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Working Party on Customs Questions affecting Transport

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Geneva, 2 - 6 February 2009  
Item 4 of the provisional agenda

**ACTIVITIES OF OTHER ORGANIZATIONS AND COUNTRIES  
OF INTEREST TO THE WORKING PARTY**

**A study evaluating international agreements to implement  
the World Customs Organisation (WCO) SAFE Framework of Standards**

Note by the Chamber of Commerce of the United States of America

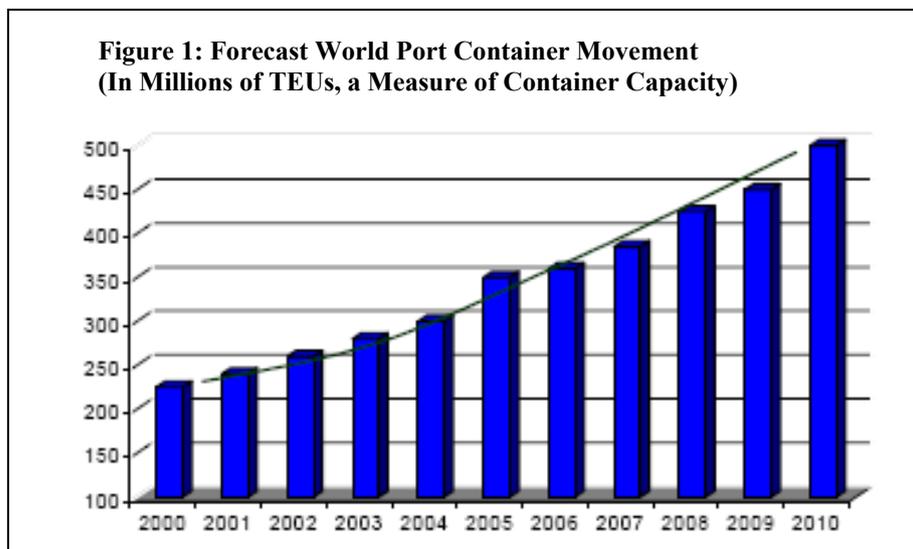
At its 120th session, the Working Party took note of a study by the United States Chamber of Commerce evaluating various international agreements to implement the World Customs Organisation SAFE Framework of Standards and decided to continue its considerations on this subject at one of its next sessions. The secretariat was requested to publish the study by the United States Chamber of Commerce as official document.

## CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	3
A. The WCO and the SAFE Framework of Standards.....	4
B. Implementation Options for the SAFE Framework of Standards.....	5
C. Multilateral International Agreements.....	6
II. THE REVISED KYOTO CONVENTION.....	6
A. The Kyoto Convention and the Revised Kyoto Convention.....	6
B. The Connection Between the Revised Kyoto Convention and the WCO.....	6
C. Strengths and Weaknesses of the Revised Kyoto Convention.....	7
III. THE INTERNATIONAL MARITIME ORGANIZATION AND THE SOLAS CONVENTION.....	9
A. The International Maritime Organization.....	9
B. The SOLAS Convention.....	9
C. The International Ship and Port Facility Security Code.....	10
D. Strengths and Weaknesses of the SOLAS Convention.....	10
IV. THE TIR CONVENTION.....	12
A. Evolution of the TIR Convention.....	12
B. Contracting Parties to the TIR Convention.....	13
C. The Connection Between the TIR Convention and the UNECE.....	13
D. Enforcement of the TIR Convention and The TIR Administrative Committee ...	14
E. Strengths and Weaknesses of the TIR Convention.....	15
V. ALTERNATIVE METHODS TO IMPLEMENT THE SAFE FRAMEWORK OF STANDARDS.....	18
A. Bilateral Agreements.....	18
B. Unilateral Agreements.....	19
VI. CONCLUSION.....	19
A. Amending the Revised Kyoto Convention to Implement the SAFE Framework of Standards.....	20
B. Amending the SOLAS Convention to Implement the SAFE Framework of Standards.....	21
C. Amending the TIR Convention to Implement the SAFE Framework of Standards.....	23
VII. FINAL SUMMARY.....	25

## I. INTRODUCTION

1. One third of the U.S. economy is dependent on international trade.<sup>1/</sup> The maritime transportation system accounts for the movement of more than ninety percent of global trade, and the majority of goods, raw materials and component parts move by sea in cargo containers.<sup>2/</sup> According to the United Nations Conference on Trade and Development, container traffic is forecast to more than double until 2010 (Figure 1).<sup>3/</sup>



2. Considering these international trade statistics, imagine the potential damage that could be caused to the global economy in the following supply chain security scenario:

3. While 100 percent screening of supply chain goods at the point of departure is currently an unrealistic and economically isolating policy, a country that implements uniform, international security and trade facilitation procedures for all transport modes at each trade route segment reduces the chances of a breach in the supply chain.

4. The negative effect of a security breach indicates that the continued, positive financial health of the U.S. and other countries' economies depends upon secure, free-flowing international trade. In furtherance of this goal, the U.S., along with numerous other nations representing 99 percent of global trade, adopted a modern customs strategy called the SAFE Framework of Standards.<sup>4/</sup> Developed by the World Customs Organization (WCO), under the mandate of the G7 post 9/11, the SAFE Framework is a 21st century customs program that balances national security concerns of terrorism and economic security concerns of fraud and piracy with trade facilitation interests.

<sup>1/</sup> U.S. Chamber of Commerce, International Policy Department, <http://www.uschamber.com> (last visited December 5, 2007).

<sup>2/</sup> Robert W. Kelly, *Containing the Threat: Protecting the Global Supply Chain Through Enhanced Cargo Container Security*, The Reform Brief (October 3, 2007), <http://www.reforminstitute.org>.

<sup>3/</sup> U.N. Conference on Trade and Development, *Multimodal Transport: The Feasibility of an International Legal Instrument*, U.N. Doc. UNCTAD/SDTE/TLB/2003/1 (January 13, 2003), <http://www.unctad.org>.

<sup>4/</sup> U.S. Customs and Border Protection, Commissioner Messages, Speeches and Statements, *Historic Adoption of the Framework of Standards to Secure and Facilitate Global Trade*, (June 23, 2005), <http://www.cbp.gov>.

5. The purpose of this study is to provide customs administrations, policy makers and other relevant parties connected to the supply chain with an overview of the existing, multilateral international agreements that could successfully implement the SAFE Framework of Standards.

#### **A. The WCO and the SAFE Framework of Standards**

6. The WCO is a 171 member intergovernmental organization that promotes communication and cooperation on customs matters. Responding to the need in the global community for modern standards on supply chain security and trade facilitation, the WCO adopted the SAFE Framework of Standards in 2005. Adopted as the Framework of Standards to Secure and Facilitate Global Trade, the customs instrument was later referred to as the SAFE (Security and Facilitation in a Global Environment) Framework of Standards. In this study, the name will be abbreviated to the SAFE Framework.

7. The SAFE Framework is based on a two pillar approach: Customs-to-Customs network arrangements and Customs-to-Business partnerships. The Customs-to-Customs pillar promotes cooperation between different countries' customs administrations by using advance electronic information and modern technology equipment to identify high risk items. The Customs-to-Business pillar encourages the establishment of partnerships between customs administrations and businesses who have validated and maintained a high level of security guarantees.<sup>5/</sup> This study will examine how these two key provisions of the SAFE Framework could be incorporated into an appropriate international agreement.

8. Another provision of the SAFE Framework discussed in this study is the collective guidelines referring to the Authorized Economic Operator (AEO). AEO Guidelines were developed prior to the adoption of the SAFE Framework and the principles of these guidelines have been incorporated into the SAFE Framework in order to provide baseline guidance on the implementation of AEO programs. Defined as a party involved in the international movement of goods in whatever function that has been approved by or on behalf of a national Customs Administration as complying with WCO or equivalent supply chain security standards, examples of AEOs include, inter alia, manufacturers, importers, exporters, ports, airports, warehouses, and distributors.<sup>6/</sup>

9. The implementation of a supplementary provision of the SAFE Framework, Capacity Building, will also be examined in this study. Capacity Building refers to the supportive, phased approach offered to willing member countries by the WCO in order to ensure a smooth adoption and implementation of the SAFE Framework. Capacity Building is described as a "critical element" of the SAFE Framework<sup>7/</sup> and its prime importance has been noted by Customs

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<sup>5/</sup> Kunio Mikuriya, *Supply Chain Security: The Customs Community's Response*, World Customs Journal, Volume 1, Number 2 (September 2007), <http://www.worldcustomsjournal.org>.

<sup>6/</sup> World Customs Organization, *WCO SAFE Framework of Standards*, Introduction (June 23, 2005), <http://www.wcoomd.org>.

<sup>7/</sup> World Customs Organization, *WCO SAFE Framework of Standards*, Section 3 (June 23, 2005) <http://www.wcoomd.org>.

sources since the implementation of the Framework requires necessary, long-term improvements in customs capabilities and integrity.<sup>8/</sup>

## B. Implementation Options for the SAFE Framework of Standards

10. The SAFE Framework is a voluntary set of guidelines and standards that WCO Member Countries are invited to implement on a national basis. However, this approach inevitably does not lend itself to mutual recognition of Customs security provisions between WCO Member Countries. Therefore, a mandatory, binding international agreement is needed to effectively implement the SAFE Framework. Three formats for international agreements are described below:

- (a) Unilateral - one party's unilateral declaration possessing legal content and expressing an understanding relating to the legal scope of a provision of another international agreement.<sup>9/</sup>
- (b) Bilateral - an international agreement concluded between two parties, each possessing treaty-making capacity.<sup>10/</sup>
- (c) Multilateral - an international agreement concluded between three or more parties, each possessing treaty-making capacity.<sup>11/</sup>

11. When evaluating these three types of agreements as implementation options, there are important differences to consider that could impact the security effectiveness and the trade facilitation goals of the SAFE Framework. While this study will briefly address the strengths and weaknesses of implementing the SAFE Framework using bilateral and unilateral agreements, the study presents the multilateral international agreement as the most effective implementing format for the SAFE Framework (See Figure 2).<sup>12/</sup>

**Figure 2: The Advantages of the Multilateral Agreement Implementing the SAFE Framework**

	<b>Number of Agreements with Countries who Agreed to Adopt the SAFE Framework</b>	<b>Time estimate</b>	<b>AEO'S Promoted</b>	<b>Impact on Commerce</b>
UNILATERAL	1 declaration	N/A	No	Uniform compliance on one border only
BILATERAL	100+ separate agreements	Lengthy process	Yes	Fragmented compliance
MULTILATERAL	1 agreement	N/A	Yes	Harmonized compliance

<sup>8/</sup> Kunio Mikuriya, *Supply Chain Security: The Customs Community's Response*, World Customs Journal, Volume 1, Number 2 (September 2007), <http://www.worldcustomsjournal.org>.

<sup>9/</sup> *See id.*

<sup>10/</sup> U.N. Office of Legal Affairs, Treaty Section, *Treaty Handbook* (March 2006), <http://untreaty.un.org>.

<sup>11/</sup> *See id.*

<sup>12/</sup> Email from Gordon Wright, Head of Customs Security & Transport Matters, (September 14, 2007).

### **C. Multilateral International Agreements**

12. This study identifies three multilateral international instruments that could successfully implement the SAFE Framework: the Revised Kyoto Convention the SOLAS Convention and the TIR Convention. The first section of this study introduces each international agreement and any relevant international organizations connected to the agreement. The second section of the study provides an analysis of the international agreements' strengths and weaknesses as an implementing instrument of the SAFE Framework. Proposed methods detailing how each of the international agreements could be modified in order to implement the provisions of the SAFE Framework will also be addressed in this section.

## **II. THE REVISED KYOTO CONVENTION**

### **A. The Kyoto Convention and the Revised Kyoto Convention**

13. The international agreement known as the Kyoto Convention addresses aspects of Customs legislation uniformity. The full name of the Kyoto Convention is the International Convention on the Simplification and Harmonization of Customs Procedures. The WCO concluded the original Convention in 1973 in Kyoto, Japan and the Convention entered into force in 1974. One U.S. Customs and Border Protection (CBP) official described the Convention as “the main international framework for Customs procedures applied to the cross-border movement of goods and people.”<sup>13/</sup>

14. As the need for a streamlined global trade process and reliable supply chain security increased, WCO members sought a modernized Kyoto Convention that contained standard, simplified procedures to facilitate trade and heightened security measures such as advance electronic data on inbound cargo. In 1999, Contracting Parties to the Kyoto Convention adopted amendments that revised the original Kyoto Convention in a legal instrument titled the Protocol of Amendment. After the required 40 Contracting Parties had ratified or acceded to the Protocol of Amendment<sup>14/</sup>, the Revised Kyoto Convention entered into force on February 3, 2006.<sup>15/</sup> The true and correct name of this treaty is the International Convention on the Simplification and Harmonization of Customs Procedures (as amended); however, in this study we will refer to the agreement as the Revised Kyoto Convention or the RKC. The RKC is a third multilateral instrument that could be used to implement the SAFE Framework.

### **B. The Connection Between the Revised Kyoto Convention and the WCO**

15. As the central promoting organization behind the Revised Kyoto Convention, the WCO is key to the success of the Convention. The WCO is responsible for the administration of the RKC, and through the Management Committee established under Article 6, the WCO is granted

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<sup>13/</sup> *Law Enforcement Treaties: Testimony on Revised Customs Convention*: Hearing Before the Senate Comm. on Foreign Relations, 108th Cong. (2004) (testimony of Michael T. Schmitz, Office of International Affairs, U.S. Customs and Border Protection), <http://foreign.senate.gov>.

<sup>14/</sup> Asia-Pacific Economic Cooperation, APEC Secretariat, *The Revised Kyoto Convention: A Pathway to Accession and Implementation*, at 10, APEC#203-CP-01.2 (September 2003), <http://www.apecsec.org.sg>.

<sup>15/</sup> World Customs Organization, The Revised Kyoto Convention Section, *Revised Kyoto Convention: Your questions answered*, at 3, D/2006/0448/8 (February 2006), <http://www.wcoomd.org>.

the legal authority to recommend amendments, settle disputes between Contracting Parties and to implement the provisions of the RKC. Under Article 19 of the RKC, the WCO is the depositary and “all signatures with or without reservation and all instruments of ratification or accession shall be deposited with the Secretary General of the Council.” The term “Council” refers to the WCO as the official name of the WCO is the “Customs Co-Operation Council.”<sup>16/</sup> Thus the Revised Kyoto Convention is a WCO treaty.<sup>17/</sup>

### C. Strengths and Weaknesses of the Revised Kyoto Convention

16. The Revised Kyoto Convention and the SAFE Framework of Standards are global trade instruments drafted by the same source, members of the WCO. Both instruments also promote the same principles of secure international trade facilitation, including risk assessment, the use of advance cargo information, authorized traders, cooperation between Customs administration and cooperation between Customs administrations and private industry.<sup>18/</sup> The RKC preceded and is the foundation for the SAFE Framework; all of the main principles of the SAFE Framework are incorporated in the RKC.<sup>19/</sup>

17. There are several advantages in using the RKC to implement the SAFE Framework. First, many countries have indicated their approval of the Customs principles advocated in the RKC and have indicated their willingness to adhere to its new procedures and practices. In 1999, all 151 members of the WCO unanimously voted to adopt the RKC.<sup>20/</sup> The RKC also benefits from its WCO connection since the WCO “has the membership and thus the participation of Customs administrations representing 99 percent of global trade.”<sup>21/</sup> This widespread support of the RKC reinforces its positive appeal as a multilateral instrument that could realistically implement uniform Customs standards.

18. Second, the RKC is a binding, international agreement grounded in modern concepts. Described as “the blueprint for modern and efficient Customs procedures in the 21st Century,” the RKC promotes uniformity by equally applying its Customs principles to all goods and all modes of transport.<sup>22/</sup> In addition, all Contracting Parties to the RKC must accept two obligatory sections of the RKC, the Body and the General Annex. Both the Body of the RKC, which sets out basic provisions, and the General Annex of the RKC, which contains mandatory core principles, must be accepted in their entirety by Contracting Parties.

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<sup>16/</sup> World Customs Organization, *WCO SAFE Framework of Standards*, Section 6 (June 23, 2005), <http://www.wcoomd.org>.

<sup>17/</sup> Email from Artur Bouten, Legal Officer, TIR Secretariat, U.N. Economic Commission for Europe, to Josh Brill, Research Specialist, GlobalOptions, Inc. (November 8, 2007).

<sup>18/</sup> World Customs Organization, The Revised Kyoto Convention Section, *Revised Kyoto Convention: Your questions answered*, at 9, D/2006/0448/8 (February 2006), <http://www.wcoomd.org>.

<sup>19/</sup> Email from Simon Royals, Senior Technical Officer, World Customs Organization, to Josh Brill, Research Specialist, GlobalOptions, Inc. (November 16, 2007).

<sup>20/</sup> World Customs Organization, The Revised Kyoto Convention Section, *Revised Kyoto Convention: Your questions answered*, at 9, D/2006/0448/8 (February 2006), <http://www.wcoomd.org>.

<sup>21/</sup> World Customs Organization, *WCO SAFE Framework of Standards*, Introduction (June 23, 2005), <http://www.wcoomd.org>.

<sup>22/</sup> World Customs Organization, The Revised Kyoto Convention Section, *Revised Kyoto Convention: Your questions answered*, at 4-5, D/2006/0448/8 (February 2006), <http://www.wcoomd.org>.

19. Third, a practical advantage in utilizing the RKC to implement the SAFE Framework would be the general compatibility of the two instruments. This compatible link between the two instruments of shared international trade principles is demonstrated by the specific document language of the SAFE Framework clearly defining the flexible standards of the RKC. For example, Chapter 7 of the RKC's General Annex provides for both "electronic and paper-based authentication methods."<sup>23/</sup> The Customs-to-Customs Section (3.1) of the SAFE Framework directly addresses this section of the RKC by standardizing the practice of advance electronic information on cargo and container shipments for adequate risk assessments. Another example illustrating the compatibility of the two instruments is that one of the integral, clearly-defined concepts incorporated in the SAFE Framework, the preferential treatment accorded to Authorized Economic Operators, is based on the broad language of the RKC's "Special procedures for authorized persons" section (Chapter 3) of the General Annex.<sup>24/</sup>

20. There are several drawbacks to using the RKC to implement the SAFE Framework. On the macro level, seven out of the top fifteen U.S. trading partners<sup>25/</sup> are not Contracting Parties to the RKC. As of September 2007, Mexico, South Korea, Taiwan, Brazil, Venezuela, Singapore and Malaysia were not listed by the WCO as Contracting Parties to the RKC.<sup>26/</sup> This disadvantage could be remedied by the U.S. and other WCO members encouraging these countries to accede to the RKC.

21. On the micro level, there are two main disadvantages in utilizing the RKC to implement the SAFE Framework. First, the process to accede to the RKC can be lengthy and difficult. A 25-page guidebook on the RKC published by the Asia-Pacific Economic Cooperation (APEC) Secretariat states that the RKC "deals with some relatively complex issues" and that a guidebook for the process of acceding to the RKC is needed since "the text of the Convention itself and the Guidelines are not enough to lead an economy successfully through the entire accession process."<sup>27/</sup> A practical solution to this drawback, as suggested by the APEC guidebook, would be for a prospective Contracting Party to adopt a systematic approach when undertaking the goal of acceding to the RKC by methodically adhering to the guidebook's outline and cooperatively working with fellow Customs administrations.

22. Second, the comprehensive, complex nature of the RKC presents an overly broad document in which to incorporate the more specific provisions of the SAFE Framework. The RKC's General Annex addresses broad customs issues spread across ten different chapters; the current textual order of the specific standards in the SAFE Framework would likely be rearranged if the standards were incorporated as amendments within the different existing chapters of the RKC. A possible solution to this weakness of the RKC as an implementing

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<sup>23/</sup> World Customs Organization, *Text of the Revised Kyoto Convention*, General Annex, Chapter 7, <http://www.wcoomd.org> (last visited November 27, 2007).

<sup>24/</sup> Kunio Mikuriya, *Supply Chain Security: The Customs Community's Response*, World Customs Journal, Volume 1, Number 2 (September 2007), <http://www.worldcustomsjournal.org>.

<sup>25/</sup> U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Division, *Trade Highlights: Top Trading Partners* (November 9, 2007), <http://www.census.gov>.

<sup>26/</sup> World Customs Organization, The Revised Kyoto Convention Section, *Position as Regards Ratifications and Accessions* (September 18, 2007), <http://www.wcoomd.org>.

<sup>27/</sup> Asia-Pacific Economic Cooperation, APEC Secretariat, *The Revised Kyoto Convention: A Pathway to Accession and Implementation*, at 3, APEC#203-CP-01.2 (September 2003), <http://www.apecsec.org.sg>.

mechanism would be to incorporate the SAFE Framework provisions as new, separate chapters in the General Annex of the RKC.

### III. THE INTERNATIONAL MARITIME ORGANIZATION AND THE SOLAS CONVENTION

#### A. The International Maritime Organization

23. The International Maritime Organization (IMO) is a specialized agency of the UN tasked with maintaining a regulatory framework for the shipping industry, including maritime safety and maritime security guidelines. The IMO, comprising 167 Member States and three associate states, is recognized as “the competent body for all aspects of maritime transportation.”<sup>28/</sup> Although the IMO was not granted the legal authority to adopt treaties, the organization convenes the conferences where states and intergovernmental groups draft conventions, treaties and other agreements regarding international shipping interests. One such treaty, the International Convention for the Safety of Life at Sea (SOLAS), is generally regarded as the most important of all international treaties dealing with maritime safety. The following section identifies the SOLAS Convention of 1974 as a second multilateral, international mechanism that could be used to implement the SAFE Framework.

#### B. The SOLAS Convention

24. The first version of the SOLAS Convention was adopted in 1914, years before the IMO was formed. Several successive versions followed, and then later after the organization’s creation, the IMO facilitated a conference that revised the SOLAS Convention in 1960. The amendment procedure of the 1960 Convention was later determined to be very slow, and thus the SOLAS Convention of 1974 was adopted by the Contracting Governments to the agreement with a new amendment procedure designed to incorporate changes in a timely, specified time period. The SOLAS Convention of 1974 has been updated numerous times and currently over 150 Contracting Governments have acceded to the convention. The U.S. is a signatory party to the SOLAS Convention of 1974 and has operated under the provisions of the Convention since May 25, 1980.<sup>29/</sup>

25. While the original objective of the SOLAS Convention was “to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety,”<sup>30/</sup> the devastating terrorist attacks of September 11, 2001 focused contracting government’s attention on bolstering maritime security.<sup>31/</sup> The IMO convened a conference of the Contracting Governments to the SOLAS Convention in December 2002 and the conference

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<sup>28/</sup> Chris Trelawney, *Containerized Cargo Security - a Case for ‘Joined-Up’ Government*, IMO News, No. 2 (2006), <http://www.imo.org>.

<sup>29/</sup> International Maritime Organization, *Status of Multilateral Conventions and Instruments In Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions*, at 15-18, I:J\_9193.doc (December 31, 2005), <http://www.imo.org>.

<sup>30/</sup> International Maritime Organization, SOLAS Section, <http://www.imo.org> (last visited December 7, 2007).

<sup>31/</sup> Chris Trelawney, *Cargo Security - a Case for ‘Joined-Up’ Government*, IMO News, No. 2 (2006), <http://www.imo.org>.

adopted enhanced security amendments under Chapter XI-2, including the incorporation of the International Ship and Port Facility Security (ISPS) Code.

### C. The International Ship and Port Facility Security Code

26. As part of the U.S. government's response to the terrorist attacks of September 11, 2001, the U.S. Coast Guard initiated support for the adoption of the ISPS Code. At the 2002 SOLAS conference, the U.S. delegation to the IMO pushed for the adoption of enhanced security amendments. These amendments, in the form of Chapter XI-2 and the ISPS Code, were then adopted.<sup>32/</sup> Following the incorporation of the ISPS Code into the SOLAS Convention, maritime security experts viewed the new initiative as both an expeditious and inclusive approach to maritime security. The approach was expeditious since the new security amendments were incorporated into the SOLAS Convention as opposed to developing a new implementing instrument, and the approach was viewed as inclusive due to its multilateral reach via the IMO.<sup>33/</sup>

27. The ISPS Code is a two-part initiative which became effective on July 1, 2004. According to the IMO, "part A of the Code is mandatory and part B contains guidance as to how best to comply with the mandatory requirements."<sup>34/</sup> The ISPS Code applies to passenger ships and cargo ships of 500 plus gross tonnage and the regulations also apply to the facilities servicing such ships. The regulations in the ISPS Code require that ships in the port of a Contracting Government or ships about to enter a port within the territory of a Contracting Government must comply with the security level requirements set by that government, inter alia. Other regulations in Chapter XI-2 require the communication of information to the IMO, the control of ships in port known as "port state control," the responsibility of corporate actors, and security assessments at port facilities and security alert systems on ships. A basic discussion of the ISPS code was introduced in this section mainly as a reference point; the focus of this study will evaluate how multilateral agreements such as the SOLAS Convention implement the SAFE Framework.

The majority of international trade for less developed countries moves by sea. As reported by UNCTAD, prior security requirements by the IMO have placed "a particularly heavy burden on the poorer developing countries that often lack both the capital and expertise and may face further limitations on their ability to participate in international trade..."

(Source: United Nations Conference on Trade and Development)

### D. Strengths and Weaknesses of the SOLAS Convention

28. As its name implies, the Safety of Life at Seas Convention applies to maritime safety and security. The SOLAS Convention is generally accepted as a central shipping regime for all parties connected to maritime transport, and the 2002 adopted amendments of the ISPS Code and other security measures enhanced the maritime security aspects of the SOLAS Convention. While the IMO's approach to link these security-based amendments to the established, maritime

<sup>32/</sup> *Neutralizing the Nuclear and Radiological Threat: Securing the Global Supply Chain*: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs, 109<sup>th</sup> Cong. (2006) (testimony of Stephen E. Flynn, Council on Foreign Relations), <http://hsgac.senate.gov>.

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

<sup>34/</sup> *See id.*

safety-based schema of the SOLAS Convention has been recognized as practical and time efficient,<sup>35/</sup> the security and trade facilitation standards of the SAFE Framework should be optimally implemented by an international agreement that applies to each mode of the supply chain.

29. Thus the first general weakness of using the SOLAS Convention to implement the SAFE Framework of Standards is the limited jurisdiction of this international agreement. Since the jurisdiction of the SOLAS Convention is focused on maritime transport and operates with limited jurisdiction on land transport such as road vehicle and rail transport, the SOLAS Convention would need to be amended to apply to all modes of transport or separate agreements would need to be signed that also applied to the other transport modes.<sup>36/</sup>

30. More specific weaknesses of the SOLAS Convention as an implementing mechanism are the past problems identified by some SOLAS Contracting Governments in adhering to parts of the SOLAS Convention, specifically the ISPS Code amendments. A 2003 survey by the International Association of Ports and Harbours reported that almost 20 percent of member ports responded that they were uncertain of meeting ISPS implementation deadlines.<sup>37/</sup> Some of the reasons cited for implementation delays included financial constraints, a lack of experienced staff and delays in legislative enactment by governing authorities. In addition, a 2003 survey by the Lloyd's Ship Manager reported that "over 60 percent of respondents did not believe that enough adequate information had been made available by flag states regarding the correct course for ISPS preparations and developments."<sup>38/</sup>

31. These past implementation issues with amending the SOLAS Convention suggest that the IMO Member State community does not possess a strong field presence that provides adequate financial assistance, information sharing and technical guidance to its less developed members.<sup>39/</sup> This issue could be directly addressed by the IMO instituting a supportive program similar to the WCO's Columbus Program for its Capacity Building goals outlined in the SAFE Framework.

32. Another weakness of using the SOLAS Convention as an implementing instrument for the SAFE Framework is that the agreement's maritime control regime is traditionally focused on the customs point of arrival. Some of the port State control procedures in the SOLAS Convention concentrate more on the items coming into the country than on the items leaving the country; this approach can be viewed as an ineffective maritime security control since once a ship carrying a containerized dirty bomb arrives in a country's port, the damage may be done.<sup>40/</sup> The advance electronic information sharing promoted by Pillar 1 of the SAFE Framework could help balance

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<sup>35/</sup> Chris Trelawney, *Cargo Security - a Case for 'Joined-Up' Government*, IMO News, No. 2 (2006), <http://www.imo.org>

<sup>36/</sup> See *id.*

<sup>37/</sup> U.N. Conference on Trade and Development, *Container Security: Major Initiatives and Related International Developments*, U.N. Doc. UNCTAD/SDTE/TLB/2004/1 (February 26, 2004), <http://www.unctad.org>.

<sup>38/</sup> See *id.*

<sup>39/</sup> International Maritime Organization, *International Shipping and World Trade: Facts and Figures*, at 27 (October 2007), <http://www.imo.org>.

<sup>40/</sup> Chris Trelawney, *Containerized Cargo Security - a Case for 'Joined-Up' Government*, IMO News, No. 2 (2006), <http://www.imo.org>.

the Customs control regime of the SOLAS Convention, and this issue could be resolved upon the incorporation of the SAFE Framework into the SOLAS Convention.

33. There are two advantages in using the SOLAS Convention as an implementing agreement. First, in prior situations, the IMO Member States have evenly enforced amendments to the SOLAS Convention in a time efficient manner. For example, after the IMO Member States adopted the enhanced maritime security measures to the SOLAS Convention in 2002, the timely implementation of the new security regime was mandatory for all 147 SOLAS Contracting Governments, without any distinction between developed countries and less developed countries.<sup>41/</sup> This past example indicates that the IMO would implement the SAFE Framework of Standards in a time efficient and level approach.

34. Second, the SOLAS Convention establishes clear, broad grounds for the application of some of its security control measures. For example, under the adopted security amendments to the SOLAS Convention of the ISPS Code and the additional enhanced security measures, a ship that is otherwise compliant with the security standards of the SOLAS Convention “may be subject to appropriate control measures if the ship had interactions with a non-compliant port facility or ship.”<sup>42/</sup>

#### IV. THE TIR<sup>43/</sup> CONVENTION

##### A. Evolution of the TIR Convention

35. The TIR Convention, in simple terms, is a multilateral treaty that underpins the existing customs transit system across many land borders around the world. The TIR Convention was prepared by a number of countries who sought the secure facilitation of the international transport of goods. The first TIR Convention was signed by 17 countries in 1959 and was preceded by a 1949 TIR Agreement. Subsequent revisions and continuous updates in response to risks and the need to maintain trade facilitation have resulted in today’s TIR Convention of 1975. This report identifies the TIR Convention of 1975 as the international instrument that could be used to implement the SAFE Framework.

36. Established international law principles recognize the legal status of the TIR Convention as a binding international treaty.<sup>44/</sup> As the generic term “convention” is synonymous with the generic term “treaty,”<sup>45/</sup> the TIR Convention is a treaty subject to the provisions of the Vienna Convention on the Law of Treaties of 1969. The 1969 Vienna Convention defines a treaty as an “international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Article 26 of the Vienna Convention defines the binding legal authority of treaties and states that “Every treaty in force is binding upon the

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<sup>41/</sup> U.N. Conference on Trade and Development, *Container Security: Major Initiatives and Related International Developments*, U.N. Doc. UNCTAD/SDTE/TLB/2004/1 (February 26, 2004), <http://www.unctad.org>.

<sup>42/</sup> International Maritime Organization, *Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code*, at Annex II, 3, I:\CIRC\MSC\1111.doc (June 7, 2004), <http://www.imo.org>.

<sup>43/</sup> TIR stands for “Transports Internationaux Routiers”.

<sup>44/</sup> U.N. Office of Legal Affairs, Treaty Section, *Treaty Reference Guide* (1999), <http://untreaty.un.org>.

<sup>45/</sup> U.N. Office of Legal Affairs, Treaty Section, *Treaty Reference Guide* (1999), <http://untreaty.un.org>.

parties to it and must be performed by them in good faith”.<sup>46/</sup> The SOLAS Convention and the Revised Kyoto Convention also derive their legal authority as binding international treaties from the provisions of the Vienna Convention.

## **B. Contracting Parties to the TIR Convention**

37. Article 52 of the TIR Convention provides that states may become contracting parties to the TIR Convention by three methods, one method being accession.<sup>47/</sup> Accession to a treaty has the same legal effect as ratification, and establishes a state’s consent to be bound by a treaty. A United Nations (UN) guide to conventions explains that states wishing to join a UN convention need to deposit an instrument of accession, ratification or approval with the Secretary-General of the United Nations. Article 53 of the TIR Convention provides that six months following the date that a state deposits an instrument of accession with the Secretary General of the United Nations, the TIR Convention enters into force for that state.

38. In 1982, the U.S. became a contracting party to the TIR Convention of 1975 by accession.<sup>48/</sup> Customary international law provides that when countries accede to an international legal instrument, they agree to introduce its provisions into their national legislation in accordance with the principles of their national constitutions.<sup>49/</sup> Following the U.S. Senate’s affirmative “advice and consent” vote and the President’s ratification, a treaty is deposited in the National Archives by the President and then becomes domestic U.S. treaty law.<sup>50/</sup> A treaty does not become effective as U.S. domestic law automatically upon its entry into force on the international level unless the agreement operates without any need for implementing legislation. The TIR Convention was not a self-executing treaty and was implemented by U.S. federal law under Executive Order 12445 by President Ronald Reagan.<sup>51/</sup> The TIR Convention operates with the same legal authority as a federal statute because treaties and federal statutes are considered equal in authority, and so long as the provisions of a treaty comply with the U.S. Constitution, a treaty “will prevail over contrary law enacted by any one of the fifty states” or will normally prevail over a federal statute if the treaty is “later in time.”<sup>52/</sup>

## **C. The Connection Between the TIR Convention and the UNECE**

39. The relationship between the TIR Convention and the UN deserves a detailed explanation. Several international organizations state that the TIR Convention was produced “under the aegis” or “under the auspices” of the UN Economic Commission for Europe (UNECE), a regional UN Commission of 56 countries including the United States and Canada. These

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<sup>46/</sup> Vienna Convention on the Law of Treaties (with annex), May 23, 1969, 1155 U.N.T.S. 331, 339, <http://untreaty.un.org>.

<sup>47/</sup> Customs Convention on International Transport of Goods Under Cover of TIR Carnets (TIR Convention) (with annexes), November 14, 1975, 1079 U.N.T.S. 89, 101, <http://untreaty.un.org>.

<sup>48/</sup> U.N. Office of Legal Affairs, Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* at 637, U.N. Doc. ST/LEG/SER.E/25 (Vol. I), U.N. Sales No. E.07.V.3 (2007), <http://untreaty.un.org>.

<sup>49/</sup> Email from Artur Bouten, Legal Officer, TIR Secretariat, U.N. Economic Commission for Europe, to Josh Brill, Research Specialist, GlobalOptions, Inc. (October 31, 2007).

<sup>50/</sup> U.S. Senate, Staff of the Senate Historical Office, *Treaties*, <http://www.senate.gov>.

<sup>51/</sup> Exec. Order 12445, 48 FR 48441 (Oct. 19, 1983).

<sup>52/</sup> Indiana University School of Law, Ruth Lilly Law Library, *Finding U.S. Law in Treaties*, <http://indylaw.indiana.edu>.

statements are relatively vague, but according to the TIR Secretariat's Legal Office with the UNECE, the TIR Convention was not drafted by the UNECE, but prepared by a number of European countries meeting in Geneva. For this meeting, the UNECE provided a secretariat and use of its facilities to these countries for their discussion and preparation of the TIR Convention.<sup>53/</sup> Thus while the UNECE did not draft nor sponsor the TIR Convention, the TIR Convention is a UN treaty that the UNECE promotes as an essential multilateral instrument for the facilitation of international trade.<sup>54/</sup> All agreements and conventions, once deposited with the Secretary-General of the UN, are recognized as multilateral legal instruments of the UN.<sup>55/</sup>

40. Perhaps one way to describe the connection between the TIR Convention and the UN is that of a franchise owner and the corporate chain restaurant that the owner represents. The UN, as the corporate chain restaurant, provides the franchise owner with the tools necessary to set up the business and benefits from the name recognition of the brand, as does the UN with its name and logo on the TIR Convention. The TIR Convention, as the franchise owner, operates and manages the day-to-day details of running the business.

#### **D. Enforcement of the TIR Convention and The TIR Administrative Committee**

41. While the above analogy of the franchise owner and corporate chain restaurant suits the purposes of this study on a basic level, the analogy does not accurately reflect specific items. One key item that neither the UN nor the UNECE possess is the authority to enforce the provisions of the TIR Convention. While a corporate chain restaurant, through its legal agreements with the franchise owner, would likely possess the authority to enforce corporate chain regulations, the UN does not possess the authority to enforce the provisions of the TIR Convention. The UN, via the UNECE, does not dispose of any tool to enforce or implement the provisions of the TIR Convention. The TIR Convention also does not contain any tools to enforce the correct implementations of its provisions at the national level.<sup>56/</sup> How then has it remained a functioning mechanism, through boom and bust, peace and war, across hundreds of border crossings, providing \$700 million of guarantees on a daily basis for almost 60 years?

42. At the inception of the TIR Convention, a regulating body called the Administrative Committee was established. The Administrative Committee is the highest organ under the TIR Convention and consists of all of the contracting parties to the convention. The Administrative Committee usually meets twice a year in Geneva or at the request of at least five contracting parties to the TIR Convention. If a situation arises where a contracting party does not abide by the TIR Convention provisions, it is at the discretion of the Administrative Committee to discuss the party's noncompliance and provide that contracting party with its opinion.<sup>57/</sup>

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<sup>53/</sup> Email from Artur Bouten, Legal Officer, TIR Secretariat, U.N. Economic Commission for Europe, to Josh Brill, Research Specialist, GlobalOptions, Inc. (October 31, 2007).

<sup>54/</sup> Email from Christian Piaget, Head of TIR Policy and External Relations, International Road Transport Union, to Josh Brill, Research Specialist, GlobalOptions, Inc. (November 5, 2007).

<sup>55/</sup> U.N. Office of Legal Affairs, Treaty Section, *Multilateral Treaties Deposited with the Secretary-General* at III, U.N. Doc. ST/LEG/SER.E/25 (Vol. I), U.N. Sales No. E.07.V.3 (2007), <http://untreaty.un.org>.

<sup>56/</sup> Email from Artur Bouten, Legal Officer, TIR Secretariat, U.N. Economic Commission for Europe, to Josh Brill, Research Specialist, GlobalOptions, Inc. (October 31, 2007).

<sup>57/</sup> Email from Artur Bouten, Legal Officer, TIR Secretariat, U.N. Economic Commission for Europe, to Josh Brill, Research Specialist, GlobalOptions, Inc. (October 31, 2007).

## E. Strengths and Weaknesses of the TIR Convention

43. The central inquiry of this analysis is whether TIR can evolve from an effective and tested commercial facilitation mechanism to include a trade security arrangement in the context of the SAFE convention. The TIR Convention, currently signed by over 65 countries, is recognized as the “only universal Customs transit system in existence.”<sup>58/</sup> According to a Transport Division document by the UN’s Economic Commission for Europe, the TIR system operates within a widespread network; in developed countries, the use of the TIR Convention has led to increases in transport efficiency and cost savings for transport in Eastern Europe, Western Europe, and from Europe to Northern Africa and towards the Middle East and Central Asia.<sup>59/</sup> The trade between Southeastern Asia and Europe and developing regions such as the Central Asian Republics of Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan is rapidly expanding, and the Asian Development Bank recommended the full implementation of the TIR Convention in these regions’ territories.<sup>60/</sup> Thus the first broad strength of the TIR Convention as an implementing mechanism for the SAFE Framework is its widespread use, acceptance, mutual recognition of customs controls and procedures and its recognition as an effective international customs system.

44. Another advantage of using the TIR Convention as an implementing instrument for the SAFE Framework is the multimodal application of the agreement. Under Article 2 of the TIR Convention, the text states that the treaty will apply to the transport of goods across one or more frontiers of a Contracting Party “provided that some portion of the journey between the beginning and the end of the TIR transport is made by road.”<sup>61/</sup> Thus a universal component and a multimodal component are applicable to the TIR Convention, and so long as one segment of the journey is completed by road transport, the TIR Convention provides that numerous types of goods may be carried in containers or in road vehicles by rail, road vehicle, sea or inland water transport (See Figure 3).<sup>62/</sup> The TIR Carnet, the customs transit document permitting international transport as stated in the TIR Convention, covers the transit operation carried out only for the segment by road transport.

45. A third advantage of the TIR Convention as an implementing agreement is that the TIR Convention operates with a built-in guaranteeing chain to cover the duties and taxes at risk for transport movements covered by a TIR Carnets. The guarantee chain that TIR relies on makes it in effect a sophisticated public-private risk assessment and management system. As established under the TIR Convention, the guaranteeing chain is managed by the International Road Transport Union (IRU). The IRU, based in Geneva, is recognized as the international

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<sup>58/</sup> U.N. Economic Commission for Europe, *TIR Handbook*, U.N. Doc. ECE/TRANS/TIR/6/Rev.8 (2007), <http://www.unece.org>.

<sup>59/</sup> U.N. Economic Commission for Europe, Transport Division, *United Nations Facilitation Conventions: TIR Convention* (November 20, 2004), <http://r0.unctad.org/ttl/ppt-2004-11-24/Poul%20Hansen%20ECE.pdf>.

<sup>60/</sup> Asian Development Bank, *Central Asia: Increasing Gains from Trade Through Regional Cooperation in Trade Policy, Transport, and Customs Transit* (2006), <http://www.adb.org>.

<sup>61/</sup> U.N. Economic Commission for Europe, *TIR Handbook*, U.N. Doc. ECE/TRANS/TIR/6/Rev.8 (2007), <http://www.unece.org>.

<sup>62/</sup> Jeffrey Liang and Dorothea Lazaro, *Central Asia: Increasing Gains from Trade through Regional Cooperation in Trade Policy, Transport, and Customs Transit*, Asian Development Bank (2006), <http://www.adb.org>.

organization for the TIR system, and is also responsible for the printing the TIR Carnets and distributing them to its national associations.<sup>63/</sup>

**Figure 3: The Multimodal Advantage of the TIR Convention**

- Road Transport
- Rail Transport
- Maritime and Inland Water Transport
- Air Transport

\* The TIR Carnet can apply providing one segment of the transit operation is undertaken by road transport.

46. The importance of the TIR Convention's guaranteeing chain should be highlighted; the guaranteeing chain serves as an attractive risk management tool to countries operating under the TIR system since the guarantee obligations of the national associations are backed by insurance companies.<sup>64/</sup>

47. Fourth, the TIR system supports the advanced electronic cargo information standard of the SAFE Framework's Customs-to-Customs Pillar 1. More than one decade ago, the TIR Contracting States adopted an international electronic data interchange (EDI) control system for TIR Carnets called SafeTIR, developed by the IRU, in order to improve risk management procedures. SafeTIR, now introduced as Annex 10 of the TIR Convention, allows Customs administrations to provide and interrogate useful risk management data and to be informed about TIR transport movements. In addition the IRU has developed an I.T. application allowing for pre-notification or summary declarations to customs authorities of any transport vehicle with any goods conveyed.<sup>65/</sup> As of December 2006, an electronic TIR pre-declaration pilot tool tested successfully with several countries, allowing the use of the TIR Carnet as the customs declaration via the internet and complying with the SAFE Framework and the revised provisions of the European Union Customs Code regarding advanced cargo information.<sup>66/</sup>

48. Fifth, the TIR Convention and the SAFE Framework share similar definitions for the status of cleared and authorized parties that engage in global trade activities. Under the TIR Convention, "the status of authorized TIR transport operator is essentially based on the same criteria as those necessary to obtain the status of AEO under the SAFE Framework."<sup>67/</sup> Similar to the Customs Pillar 2 of the SAFE Framework that partners Customs administrations and the private sector to maintain the security guarantees of AEOs, the TIR Convention regulates access

<sup>63/</sup> U.N. Economic Commission for Europe, Transport Division, *United Nations Facilitation Conventions: TIR Convention* (November 20, 2004), <http://r0.unctad.org/ttl/ppt-2004-11-24/Poul%20Hansen%20ECE.pdf>. Modified by Gordon Wright, Head of Customs Security and Transit matters.

<sup>64/</sup> Asian Development Bank, *Central Asia: Increasing Gains from Trade through Regional Cooperation in Trade Policy, Transport, and Customs Transit* (2006), <http://www.adb.org>.

<sup>65/</sup> Christian Piaget, *Compliance of the TIR System with the WCO Framework of Standards*, IRU Events: Contribution of the TIR System to the Security of Trade and Transport (March 2007), <http://www.iru.org>.

<sup>66/</sup> Andrea Graf-Gruber, *Presentation of the Project NCTS/TIR: Electronic TIR pre-Declaration*, IRU Events: Contribution of the TIR System to the Security of Trade and Transport (March 2007), <http://www.iru.org>.

<sup>67/</sup> Christian Piaget, *Compliance of the TIR System with the WCO Framework of Standards*, IRU Events: Contribution of the TIR System to the Security of Trade and Transport (March 2007), <http://www.iru.org>.

to the TIR system though cooperation between national customs authorities and private sector associations that employ a selective process and strict criteria for authorized transport companies to use the system.<sup>68/</sup> In addition, Annex 9 of the TIR Convention provides an accreditation process for authorized TIR transport operators that is more rigorous and comprehensive than the AEO accreditation process outlined by the SAFE Framework.<sup>69/</sup> The binding legal authority of the TIR Convention also provides an effective international platform for the mutual recognition of the AEO status.

49. There are three main weaknesses in using the TIR Convention as an implementing agreement for the SAFE Framework. The first drawback is that the fixed costs and strict security requirements of the TIR system are considered too cumbersome for some transport operators from developing countries. For example, most of the transport operators in the Central Asian Republic countries are small to medium-sized companies that cannot afford using the TIR system due to the high fixed costs of certified road vehicles and various transport operator fees. This disadvantage could be offset by some of the direct benefits to a country participating in the TIR system such as faster border crossings and exemptions from required customs escorts.<sup>70/</sup> It should also be noted that the fixed costs screen away some of the less-established operators with skimpy credit history, poor Customs compliance records, or ownership information.

50. A second weakness of using the TIR Convention to implement the SAFE Framework is that organized crime and smuggling activities have negatively affected the TIR system in the past. As the largest existing customs transit mechanism in the world, the TIR system is constantly stress-tested by organized crime. According to the UN Economic Commission for Europe, the emergence of newly independent states in Europe and increased European commerce traffic was followed by the falsification of customs stamps, the filing of false cargo declarations and the disappearance of entire truck loads of goods bound for sale on black markets.<sup>71/</sup> But Contracting States to the TIR Convention have developed countermeasures to reduce the number of fraudulent incidents and increase confidence in customs control measures through automated initiatives such as the SafeTIR control system database referred to as the Customs Utility for TIR Transaction Entry Worldwide Information System for Enquiry (CUTE-Wise).<sup>72/</sup>

51. The third weakness of the TIR Convention is that the provisions of the agreement, as previously noted, singularly apply the TIR Carnet system controls to road transport. While a container or road vehicle could be transported under cover of a TIR Carnet in a combined transport operation, the TIR Carnet is currently mainly used for transport operations by road and in a country with which a TIR transit operation can be established.<sup>73/</sup> The TIR system can be

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<sup>68/</sup> See *id.*

<sup>69/</sup> Umberto de Pretto, Speech at the IRU Road Freight Transport Security Seminar (September 17, 2007), <http://www.iru.org>.

<sup>70/</sup> Asian Development Bank, *Central Asia: Increasing Gains from Trade Through Regional Cooperation in Trade Policy, Transport, and Customs Transit* (2006), <http://www.adb.org>.

<sup>71/</sup> U.N. Economic Commission for Europe, Transport Division, *United Nations Facilitation Conventions: TIR Convention* (November 20, 2004), <http://r0.unctad.org/ttl/ppt-2004-11-24/Poul%20Hansen%20ECE.pdf>.

<sup>72/</sup> Asian Development Bank, *Forum on TIR Customs Transit System: Role of the IRU and National Associations in the TIR System* (October 2005), <http://www.adb.org>.

<sup>73/</sup> International Road Transport Union, Glossary: TIR System, <http://www.iru.org> (last visited December 11, 2007).

used for containers in other modes of transport and the United Nations should investigate the possibility of extending the application of the TIR Convention to other components of the logistics chain other than road transport.<sup>74/</sup>

## V. ALTERNATIVE METHODS TO IMPLEMENT THE SAFE FRAMEWORK OF STANDARDS

### A. Bilateral Agreements

52. As discussed in the introduction, bilateral and unilateral agreements are alternate mechanisms that could be used to implement the SAFE Framework of Standards. For the countries that use the bilateral agreement mechanism to sync their customs security standards and AEO programs, there are two advantages and two disadvantages under this approach. The first advantage of the bilateral approach is that countries that enter into a limited, bilateral agreement with another country will be assured that their trading is transacted with a low security risk trading partner. A level of trading assurance will be established between the two contracting countries since the bilateral agreement could be modified and shaped to meet a country's set level of trade or security requirements.<sup>75/</sup> Second, a bilateral agreement that implements the pillars of the SAFE Framework will benefit both industry and government groups. For industry groups connected to global trade, the benefits could include reduced business costs, decreased incidents of pilferage and increased control over "just-in-time" deliveries.<sup>76/</sup> For government agencies that depended upon the timely shipment of goods, the benefits could include the ability to direct resources in a more expedient manner to priority areas.<sup>77/</sup>

53. The general weaknesses of using a bilateral agreement to implement the SAFE Framework stem from time and uniformity issues. First, the U.S. would need to allow for the lengthy time process required to negotiate more than 100 separate bilateral agreements with the WCO members who have agreed to implement the SAFE Framework. Second, the increased security measures, trade facilitation and overall uniformity sought by implementing the SAFE Framework would likely be jeopardized by numerous separate bilateral agreements since the terms of the agreements would differ.<sup>78/</sup>

54. In June 2007, the U.S. via CBP and New Zealand via the New Zealand Customs Service entered into a bilateral agreement that will implement the Customs-to-Business pillar of the SAFE Framework. The agreement, identified as a Mutual Recognition Arrangement, is the first such arrangement entered into since the adoption of the SAFE Framework in 2005. According to an October 2007 Government Accountability Office (GAO) study, the U.S. is also pursuing similar bilateral arrangements with Jordan and Japan, and is conducting a pilot program with the

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<sup>74/</sup> Godfried Smit, Speech at the IRU Road Freight Transport Security Seminar (September 17, 2007), <http://www.iru.org>.

<sup>75/</sup> Email from Gordon Wright, Head of Customs Security & Transport Matters. (September 14, 2007).

<sup>76/</sup> U.S. Customs and Border Protection, Press Release, *U.S., New Zealand Establish Joint Trade Security Agreement* (October 22, 2007), <http://www.cbp.gov>.

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

<sup>78/</sup> Email from Gordon Wright, Head of Customs Security & Transport Matters (September 14, 2007).

European Commission to test approaches to achieving mutual recognition and address differences in each of their programs.<sup>79/</sup>

55. The GAO study states that under the bilateral arrangements, each country will have to establish with the other country the compatibility of their customs and security supply chain programs before the specific implementation details of the mutual recognition arrangement will be confirmed. The GAO study also notes that challenges exist for countries entering into bilateral mutual recognition arrangements that desire to pursue and define individual supply chain security programs such as the Container Security Initiative (CSI), the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Free and Secure Trade Program (FAST) by the U.S.<sup>80/</sup>

## **B. Unilateral Agreements**

56. The SAFE Framework could also be implemented by a unilateral agreement, or perhaps more accurately stated, the SAFE Framework could be implemented by a country's unilateral declaration that operated as an international agreement.<sup>81/</sup> However, a July 2007 DHS publication comments that "International cargo supply chain security is a global issue that cannot be successfully achieved unilaterally."<sup>82/</sup> While a country could choose to implement the SAFE Framework by incorporating these guidelines into their national legislation and supply chain security programs, there are several disadvantages to the unilateral approach. First, import maritime security would be the only segment of supply chain security that would benefit under a unilateral approach since other segments such as rail cargo, truck/other road vehicle cargo and air cargo would not be addressed. Second, a unilateral approach does not provide the environment/setting to establish AEOs since the AEO concept was designed as an inclusive, cooperative program that would lead to mutual recognition of the program participants. Third, a unilateral approach encourages protectionist trade policies and could damage the growth of U.S. trade.<sup>83/</sup>

57. The general advantage of the unilateral approach is similar to that of the bilateral approach; a country could tailor the implementation of the SAFE Framework to its preferred levels of trade or security requirements.<sup>84/</sup>

## **VI. CONCLUSION**

58. To date, the majority of the countries engaged in international trade have collectively supported and agreed to implement the SAFE Framework of Standards, and an implementing mechanism is needed. This study presented several examples of multilateral international agreements as implementing mechanisms for the SAFE Framework; while each of these separate

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<sup>79/</sup> *The Security of our Nation's Ports: Maritime Security: The SAFE Port Act and Efforts to Secure our Nation's Ports*: Hearing Before the Senate Comm. on Commerce, Science and Transportation, 110<sup>th</sup> Cong. (2007) (testimony of Stephen L. Caldwell, Government Accountability Office), <http://commerce.senate.gov>.

<sup>80/</sup> *See id.*

<sup>81/</sup> U.N. Office of Legal Affairs, Treaty Section, *Treaty Handbook* (March 2006), <http://untreaty.un.org>.

<sup>82/</sup> U.S. Department of Homeland Security, Prevention & Protection Publications Section, *Strategy to Enhance International Supply Chain Security* (July 2007), <http://www.dhs.gov>.

<sup>83/</sup> Email from Gordon Wright, Head of Customs Security & Transport Matters (September 14, 2007).

<sup>84/</sup> *See id.*

multilateral agreements has advantages and disadvantages as respective implementation options, the practical advantages of utilizing a multilateral format exceed any benefits gained from piecemeal bilateral or unilateral agreements.

#### **A. Amending the Revised Kyoto Convention to Implement the SAFE Framework of Standards**

59. As noted above, one approach to implementation of the SAFE Framework's key provisions is to amend the General Annex of the RKC. Amending the Specific Annexes of the RKC is not a viable solution since acceding to the Specific Annexes is optional and new contracting parties could fail to comply with the SAFE Framework standards if the country did not accede to all of the relevant Specific Annexes. While a contracting party must accede to the Body of the RKC, the Body serves as an introductory section that includes a preamble and five brief chapters addressing procedural matters; thus amending the procedural Body of the RKC to include the substantive sections of the SAFE Framework seems an incompatible solution.

60. Amending the General Annex of the RKC is addressed in Chapter IV of the Body and is a simple process. Six months following the date that a recommended amendment was communicated to the Contracting Parties by the RKC's Management Committee, the recommended amendment is deemed to have been accepted unless a Contracting Party objects, a Contracting Party bound by a Specific Annex or Chapter objects, or a Contracting Party informs the Secretary General of the Council of an acceptance issue with the recommended amendment.<sup>85/</sup> The key provisions of the SAFE Framework could each be included in their entirety as new chapters amending the RKC's General Annex. This method of incorporation enables the RKC to implement the SAFE Framework standards in a document-friendly, simplified manner.

61. For example, the central tenet of the SAFE Framework's Pillar 1 is the use of advance electronic information by Customs administrations to identify high-risk containers or cargo,<sup>86/</sup> and the eleven standards comprising Pillar 1 address different aspects of customs control procedures. Some of the standards, such as Standard 3 which specifically provides for "non-intrusive inspection equipment and radiation detection equipment" and Standard 11 which provides for "outbound security inspection of high risk containers and cargo," both indirectly expand on the RKC principles of utilizing modern customs control applications and electronic technology.<sup>87/</sup> Some of the other standards, such as Standard 2 which provides for the customs authority to inspect inbound and outbound cargo and Standard 6 which states that "the Customs administration should require advance electronic information on cargo and container shipments in time for adequate risk assessments to take place" either directly reference the RKC in the SAFE Framework text or directly refer to similar Customs control terms noted in the RKC.<sup>88/</sup>

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<sup>85/</sup> World Customs Organization, *Text of the Revised Kyoto Convention*, Article 3, 15, <http://www.wcoomd.org> (last visited November 27, 2007).

<sup>86/</sup> World Customs Organization, *WCO SAFE Framework of Standards*, Section 3 (June 23, 2005), <http://www.wcoomd.org>.

<sup>87/</sup> *See id.*

<sup>88/</sup> *See id.*

62. The Pillar 2 of the SAFE Framework, the Customs-to-Business section, could also be included in its entirety as a new chapter amending the RKC's General Annex. The six standards comprising Pillar 2 focus on the partnership between Customs administrations and the private sector, specifically with respect to identifying business partners as AEOs. As noted earlier in this study, the RKC provides a basis for the AEO concept in the Chapter 3 General Annex section titled "Special procedures for authorized persons."<sup>89/</sup> To smoothly transition the SAFE Framework Pillar 2 standards into the RKC, a brief amendment to this section could formally define AEOs as the term described by the authorized persons section and further direct the reader to the new General Annex Chapter that incorporates the AEO Guidelines. In addition, the new chapter in the RKC's General Annex incorporating Pillar 2 of the SAFE Framework will include the complete section 5 of the SAFE Framework that describes AEO authorization, validation and monitoring processes, and mutual recognition, the standardized approach to AEO authorization.

63. Another provision of the SAFE Framework that could be incorporated into the RKC's General Annex as a new chapter is the Capacity Building section. Although there are brief references to Capacity Building in the SAFE Framework's Introduction and Pillar 1, the need for a separate, new Chapter amending the RKC addressing Capacity Building is underscored by the importance of Capacity Building to the successful implementation of the SAFE Framework. As many countries will require assistance implementing the SAFE Framework, the phased approach of the WCO's Columbus Program should be the suggested model for prospective contracting parties in the new RKC's Capacity Building Chapter.

#### **B. Amending the SOLAS Convention to Implement the SAFE Framework of Standards**

64. There exists a direct connection between the SOLAS Convention and the SAFE Framework. At the 2002 Diplomatic Conference that adopted the enhanced security amendments to the SOLAS Convention, the IMO and the Contracting Governments to the SOLAS Convention anticipated the benefit gained from the drafting of the SAFE Framework by the WCO. The majority of the SOLAS Contracting Governments recognized the competency of the WCO on customs security and trade facilitation matters, and at the Conference, these SOLAS parties requested the WCO to broaden the scope of security regarding closed cargo transport units (CTUs).<sup>90/</sup> Specifically, the Diplomatic Conference adopted a resolution that invited the WCO to consider measures to enhance security throughout international closed CTU movements and that agreed that "the [SOLAS] Convention should be amended, if and when appropriate, to give effect to relevant decisions taken by the WCO and endorsed by the Contracting Governments of the Convention insofar as these relate to the carriage of closed CTUs by sea."<sup>91/</sup> Thus the adoption of the enhanced security measures to the SOLAS Convention and the

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<sup>89/</sup> World Customs Organization, *Text of the Revised Kyoto Convention*, General Annex, Chapter 3, <http://www.wcoomd.org> (last visited November 27, 2007).

<sup>90/</sup> Chris Trelawney, *Containerized Cargo Security - a Case for 'Joined-Up' Government*, IMO News, No. 2 (2006), <http://www.imo.org>.

<sup>91/</sup> *See id.*

cooperative effort between the IMO and the WCO were both part of a broader initiative to counter terrorism.<sup>92/</sup>

65. The amendment procedure of the SOLAS Convention is straightforward and simplified. A tacit acceptance procedure “provides that an amendment shall enter into force on a specified date, unless, before that date, objections to the amendment are received from an agreed number of parties.”<sup>93/</sup> Under Article VIII of the SOLAS Convention, amendments are proposed by a Contracting Government to a Maritime Safety Committee or at a Conference of Contracting Parties. For both options, amendments are adopted by a two-thirds majority of Contracting Governments present and voting, and amendments are deemed accepted after a period of time set by the adopting Contracting Governments unless a specified number of Contracting Governments object. The period of time for acceptance is set at two years unless another time is established by the Contracting Governments and the period of time cannot be less than one year. Amendments enter into force six months following the date of their acceptance.<sup>94/</sup>

66. The SOLAS Convention is comprised of an introductory group of Articles setting out general obligations, the amendment process and other procedural matters and an Annex describing the substantive sections of the agreement. The bulk of the SOLAS Convention sections apply to the safety of ships, but there are two chapters that discuss security procedures and standards, Chapter VI and Chapter XI-2. Chapter VI addresses the carriage of all types of cargoes except bulk liquids and gases, and Chapter XI-2, as previously noted, addresses various special measures that enhance maritime security. The SOLAS Convention could implement the provisions of the SAFE Framework by incorporating the relevant sections of the SAFE Framework into these two chapters and then incorporating the remaining provisions of the SAFE Framework as separate additional amendments.

67. Chapter VI of the SOLAS Convention discusses regulations for the stowage and securing of cargo or containers. Under Pillar 1 of the SAFE Framework, the first standard describes the customs control procedures for Integrated Supply Chain Management, specifically discussing the procedures for sealing containers at stuffing sites. This first standard of Pillar 1 should be incorporated in its entirety as an amendment into Chapter VI of SOLAS.

68. Chapter XI-2, which includes the ISPS Code, should be amended to incorporate the remaining standards of Pillar 1 of the SAFE Framework. As several parts of this chapter of the SOLAS Convention apply to security procedures required by Customs administrations, the Customs-to-Customs focus of the Pillar 1 standards of the SAFE Framework appropriately supplement this chapter.

69. The remaining Pillar 2 of the SAFE Framework and the Capacity Building section should be incorporated into the SOLAS Convention as separate additional amendments. Although Chapter XI-2 contains regulations regarding the security responsibilities of port facilities and private sector companies, the AEO concept is not detailed as specifically as in the SAFE

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<sup>92/</sup> International Maritime Organization, FAQs on ISPS Code and Maritime Security (last visited on November 2, 2007), <http://www.imo.org>.

<sup>93/</sup> International Maritime Organization, International Convention for the Safety of Life of Sea (SOLAS), 1974 (last visited on November 2, 2007), <http://www.imo.org>.

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

Framework. Thus the SAFE Framework provisions of Pillar 2 discussing the AEO guidelines would operate more effectively as an independent section in the SOLAS Convention.

70. As anticipated by the 2002 SOLAS Conference Contracting Governments, the SOLAS Convention should broaden the scope of its security regime by amendments that conform to the security standards of the WCO. However, these SOLAS Contracting Governments specifically stated that the amendments to the SOLAS Convention would comply with only those security standards of the WCO that related to the transport of closed containers by sea. While the SAFE Framework standards apply to all modes of international transport, the SOLAS Convention's limited jurisdiction constrains the application of the agreement to sea transport. Regardless of the incorporation of the inclusive standards of the SAFE Framework to the SOLAS Convention, the Contracting Governments of the SOLAS Convention would need to expand the scope of the agreement to all modes of transport or utilize other international agreements in order to present a modern, comprehensive customs transport agreement.

### **C. Amending the TIR Convention to Implement the SAFE Framework of Standards**

71. As the chart below indicates, the majority of the SAFE Framework of Standards is currently implemented by the TIR Convention (See Figure 3).<sup>95/</sup> The TIR Convention compliments the SAFE Framework of Standards as a suitable implementing mechanism since the majority of the standards outlined in the SAFE Framework align with standards in the TIR Convention.

72. In order to effectively implement the SAFE Framework, the TIR Convention should be amended with the addition of a new security Annex and the amendment of a few of its existing Annexes.<sup>96/</sup> The amendment procedure of the TIR Convention is flexible and would enable the incorporation of the SAFE Framework in a reasonable timeframe.<sup>97/</sup> Article 59 of the TIR Convention provides that both the Body of the TIR Convention and its Annexes are open for amendment. Following the proposal of an amendment by a Contracting Party to the TIR Administrative Committee, the amendment will be considered by the TIR Administrative Committee, and if a two-thirds majority of the members present and voting support the amendment, it will be adopted. Upon the amendment's adoption, the amendment shall be communicated by the Secretary-General of the United Nations to the Contracting Parties for their acceptance. After the subsequent communication to the Contracting Parties and the expiry of a fifteen month time period or another time period as indicated by Article 60, the amendment will come into force for all Contracting Parties provided there were no objections communicated to the proposed amendment.<sup>98/</sup>

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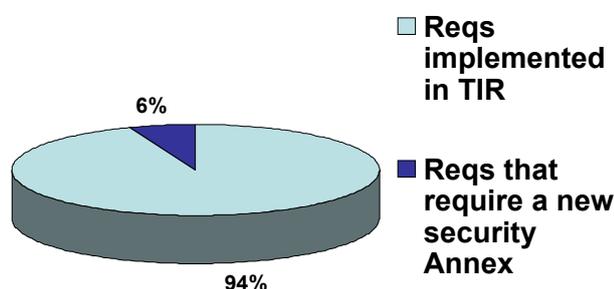
<sup>95/</sup> Microsoft PowerPoint Presentation from Christian Piaget, Head of TIR Policy and External Relations, International Road Transport Union, to Josh Brill, Research Specialist, GlobalOptions, Inc. (November 13, 2007) (on file with author).

<sup>96/</sup> Interview with Christian Piaget, Head of TIR Policy and External Relations, International Road Transport Union, in Washington, D.C. (November 13, 2007).

<sup>97/</sup> Umberto de Pretto, Speech at the IRU Road Freight Transport Security Seminar (September 17, 2007), <http://www.iru.org>.

<sup>98/</sup> U.N. Economic Commission for Europe, *TIR Handbook*, U.N. Doc. ECE/TRANS/TIR/6/Rev.8 (2007), <http://www.unece.org>.

Figure 4: The SAFE Framework of Standards and the TIR Convention



73. Several of the Customs-to-Customs standards in the SAFE Framework's Pillar 1 are currently implemented by the TIR Convention and some of the standards would require adoption in a new security Annex. Standard 2 of the SAFE Framework regarding Cargo Inspection Authority is referred to by Articles 5, 19, 23 and 24 and directly addressed by Article 21 of the TIR Convention. Standard 5 of the SAFE Framework regarding High Risk Cargo or Container is directly addressed by Annex 10 of the TIR Convention and as discussed above, the SafeTIR control system and additional automated pilot tools provide for advanced electronic cargo information. Standards 7, 9 and 11 of the SAFE Framework regarding general security responsibilities of customs administrations are currently addressed by Articles 49 and 50 TIR Convention and these security standards could be implemented by the TIR Convention's binding legal authority with few revisions of the treaty text.<sup>99/</sup>

74. The remaining standards of the Customs-to-Customs network arrangements would require incorporation into the TIR Convention in a new security Annex. Standard 3 regarding Modern Technology in Inspection Equipment, Standard 8 regarding performance measures and Standard 10 regarding employee integrity would require incorporation into the new security Annex in its entirety. The other standards, 1, 4, and 6 are addressed in partial sections by the TIR Convention, but require incorporation into the new security Annex in order to achieve the goal of full implementation.<sup>100/</sup>

75. The majority of the SAFE Framework's Customs-to-Business standards are directly addressed and implemented by the TIR Convention. Annex 9 of the TIR Convention currently implements Standard 1 of the SAFE Framework regarding the Partnership between Customs administrations and AEOs and Standard 4 regarding the use of modern technology. Standards 3, 5 and 6 are also currently implemented by various provisions of the TIR Convention Annexes. In order to achieve complete implementation of the security guidelines in Standard 2 regarding

<sup>99/</sup> Microsoft PowerPoint Presentation from Christian Piaget, Head of TIR Policy and External Relations, International Road Transport Union, to Josh Brill, Research Specialist, GlobalOptions, Inc. (November 13, 2007) (on file with author).

<sup>100/</sup> See *id.*

the security practices of AEOs, Standard 2 should be incorporated in its entirety into the new security Annex.<sup>101/</sup>

76. Highlighted above as an advantage of using the TIR Convention as an implementing instrument for the SAFE Framework, the TIR Convention provides a comprehensive and multilateral platform for the mutual recognition of AEOs. Identified in Annex 9 of the TIR Convention as the authorized natural and legal person to use TIR Carnets, the TIR Convention currently implements many of the AEO guidelines outline by the SAFE Framework. In order to achieve full implementation of the SAFE Framework AEO guidelines, two steps are required. First, language should be inserted into Annex 9 that states that the Authorized TIR Operator should be recognized as an AEO.<sup>102/</sup> Second, Annex 9 of the TIR Convention should be amended to reflect all SAFE Framework AEO standards not currently implemented by the TIR Convention.

77. As the Capacity Building program referred to in the SAFE Framework is a critical element for the successful implementation of the SAFE Framework by less developed countries, the SAFE Framework provisions noting this supportive program should also be included as an amendment to the TIR Convention. The phased approach of the WCO's Columbus Program should be the suggested model for the Capacity Building program. The amendment could be incorporated in either Annex 10 or in the new security annex.

### VIII. FINAL SUMMARY

78. Therefore, based on the conclusions drawn within this study it is clear that the multi-lateral approach derives greater benefits than the unilateral or bilateral. And, while, there are several mechanisms that help ensure the safe, secure and expeditious movement of goods around the globe; based on the multitude of factors outlined, the TIR Convention or an amended version thereof appears to offer the most logical and tested mechanism for implementing this multi-lateral approach. The TIR Convention, which is a functioning multilateral customs transit system already applicable to multimodal transport could be used as a global multilateral legal instrument to provide mutual recognition of the security requirements, including the accreditation for Authorized Economic Operators (AEO's). In the interest of enhancing security, better risk management and trade facilitation, utilizing the TIR Convention as an implementing mechanism for the requirements of the WCO SAFE framework, including AEO status could create greater certainty among trading partners that all shipments under TIR are being processed and facilitated within the same uniform guidelines and procedures as laid out in the TIR Convention.

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<sup>101/</sup> *See id.*

<sup>102/</sup> Interview with Christian Piaget, Head of TIR Policy and External Relations, International Road Transport Union, in Washington, D.C. (November 13, 2007).