatment). As the wording of the Article is quite similar to the comparable provision of GATT 1994, it is not reproduced here.

<sup>51</sup> See *id.* art. XVII.

<sup>52</sup> See *id.* art. XVI.

jurisdiction,<sup>53</sup> such invocation may not be legitimate. There are advance requirements for such exceptions to be justified.

*D. Agreement on Trade-Related Aspects of Intellectual Property Rights*

The Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO (“TRIPs Agreement”) is also related to the introduction and operation of counter-terrorism measures. As explained below, recent counter-terrorism measures are based on new technology and equipment, mostly due to technological innovation by private entities that often hold intellectual property rights (“IPRs”) over the relevant technology or equipment. Given the fact that developing countries are in dire need of technological and logistical support to participate in the growing global anti-terrorism network, it is essential that key technologies and equipment not be subject to unreasonably strict protection of IPRs, which will make them available to developing countries at a reasonable cost. Articles VII and VIII of the TRIPs Agreement stipulate that protection of IPRs must be conducted in a manner conducive to social and economic welfare and to a balance of rights and obligations of various interested parties. The underlying spirit of Articles VII and VIII of the TRIPs Agreement should particularly be kept in mind with respect to relevant IPRs in the course of counter-terrorism measure development and dissemination.<sup>54</sup>

IV. A BRIEF OVERVIEW OF THE LEGALITY OF RECENT COUNTER-TERRORISM MEASURES

With the above-referenced WTO norms in mind, this section briefly looks into recent counter-terrorism measures in maritime sector and aviation sector, respectively, to analyze their consistency with relevant trade norms.

*A. Maritime Cargo Transportation Security Measures*

Given the vast amount of maritime transportation, the commercial

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<sup>53</sup> *See id.* arts. XIV and XIV.

<sup>54</sup> WTO members are also encouraged to consider promotion of public interest in formulating or amending national law and regulation for IPR protection. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, The WTO Legal Texts, *supra* note 38, at Annex 1C, 321, 1869 U.N.T.S. 299 (1994), 33 I.L.M. 1197 (1994), art. VIII (Principle).

benefit from preserving a maritime security network<sup>55</sup> would be undeniable. Any terrorist attack against maritime transportation routes would create havoc with trading in the APEC region.<sup>56</sup> It would disrupt the entire trading system, at least temporarily, by increasing oil prices, premiums of insurance, and shipping costs from using alternative routes.<sup>57</sup> If unchecked, maritime terrorism in the APEC region could cause unquestionably high economic costs<sup>58</sup> to the APEC member economies.<sup>59</sup>

Based upon this fear, counter-terrorism measures in the maritime security sector discussed at the APEC and adopted independently by member economies have focused on the issue of how to “seal off” the

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<sup>55</sup> See Alberto A. Encomienda, *Durable APEC-STAR: A Regional Maritime Security Arrangement under UNCLOS (2005)*, available at [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”). The current status for maritime security network is mentioned in this document as follows.

Within the framework provided by the three year old STAR, a thorough review has been made of measures and initiatives to assure maritime security under APEC, especially against terrorist threats. Most of these maritime security initiatives are being pursued under the International Maritime Organization (“IMO”), albeit parallel arrangements, such as the Regional Maritime Security Initiative (“RMSI”) and Proliferation Security Initiative (“PSI”) and even a planned establishment of identification zones thousands of nautical miles from shore, are being initiated and implemented through “coalitions of the willing.”

<sup>56</sup> Recently, among all APEC regions, critical SLOCs, Malacca and Singapore Straits have been considered of much significance. See Mary Seet-Cheng, *International Co-operation to safeguard critical Sea Lines of Communications(SLOCs)* (2005), [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”), and Int’l Mar. Org., *Possible Ways of Co-operation to Protect SLOC: The Marine Electronic Highway Project in the Straits of Malacca and Singapore* (2005), [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”).

<sup>57</sup> See Anne Korin & Gal Luft, *Terrorism Goes to Sea*, FOREIGN AFFAIRS, Nov.-Dec. 2004, available at [http://www.cfr.org/publication/7545/terrorism\\_goes\\_to\\_sea.html](http://www.cfr.org/publication/7545/terrorism_goes_to_sea.html).

<sup>58</sup> See Suh-Yong Chung, *Secure Trade in the APEC Region: Past, Present and Future* (2005), [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”). In this document Professor Chung indicates that the costs of terrorism include a weakened business and consumer confidence, shrinkage of affordable insurance coverage, increased shipping cost and growing security and military spending.

<sup>59</sup> See generally, Geoff Raby, Deputy Sec’y of Dep’t of Foreign Affairs and Trade of Austl., *The Cost of Terrorism and the Benefits of Cooperating to Combat Terrorism* (2005), available at <http://www.apec.org.au/newsarchive.htm>. (follow the hyperlink under “STAR Conference”).

maritime cargo transportation system and the supply chain system. As explained above, simple concentration on the deterrence effect of maritime counter-terrorism measures may successfully “seal off” the cargo transportation system by barraging certain trade flow with barrier after barrier, and screening after screening, but they also run the risk of violating applicable provisions of WTO Agreements. Depending on specific mechanics of a measure at issue, all or some of the provisions of WTO Agreements mentioned in the previous sections may be implicated in this regard. This alleged violation could then trigger an international legal dispute if one member economy (or other non-APEC countries for that matter) officially raises a legal claim based on WTO provisions.<sup>60</sup> Although there are efforts on the part of some member economies to minimize the adverse impact from the operation of counter-terrorism measures,<sup>61</sup> there is still no

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<sup>60</sup> See Choi, *supra* note 37.

<sup>61</sup> See *id.* U.S. and EU initiatives were discussed as follows:

U.S. Initiatives: Since the terrorist attacks on September 11, 2001, the U.S. government has taken several measures to increase border and transportation security for cargo imported to the U.S.

In November 2002, U.S. Congress enacted a statute entitled the “Maritime Transportation Security Act of 2002” (“MTSA”) directing its Department of Homeland Security (“DHS”) to “...evaluate and certify secure systems of international intermodal transportation.” It also directed the department to articulate standards for container security, including standards for sealing and locking. In response to this mandate, DHS recently drafted a cargo security strategy in which one of the important elements focused on “secure stuffing procedures and container seals and sensors”, including *container security devices* (“CSD’s”).

Within DHS, U.S. Customs and Border Protection (“CBP”) carries the direct responsibility of ensuring freight containers entering U.S. ports do not carry dangerous cargo or terrorist contraband such as weapons of mass destruction (“WMD”) or their components. As a consequence, CBP has implemented several interrelated container security programs, of which the most salient are:

- Customs-Trade Partnership Against Terrorism (“C-TPAT”)
- Container Security Initiative (“CSI”)
- Automated Targeting System (“ATS”) built on the Automated Commercial Environment (“ACE”) platform
- “24-hour Manifest Rule” including Automated Manifest System (“AMS”)
- CBP “Smart Box”

meaningful discussion as to how to solve the *de facto* Non-Trade Barriers (“NTB”) issue for those who are unable to participate in counter-terrorism networks due to logistical constraints and practical hurdles.<sup>62</sup>

Besides possible violation of current legal obligation under the WTO Agreements, the trade-blind, deterrence-focused maritime counter-terrorism measure may also undermine “trade facilitation” efforts, which is one of the key issues at the DDA currently under way. Since first introduced at the 1996 WTO Ministerial Conference in Singapore,<sup>63</sup> “trade facilitation” has been one of the main objectives of

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EU initiatives: In the wake of the terrorist attacks in Europe in 2004, it has become abundantly clear that the use of means of transportation for terrorism (*e.g.*, the train bombing in Spain) is not only an American problem. Since then, the European Union has begun to act decisively in the area of container security. The most significant initiatives are described below:

- U.S.-EC Joint Customs Cooperation (“JCC”)
- Authorized Economic Operator (“AEO”)

<sup>62</sup> With regard to security and trade facilitation, Michael Mullen, Director in Office of Trade Relations of the United States mentioned the necessity to develop the “Green Lane” system in a February conference. This system is intended to expedite custom clearance procedures in order to bring commercial benefits to the private sector while providing government with an increased assurance regarding the security of the supply chain. The success of the program is contingent on managing relations with the private sector and providing real benefits to the business community in order to encourage them to improve and manage supply chain security. *See Chair’s Summary Report, supra* note 20, at 17.

<sup>63</sup> Trade facilitation has been discussed by organizations such as UNCTAD, or WCO for several decades. It was not until the 1996 Singapore Ministerial Conference that the international community officially recognized various domestic import regulations’ impact on international trade and the necessity to establish a rule in this area. Items 21 and 22 of the Declaration provides as follows:

21. We further agree to: ...direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the *simplification of trade procedures* in order to assess the scope for WTO rules in this area.

22. In the organization of the work referred to in paragraphs 20 and 21, *careful attention will be given to minimizing the burdens on delegations, especially those with more limited resources*, and to coordinating meetings with those of relevant UNCTAD bodies. The technical cooperation program of the Secretariat will be available to developing and, in particular, least-developed country Members to facilitate their participation in this work.

World Trade Organization, Singapore Ministerial Declaration of 13 December 1996,

the WTO, including the current debates at DDA.<sup>64</sup> The objective of trade facilitation is to streamline various procedures associated with the operation of international trading system.<sup>65</sup> The reason behind the

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WT/MIN(96)/DEC. (emphasis added).

<sup>64</sup> Item 27 of Doha Ministerial Declaration adopted on November 14, 2001 provides as follows:

27. Recognizing the case for *further expediting the movement, release and clearance of goods, including goods in transit*, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (emphasis added). It is also noteworthy that APEC's policy is to fully support and endorse the DDA, particularly trade facilitation negotiation. See *Joint Ministerial Statement (2004)*, supra note 34, at 2-3; APEC, *Fifteenth APEC Ministerial Meeting: Joint Statement Summary of Key Issues*, (2003), at 3, [http://www.apecsec.org.sg/apec/documents\\_reports/annual\\_ministerial\\_meetings/2003.html](http://www.apecsec.org.sg/apec/documents_reports/annual_ministerial_meetings/2003.html).

<sup>65</sup> See *International Convergence Trends in Cargo Security* (2005), [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under "STAR Conference"). In the excerpt below, General Electric Company makes recommendations to the APEC members for maintaining international cargo security:

In order to achieve wide deployment of container security devices without direct government expenditure, "green lane" and other incentive policies must be developed and implemented in all major trading countries in the context of a consistent global framework based on leveraging the experience already gained in the StairSec and US Customs and Border Protection ("CBP") Smart Box programs.

Every shipment in an intermodal cargo container should eventually be equipped with a the Container Security Device("CSD"). While a CSD adds another layer of security, it will also increase supply chain visibility and benefit participants in the supply chain such as carriers, shippers etc. as well as guard against other shipment irregularities such as pilferage, illegal immigration, etc.

Existing solutions should be implemented now so long as they are expandable to accommodate future technologies as they are developed and commercialized.

initiative is that even if conventional and formal trade barriers have been gradually abolished due to continuing global efforts, there still exist other domestic regulations and practices that hinder the global flow of goods. For example, numerous importing regulations and customs procedures still pose significant hurdles for foreign exporters, and the resulting delays and added expenses force the exporters to incur the financial burden which sometimes exceeds the total amount of applicable tariffs.<sup>66</sup> If unchecked, this situation might as well wipe out the gains the international community has accumulated through decades old effort to reduce or eliminate tariffs through the GATT and WTO regimes. As of now, it appears that the maritime counter-terrorism measure discussions are all about introducing a more thorough border inspection and cargo processing system.<sup>67</sup> As a result, maritime counter-terrorism measures appear to be designed to introduce more regulation at the border, or before the border. More regulation unfortunately translates into a likelihood of harming trade facilitation, so maritime security measures are directly related to trade facilitation.

The newly adopted International Ship and Port Facilities Security Code (“ISPS Code”) system provides a good example. The International Maritime Organization (“IMO”) adopted a number of amendments to the *1974 Safety of Life at Sea Convention* (“SOLAS”)

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In order to leverage the supply chain benefits as well as to “break the cycle”, a global CSD reader infrastructure should be rolled out in all major container port terminals starting with the 34 CSI (Container Security Initiative) ports. As part of its overall commitment in this area, General Electric is prepared to invest in and deploy a basic reader network in the CSI ports without cost to the ports.

<sup>66</sup> See World Trade Organization, *Overview of Trade Facilitation Work in the WTO*, [http://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_overview\\_e.htm](http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview_e.htm) (last visited Feb. 16, 2006).

<sup>67</sup> See International Convergence Trends in Cargo Security, *supra* note 65, at 1. The global efforts for counter-terrorism are shown in the document as follows. Outside the APEC region, the EU and the WCO are making excellent progress towards these goals, through programs such as the development of the Authorized Economic Operator (“AEO”) and the Framework of Standards to Secure and Facilitate Global Trade. Importantly, such efforts recognize the significant programs already undertaken or under development by US Customs and Border Protection (“CBP”), such as the Customs-Trade Partnership Against Terrorism (“C-TPAT”), the Container Security Initiative (“CSI”) and the 24-hour manifest Rule, and the Swedish StairSec program. CBP’s “Smart Box” program is a large-scale field trial now in operation including major US importers and trade lanes from both Europe and Asia. CBP’s intention is to give importers, using “Smart Boxes”, the incentive of expedited (“green lane”) Customs administration.



in 2003. This convention included the ISPS Code for the purpose of enhancing the maritime security level ports and vessels around the world.<sup>68</sup> As the ISPS Code is a part of SOLAS, compliance is mandatory for the 148 contracting parties to SOLAS when it became effective as of July 1, 2004.<sup>69</sup> The APEC closely cooperated with the IMO in the introduction and implementation of the ISPS Code. There has been an unexpected problem, however. Although there has been full consensus as to the necessity of such a measure to enhance supply chain security in the international maritime industry,<sup>70</sup> some governments and private shipping companies have had serious concerns about this initiative due to the lack of logistical infrastructure required to meet the specified deadlines. This has turned out to be a difficult task.<sup>71</sup> To these governments and companies, this is a serious concern, because any ISPS non-compliant shippers will be virtually forced out of the international trading system.<sup>72</sup> No trade regulation could be stronger than this.

In particular, shippers from developing countries and exporters using shippers from those countries have taken direct heat. An understandable counter-terrorism requirement has turned out to be a *de facto* trade barrier to them. Depending upon the specific contents of domestic implementation of the ISPS Code of each APEC member economy, it is possible that a certain portion of domestic implementation legislation, regulation or practice may conflict with relevant WTO obligations as indicated above, in which case a

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<sup>68</sup> See International Convention for the Safety of Life at Sea, Annex 1, ch. XI-2, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278. The detailed security measures contained in the ISPS Code are included as an Annex to the Convention for the Safety of Life at Sea ("SOLAS"). The Code has two parts. The first, Part A, contains mandatory provisions for the appointment of security officers for shipping companies, individual ships and port facilities, as well as security plans to be prepared for ships and port facilities. The second, Part B, contains recommendations for preparing security plans for ships and port facilities.

<sup>69</sup> See Press Breifing, Int'l Mar. Org., IMO Adopts Comprehensive Maritime Security Measures, (Dec. 13, 2002), available at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689); see also International Maritime Organization, *Maritime Security*, <http://www.imo.org/home.asp> (follow "Maritime Security" hyperlink; then follow "For further information on maritime security" hyperlink) (last visited Feb. 16, 2006) [hereinafter *Maritime Security*].

<sup>70</sup> See *id.*

<sup>71</sup> In the final week leading up to full implementation of the ISPS Code, widespread disruption of trade routes was mentioned. See Alan Boyd, *Turmoil over Anti-Terrorism Standards for Ports*, ASIA TIMES ONLINE, June 26, 2004, [http://www.atimes.com/atimes/Southeast\\_Asia/FF26Ae03.html](http://www.atimes.com/atimes/Southeast_Asia/FF26Ae03.html).

<sup>72</sup> See *Maritime Security*, *supra* note 69.

complicated legal problem would ensue.<sup>73</sup>

Although the IMO claims it has been generally pleased with the international response to the ISPS Code, there are still some countries that are not able to meet the ISPS Code's requirements, and need technical and logistical support from developed countries.<sup>74</sup> For instance, such APEC member economies as Indonesia, the Philippines, PNG, Thailand and Vietnam have been identified as some who require support from other developed APEC members.<sup>75</sup> Over time, shippers and exporters from these countries may get adjusted to the new environment, but the example demonstrates both the unintended trade impact of a counter-terrorism measure and a possible WTO violation.

One commentator raised a similar concern during the STAR III conference this February. He cautioned against potential abuses in employing Radio Frequency Identification ("RFID"), indicating that such a measure may lead to violation of WTO law.<sup>76</sup> For example, container control measures using RFID tags would be extremely effective in tracking down each cargo and individual shipment, but it might be in conflict with trade rules under the WTO Agreements if it is used in a way that creates unreasonable barriers to legitimate trade and discriminates among exporting countries.<sup>77</sup> To prevent this conflict with WTO law, he suggested that counter-terrorism measures be considered along with the "usefulness and danger of abuse" and a "balance between free trade and national security."<sup>78</sup> These examples collectively support the proposition that maritime counter-terrorism measures sometimes cause unintended negative impact on legitimate trade and thus possibly constitute violation of WTO norms, and that as such, the anti-terrorism discussion at the APEC should be conducted with this awareness.

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<sup>73</sup> This would force a debate between the WTO Agreements and SOLAS Convention regarding which treaty is superior to the other. Under international law, this analysis is mainly dependent on which convention came into existence first, what the collective intent of the respective parties was, or whether a particular state is a member of only one of the two treaties or both treaties, etc. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 56-57 (7th ed. rev., Routledge 1997).

<sup>74</sup> See Russell, *supra* note 31, at 3.

<sup>75</sup> See *id.*

<sup>76</sup> See Choi, *supra* note 37.

<sup>77</sup> See *id.* at 2.

<sup>78</sup> *Id.* at 15.

*B. Aviation Transportation Security Measures*

To the extent that aviation transportation is used for international trading, the same rationale as seen from the maritime transportation context equally applies to the aviation transportation system. An unreasonably restrictive security measure may turn out to be a trade barrier for countries or airports that are not able to equip themselves with new facilities and equipment.<sup>79</sup> For example, while trying to establish a new computerized system to prevent aviation terrorism, the STAR III conference recommended the adoption of Advance Passenger Information (“API”) system, Advance Passenger Processing (“APP”) system, and a biometric system for facial recognition using computer analysis and similar measures.<sup>80</sup> However, the discussions at STAR III conference presented the same core problem. The deterrence effect of having a new computerized information gathering and processing system with a centralized database was mentioned, but there was no discussion of the possible negative implications on legitimate trade and transactions. Potentially, if these measures are implemented, shipments from or going through under-equipped airports in developing countries may encounter the same problem as seen in the ISPS Code: a longer customs inspection and clearance time with more scrutiny. This would result in an increase of transaction cost on the part of exporters from developing countries, thereby eroding their competitive edge in the global trading market.

Furthermore, one of the unique characteristics of aviation security measures is that aviation security measures more directly affect the flow of natural persons, as aviation transportation is currently more widely used for passenger transportation than vessels. A more stringent inspection measure at the airport may increase the transactions cost for nationals from countries or airports where a new modernized system<sup>81</sup> has yet to be adopted. If unbridled, this situation has the potential to disrupt the trade of services by unduly restricting the travel of service providers. In the same context, the introduction of the so-called Immigration Liaison Officer<sup>82</sup> should be strictly formulated in order to facilitate the monitoring process early on, thus reducing the subsequent monitoring and resulting transaction costs,

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<sup>79</sup> See *Air Cargo Systems Based on ICAO Standards that Balance Security and Trade Facilitation submitted by ICAO*, STAR Conference, Feb. 25-26, 2005, Incheon, Korea, Doc. No. 6, available at [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (last visited Feb. 16, 2006).

<sup>80</sup> *Chair's Summary Report*, *supra* note 20, at 21-22.

<sup>81</sup> See *id.* at 21.

<sup>82</sup> *Id.* at 22-23.

rather than adding yet another layer of inspection before departure.

So depending on the specific nature of each aviation security measure discussed and adopted by APEC member economies, some may turn out to be inconsistent with relevant provisions of WTO Agreements. Aviation security measures then have to be discussed with the trade law context in mind. In addition, all of these new aviation measures obviously require substantial resources and highly specialized skills for their adoption and implementation. Therefore, capacity-building and financial assistance would be necessary from the APEC member economies with financial resources for the benefit of those with fewer resources.<sup>83</sup>

#### V. WHY DOES COMPLIANCE WITH TRADE NORMS MATTER IN A COUNTER-TERRORISM CONTEXT?

One may wonder why compliance with trade norms matters when discussing and implementing counter-terrorism measures. Indeed, an argument can be made that since terrorism threatens the very survival of the global community, an effort to fight terrorism should outweigh any other value. That may be true in emergency situations where, as feared in the immediate aftermath of September 11, a terrorist attack seems imminent. Such a national or international emergency could force related international organizations and states to consider only a terrorism-detering response until the emergency situation disappears. However, a medical procedure for an emergency room may not necessarily be an appropriate long-term cure for a chronic illness. Treatment of a chronic illness would require a wide range of different elements, such as the existence of viable medical alternatives, total cost of each medical alternative, consideration of the nature of the illness, how to finance the medical bill, etc. Only through such a multi-dimensional analysis can people determine a “durable” treatment methodology for the particular illness. Likewise, because the current global fight against terrorism is becoming an on-going, long-term project, such a project requires a “durable” response. A durable counter-terrorism measure must be legitimate in terms of international legal obligation and, in this context, international trade norms in particular. Non-compliance of trade norms would make it more difficult for the APEC and its member economies to formulate a “durable” counter-terrorism measure due to the following reasons.

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<sup>83</sup> *Id.*

*A. International Legal Disputes Undermine the “Just Cause” of Fighting Terrorism*

The most significant problem arising from maintaining a counter-terrorism measure inconsistent with international trade norms would be the likely increase of international legal disputes surrounding the measure and the resulting erosion of the international consensus and collective willingness to fight terrorism. Countries would willingly accept negative side effects from a certain counter-terrorism measure for some time, but it is unreasonable for them to “bite the bullet” for an extended period of time. If so, countries standing to lose from the measure would likely initiate legal challenges. That is why discussion of terrorism prevention in the APEC region should be done, but in observance of international law, and particularly of international trade law.

*B. Dissemination of Tendencies to Establish Counter-Terrorism Measure Barriers at the Domestic Level*

Another cost of the dissemination of counter-terrorism measures in violation of trade norms is that they would plant the seed for more stringent and more extensive domestic regulations by individual states. This is particularly the case for the APEC. Because the APEC does not create a binding legal instrument or otherwise impose mandatory legal obligations for domestic legislation, providing only guidance and recommendation, specific implementation of a particular counter-terrorism measure is reserved for domestic legislation and regulation by each member economy. Consequently, what actually matters in “real” world terms, such as from the perspective of seafarers, is specific municipal legislation implementing those guidelines and recommendations.<sup>84</sup> Furthermore, some member economies have the tendency of copying counter-terrorism measures of other countries.<sup>85</sup>

The importance of domestic legislation and the tendency of convergence support the rationale of keeping counter-terrorism

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<sup>84</sup> Although adopted under the auspice of the IMO with the support of APEC member economies, the case of the ISPS Code provides a good example in this regard. The IMO’s International Convention for the Safety of Life at Sea (“SOLAS Convention”) provides the basic obligation for each IMO member state that has discretion in adopting specific measures to implement the obligation domestically. For example, Australia adopted the Australian Maritime Security Act in 2003. See Russell, *supra* note 31, at 2.

<sup>85</sup> In an attempt to follow the 24-hour advance cargo shipment notice initiative of the United States and Canada, the Australian industry suggested that Australian Customs Service consider adopting similar measures. See Russell, *supra* note 31, at 5.

measures in line with international trade norms. The APEC's or a member economy's disregard of trade norms would initiate a chain reaction. Sooner or later, other member economies would be encouraged or emboldened to adopt counter-terrorism measures which ignore or disregard the norms in international trade. As there is always a bigger fish, one can always devise a tighter measure.<sup>86</sup> This demonstrates the importance of contemplating trade norm consistency in the course of counter-terrorism discussion at the APEC.

*C. Trade Norm-Consistent Counter-Terrorism Measures are More Likely to Bring an Ultimate Solution to Terrorism*

More fundamentally, the APEC member economies need to recognize the long-term positive effect that would flow from a trading system with "durable" counter-terrorism measures. A durable anti-terrorism network may be able to balance the competing themes of effective monitoring and free flow of legitimate trade, and the often conflicting interests of various APEC member economies. Such a system will help the APEC member economies continue in economic prosperity through more expanded international trade while protecting the trading channel from terrorist attack. The more practical question becomes, how do we achieve this? One way that a trading system with "durable" counter-terrorism measures can be achieved is by adequately evaluating important competing values and attempting to strike a balance among them through a "multi-dimensional" approach.<sup>87</sup>

An international trade norm-consistent counter-terrorism measure is more likely to keep all member economies in line for the long-term fight against terrorism. Otherwise, aggrieved parties would be tempted to break away from the cooperation network. Inconsistency with existing trade norms would likely foster such "defect." Moreover, a trade norm consistent counter-terrorism measure is more likely to keep the flow of legitimate trade. Free flow of legitimate trade could

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<sup>86</sup> See Ian W. Porter, *Proceedings of the Symposium of Maritime Experts to Assist in Implementation of the Secure Trade in the APEC Region (STAR) Initiative*, June 18-20, 2003, Melbourne, Australia, available at [http://www.apec.org.au/docs/Star\\_Symposium\\_Report.doc](http://www.apec.org.au/docs/Star_Symposium_Report.doc).

<sup>87</sup> As an example of this "multi-dimensional" approach for balancing trade and security, APEC includes some special task groups such as APEC Social Safety Net Capacity building Network, Cultural Focal Point Network, Electronic Commerce Steering Group and Gender Focal Point Network, etc. See APEC Groups, [http://www.apec.org/apec/apec\\_group.html](http://www.apec.org/apec/apec_group.html) (follow "SOM Special Task Groups" hyperlink) (last visited Feb. 17, 2006).

provide a meaningful opportunity for member economies with less economic resources to achieve prosperity through international trade. Forfeiting this opportunity would trigger more economic or political instability over time, which may be a core source of terrorism. This further demonstrates the importance of international trade norm-consistent trade measures.

*D. Overreaching Counter-Terrorism Measures have the Potential to Undermine the APEC's Key Objectives*

There is another fundamental problem in APEC's adopting counter-terrorism measures inconsistent with applicable international trade norms. The APEC was originally introduced to facilitate trade, so the focus of the APEC's discussion should be facilitation of trade. Trade facilitation has been one of the top priorities of the APEC from the beginning.<sup>88</sup> The 1994 Bogor Declaration made this point clear. In the Declaration, APEC members stated that free and open trade is one of the ultimate goals of the APEC economies.<sup>89</sup> The Bogor goals of free, open trade have been reaffirmed by APEC member economies.<sup>90</sup> In the same spirit, the APEC recently held a roundtable forum with the WTO.<sup>91</sup>

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<sup>88</sup> See About APEC, [http://www.apec.org/apec/about\\_apec.html](http://www.apec.org/apec/about_apec.html) (last visited Feb. 17, 2006) (defining APEC as "the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region.").

<sup>89</sup> See APEC Economic Leaders' Declaration of Common Resolve, Bogor, Indonesia, Nov. 15, 1994, [http://www.apec.org/apec/leaders\\_declarations/1994.html](http://www.apec.org/apec/leaders_declarations/1994.html). Item 6 of the Bogor Declaration stipulates that:

6. With respect to our objective of enhancing trade and investment in the Asia-Pacific, we agree to adopt the long-term goal of free and open trade and investment in the Asia-Pacific. This goal will be pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies. We will achieve this goal in a GATT-consistent manner and believe our actions will be a powerful impetus for further liberalization at the multilateral level to which we remain fully committed.

<sup>90</sup> In 1995, the APEC member economies promised to further develop the Bogor Declaration goals by adopting the Osaka Action Agenda ("OAA"), whereby the Bogor Declaration gained substantial infrastructure. See The Osaka Action Agenda, 1995, available at [http://www.apec.org/apec/publications/free\\_downloads/1997-1993.Medialib](http://www.apec.org/apec/publications/free_downloads/1997-1993.Medialib) (follow "Osaka Action Agenda PDF Download" hyperlink). Most recently, in the *Joint Statement of the Sixteenth APEC Ministerial Meeting* the APEC member economies pledged their efforts towards achieving an open trading system aimed at creating new opportunities in a dynamic and interdependent Asia Pacific Region. Particularly, they welcomed the launching of negotiations on trade "facilitation" and agreed to work together to advance these negotiations in the WTO. See *Joint Ministerial Statement* (2004), *supra* note 34 (emphasis added).

<sup>91</sup> See APEC Press Release, APEC-WTO Trade Facilitation Roundtable Shares

In retrospect, the Bogor Declaration was a bold step, by including not only tariffs, but also NTBs (Non-Tariff Barriers), such as customs documents and procedures for the purpose of further liberalizing the trade in the APEC region. As it currently stands, an NTB is more important and attracts far more attention than tariffs.<sup>92</sup> As counter-terrorism measures are mainly related to customs and importation processes designed to enhance security, they immediately raise NTB questions. Thus, the APEC should be cautious in addressing counter-terrorism measures, because they are possible candidates for NTBs. All anti-terrorism projects at the APEC should be discussed and implemented with the APEC's fundamental objective – improved trade environment—in mind. The APEC member economies must ensure that the trade facilitation agenda is not hijacked by counter-terrorism measures.

The discussions at the STAR III conference illustrated this issue quite effectively. It was recommended that the CTF be asked to look into the agenda and organization of the work of the STAR conference in a manner to preserve the APEC's key objectives and values.<sup>93</sup> Two suggestions/recommendations were offered in the conference in this regard.

First, the members generally agreed that the counter-terrorism measures should be balanced with trade facilitation.<sup>94</sup> To achieve this “balance” in the APEC region, member economies were requested to make continued commitments to fighting terrorism, take collective and individual action, and pursue active private sector participation.<sup>95</sup> Cooperation with other international organization such as the International Atomic Energy Agency (“IAEA”), the World Customs Organization (“WCO”), IMO, and the International Civil Aviation Organization (“ICAO”) were also discussed at the conference.<sup>96</sup> The conference particularly stressed timely implementation of the WCO's Framework of Standards to Secure and Facilitate Global Trade.<sup>97</sup>

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APEC Experience (Feb.18, 2005), *available at* [http://www.apec.org/apec/news\\_\\_media/2005\\_media\\_releases/190205\\_swit\\_apec-wtotradefacilitationroundtable\\_sharesapecexperie.html](http://www.apec.org/apec/news__media/2005_media_releases/190205_swit_apec-wtotradefacilitationroundtable_sharesapecexperie.html); Press Release, APEC, APEC Kuala Lumpur Workshop To Help Developing Countries in WTO Trade Facilitation Negotiations (Mar. 2, 2005), *available at* [http://www.apec.org/apec/news\\_\\_media/2005\\_media\\_releases/020305\\_mal\\_apeckualalumpurworkshop.html](http://www.apec.org/apec/news__media/2005_media_releases/020305_mal_apeckualalumpurworkshop.html).

<sup>92</sup> See Fischer, *supra* note 26, at 337, 339, 342.

<sup>93</sup> See *Chair's Summary Report*, *supra* note 20, at 2.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 27 (“The presentation of Ditemar Jost, Senior Technical Officer of WCO



Second, the member economies also recognized that an effort to balance security and trade required a public-private partnership.<sup>98</sup> The consensus held that it is necessary to find ways and means to revitalize the partnership between the government and the private sector for the STAR Initiative.<sup>99</sup> In order to encourage better participation of the private sector, the ABAC could be more directly involved in this area.<sup>100</sup>

#### VI. SUGGESTION FOR A CHECKLIST

Having realized the importance of trade norm compliance of counter-terrorism measures, the remaining task is ensuring compliance with international trade norms when we engage in future counter-terrorism discussions. Needless to say, measure to measure, and member economy to member economy, every case will be different. Nonetheless, a general checklist may be developed.

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about the issue, 'Implementing Common Standards for Electronic Customs Reporting,' touched upon the Framework of Standards being developed by his organization. The framework primarily focused on integrating control procedures while at the same time maintaining flexibility. The customs data principles upheld by the organization also encompassed the following features: common data sets and uniform electronic messages for cargo report, import, and export declarations for the clearance of 'ordinary goods,' maximum data requirements for the routine exchange of information between customs and the trader, and the requirement of as little information as necessary for customs control procedures. The progress achieved in the implementation of the model has been achieved through inter-governmental and inter-agency collaboration. The G8 economies and APEC economies have agreed to implement the Data Model by 2005, where possible. The speaker also warned against focusing solely on technological aspects and recalled the need to work on people and fostering their capacity:") See also International Convergence Trends in Cargo Security, *supra* note 65 ("In November 2004, the 'High Level Strategic Group' within WCO's council adopted several important resolutions as outlined in the 'Framework of Standards to Secure and Facilitate Global Trade.' The framework is built on two pillars which are Customs-to-Customs Pillars and Customs-to-Business Pillars. In this framework, it is clear that these emerging WCO standards are truly similar to the ones being developed by the US government, such as targeting, manifest and screening systems (ATS, AMS, ACE). In the second pillar the standard will likely draw from current innovative government-industry programs such as the U.S. C-TPAT program and the Swedish StairSec program. Further, and as stated, the standards will include '...use of smarter, more secure containers.' More interesting is that the framework discusses 'procedures that offer incentives to businesses to ensure that they see a benefit to their investment in good security systems and practices, including reduced risk-targeting assessments and inspections, and expedited processing of their goods,' which would indicate some sort of a 'green lane' concept.").

<sup>98</sup> See *Chair's Summary Report*, *supra* note 20, at 2.

<sup>99</sup> See *id.*

<sup>100</sup> *Id.*

A. *Have Negotiators Duly Addressed the Trade Implications of a Specific Counter-Terrorism Measure?*

First and foremost, it is imperative that representatives of APEC member economies in charge of counter-terrorism are apprised of the full spectrum of implications from particular measures. In this vein, any terrorism-related measure to be discussed at APEC conferences or adopted by APEC member economies individually, bilaterally or multilaterally has to be evaluated in terms of its trade disruption potential and possibilities for trade norm violation. In that context, future representatives or negotiators might consider including an explicit provision or a statement adopting a joint statement, declaration, bilateral or multilateral agreement among member economies, or domestic legislation, which refers to the general relationship between international security and trade facilitation. From time to time, there may be instances where a new measure must be adopted to address terrorist threats despite obvious significant adverse impact on trade, but by having an explicit provision, countries would help protect against possible negative impacts on trade. In response, a measure could be more narrowly tailored to address a specific issue posed.<sup>101</sup> APEC member economies could consider the following provisions in adopting an international agreement, for instance:

Contracting parties agree that rights and obligations arising under this agreement are not designed to put unreasonable burden on legitimate flow of goods and shipments. When an unintended burden on flow of international shipment is identified, contracting parties shall meet and discuss measures to deal with such situation.

Adverse impact on trade mentioned in above paragraph means negative consequences on international trade flowing from a particular counter-terrorism measure or regulation, which exceeds a reasonable and acceptable perimeter of such measure or regulation. Parties, however, realize that normally there is inevitable implication on trade from a measure to deal with terrorism. Such reasonable consequence from a normal effect, without more, shall not be invoked as unreasonable adverse impact on trade.

Contracting parties agree that in adopting each terrorism-related measure it is necessary to conduct an impact assessment of alternative proposals in order to adopt the least trade-restrictive measure under given circumstances. Contracting parties agree that unless otherwise proven the least trade-restrictive measure is the most preferable one.

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<sup>101</sup> See G8 Counter-Terrorism Cooperation since September 11, *supra* note 10.

Similar wordings can be devised *mutatis mutandis* for a joint statement or communiqué.

*B. Is There a Less Trade-Restrictive Alternative Available?*

Counter-terrorism measures should be the least trade-restrictive, if possible. When there are two or more competing alternatives to achieve a particular counter-terrorism mandate under given circumstances, and those alternatives basically provide the same or similar level of protection and prevention, a measure that inflicts the least negative impact on trade should be adopted to the extent practicable. This would minimize any unnecessary impact on trade, and thus actually maximize the long-term effectiveness of the counter-terrorism measure.

To this end, a prior “trade” evaluation of each candidate measure and an accurate comparison among them based on the estimated results from the prior evaluation seems to be in order. Although exact calculation of impact from a measure is not always feasible, approximation could be obtained for a rough comparison. If it is impossible to get even approximation, another alternative would be to adopt a “trial period.” The APEC or member economies could conduct simulated implementation of a particular measure for the purpose of identifying possible problems and burdens in an actual operation. Through the “trial period,” government and company officials could have a chance to quickly identify the sources of possible problems, both practical and legal, and areas of improvement. An adjustment could be made relatively easy this way and would certainly help avoid waste of time and resources.

*C. Is There an Easier Method To Implement a Particular Measure?*

Furthermore, to minimize unintended adverse impact on legitimate trade, any counter-terrorism measure should be easy to implement. When a particular measure is adopted by the international community, the procedure to comply with the measure and the substantive contents of the measure should be made as simplified as possible unless the effectiveness of the measure is unduly compromised. The easier it is to implement and comply with a measure, the less likely the measure will cause adverse trade effect, hence the less likely it is to violate a relevant trade norm. The same rule applies to equipment required to implement a new measure. The technical or mechanical specification of required equipment or devices should not be unnecessarily high. If there is a more affordable equipment or device, and if such equipment and device are found to

meet the basic technical threshold to implement the measure, then they should be utilized. A complicated procedure or unaffordable equipment may impose an unnecessary NTB burden on legitimate trade, and constitute a violation of certain provisions of WTO Agreements.

To the extent practicable, therefore, in addressing an anti-terrorism project, the APEC and its member economies should make efforts to pursue an easier-to-implement measure with simpler procedure and more affordable equipment as long as such a measure is capable of achieving a particular counter-terrorism objective without a significant problem.

*D. Have There Been Consultations With Other Relevant International Organizations or Related Entities?*

Long-term success against international terrorism cannot be won by the APEC alone. Cooperation with other non-APEC countries, other international organizations and other international entities is crucial. An accurate assessment of trade impact of a particular measure could only be achieved through thorough consultation with other international organizations and entities that arguably possess expertise in the area.<sup>102</sup>

In this respect, it is highly recommended that future counter-terrorism negotiations and discussions at the APEC level be conducted with the enhanced cooperation of with other relevant international organizations and entities.<sup>103</sup> The benefit would flow both ways. Cooperation and coordination with other trade-related international organizations and entities would provide helpful guidelines not only for the APEC and its member economies, but also for those other international organizations and entities. Such organizations or entities may include WTO, WCO, Organization for Economic Cooperation and Development (“OECD”), ICAO, UN Counter-Terrorism Committee (“CFC”) and IMO, etc.<sup>104</sup>

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<sup>102</sup> The panels in the session discussed how to strengthen cooperation in capacity building among APEC economies and to secure transport in the region. The Asian Development Bank (“ADB”) introduced its various assistance programs designed to strengthen transport and financial security. *See Chair’s Summary Report, supra* note 20, at 31.

<sup>103</sup> *See id.*, at 2.

<sup>104</sup> *See Counter Terrorism, supra* note 4.

*E. Has Adequate “Lead Time” Been Provided for Implementation of a New Measure?*

It is also important to check whether enough “lead time” has been provided for implementation and compliance of a new counter-terrorism measure. Governments and companies do require significant amount of preparation time to change the existing system, hire new personnel or purchase new equipment. Therefore, a sufficient lead time, to the extent practicable, is important to the government officials and exporters in the field, although some people have a tendency to downplay the importance.

Some member economies would be able to finalize necessary changes easily while others would have difficulty in following the new measure. So, the lead time issue is directly related with the vulnerability of some of the member economies categorized as developing countries. What should be remembered in anti-terrorism projects is the fact that the most vulnerable victims from inappropriate or disproportionate counter-terrorism measures are none other than member economies with less financial or technical resources. Lack of financial and technical resources would give economies a difficult time in keeping up with a new anti-terrorism regime, and the failure to incorporate these measures could make the product they touch untradable or hard-to-trade in the international market. Provision of sufficient “lead time” with adequate advance preparation would significantly reduce the concern and complaint from member economies with fewer resources. Allegation or actual violation of relevant trade norms would be equally diminished.

The “lead time” issue and the fundamental vulnerability of developing member economies evidence why capacity-building is particularly important in the counter-terrorism context. Indeed, new counter-terrorism measures increasingly involve IT infrastructure, while the APEC is apparently observing a “digital divide” among member economies.<sup>105</sup> An effort to minimize the negative effect on these vulnerable economies requires a more comprehensive assistance program to be incorporated in each measure, so that these member economies can get meaningful support in keeping up with the ever-complicated counter-terrorism measures and procedures. If this issue is not adequately addressed early on, accumulation of complaints and

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<sup>105</sup> See APEC, Joint Statement of the Twelfth APEC Ministerial Meeting (2000), at paras. 55-56, <http://www.mofa.go.jp/policy/economy/apec/2000/joint.html> (follow “12th Annual Ministerial Meeting Joint Ministerial Statement” hyperlink); Australian APEC Study Centre, *Bridging the Digital Divide: Refocusing on a Market-Based Approach - An APEC Perspective* 6-8 (2001), available at <http://www.apec.org.au/docs/Bdd.pdf>.

frustration from some aggrieved member economies could undermine the spirit of cooperation in the fight against international terrorism.

This issue was also extensively discussed at the recent STAR III conference in Korea. As one representative commented, it appears that there is general consensus among APEC member economies that in order to attain balance between trade and security, the APEC needed to foster capacity-building to provide every economy with the power and skills needed to respond to common human security challenges.<sup>106</sup> As commentators concurred in the conference, it is important for the APEC to gather the support of all member economies including developing ones for a successful adoption and implementation of any given counter-terrorism measure.<sup>107</sup> They also agreed that “the most direct threat to trade in today’s world is terrorism. *No single economy can stand alone and both collective and individual actions are needed.* Thus clear and continued commitment on the part of governments to address the threat of terrorism is necessary.”<sup>108</sup> The checklist can be summarized in the following diagram. This is simply exemplary and other elements may be added, as necessary.

## VII. CONCLUSION: APEC’S CRUCIAL LEADERSHIP IN THIS NEW FRONTIER

As mentioned in the beginning of this paper, the objective is not to criticize or discount current efforts to deal with the increasing threats of terrorism. To the contrary, now is not the time for complacency and we have a long way to go. It is virtually guaranteed that the APEC’s collective and each member economy’s individual economic prosperity

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<sup>106</sup> See *Chair’s Summary Report*, *supra* note 20, at 16 (Alfredo Labbé, Minister Counselor, Directorate for Special Policy, Chilean Ministry of Foreign Affairs, Briefing on Results of STAR II and Perspectives on the Future Direction of the Conference) and *Chair’s Summary Report*, *supra* note 20, at 17 (Joanne Frederiksen, Australian Ministry of Foreign Affairs, (Adoption of General Principles and Best Practices from the STAR Initiatives); see also Office of Trade Relations, U.S. Customs and Border Protection, *Enhancing Security and Trade Facilitation* (2005), available at [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”) and Gao Mingbo, *Chinese Perspective on the Relation Between Security and Trade* (2005), available at [http://www.apec.org/content/apec/documents\\_reports/counter\\_terrorism\\_task\\_force/2005.html](http://www.apec.org/content/apec/documents_reports/counter_terrorism_task_force/2005.html) (follow the hyperlink under “STAR Conference”).

<sup>107</sup> See *Chair’s Summary Report*, *supra* note 20, at 17.

<sup>108</sup> *Id.* (emphasis added).

will be seriously endangered unless an effective counter-terrorism mechanism is firmly in place. As pointed out by many experts, terrorism in general and maritime and aviation terrorism in particular can instantly disrupt overall international trade, and make the entire APEC economies suffer from the astronomical economic damage. Should it desire to maintain, let alone enhance, the current pace of economic cooperation and development, the APEC and its member economies do not have any other choice but to explore all avenues available to deter international terrorism.

This paper, however, argues that it is time to contemplate international law-consistency of counter-terrorism measures, particularly with respect to international trade norms as contained in the WTO Agreements. Certain aspects of counter-terrorism measures carry trade implication and, depending upon specific details, they may constitute a violation of various provisions of WTO Agreements. Trade law-consistency has been on the “back burner” in the emergency situation after the September 11 and ensuing terrorist attacks, but it deserves more thorough consideration in our effort to pursue a long-term strategy to address the threats of terrorism. A “durable” long-term counter-terrorism mechanism could only be attained through a full and comprehensive consideration of various related factors, most importantly, trade law-consistency. Practical effectiveness and legal legitimacy are not mutually exclusive: in fact, the combination of both can produce a synergic effect. Keeping this in mind, it is critical for the APEC and its member economies to consider the possible unintended adverse effects on trade and the possible violation of international trade law in future discussion and adoption of counter-terrorism measures. Even the United States, the most enthusiastic supporter of an effective counter-terrorism measure, seems to agree on this point.<sup>109</sup>

A frank discussion and resulting guidance from the APEC could lay the groundwork in this area. Due to its unique traits, the APEC is better suited than any other international organization or entity to address this particular issue. Member economies include both developing and developed countries along the Pacific Rim, where one

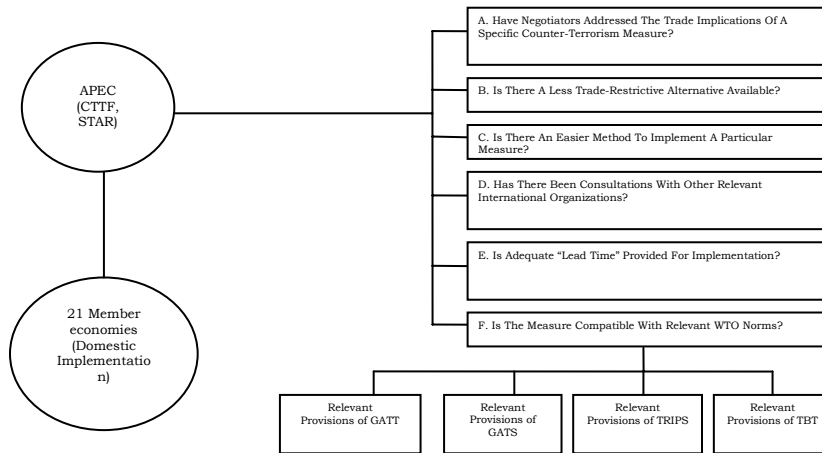
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<sup>109</sup> See Robert C. Bonner, Comm’r for Customs and Border Prot., Dep’t of Homeland Sec., Remarks at the Royal Institute of International Affairs (Sept. 20, 2004). Commissioner Bonner of the U.S. Customs and Border Protection summarized the concept quite well. He stated that “the purpose of all counter-terrorism measures adopted after September 11 is to meet the ‘Twin Goals’: *i.e.*, vastly increasing maritime security, but doing so without choking off the free flow of legitimate trade.” *Id.*

can observe both the world's busiest international trade activities and the most terrorism-vulnerable maritime and aviation routes. Furthermore, the APEC's "flexible" nature allows the member economies to more freely and frankly exchange views at various APEC meetings and experiment new measures without imposing strict legal obligation. As this issue lies in uncharted territory, flexibility and frankness would be invaluable assets in formulating a new framework and paradigm. The APEC could offer a lot of creative ideas to find innovative methodologies, using new technologies and procedures, to both strengthen security and facilitate trade.<sup>110</sup> That is why the APEC is one of the best fora to discuss this particular issue.

By fully taking advantage of its unique advantages, the APEC could establish its leadership in this field and lead similar discussions and endeavors in other international organizations and countries. This is the area where the APEC could provide its crucial contribution and enhance its status. This is indeed a golden opportunity for the APEC.

#### **Counter - Terrorism Discussion Checklist**



<sup>110</sup> See generally, Raby, *supra* note 59, at 5.