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Containerships: legal frameworks and threats of illicit trade

International maritime transport in container ships has been framed with a number of international rules and norms. In addition, the misuse of maritime transport in illicit trade is a concern of both governments and industry. They have been active in combating counterfeiting and piracy on a number of fronts, both independently and, equally importantly, with each other. Besides efforts undertaken in a national context, governments have been working through multilateral institutions and on a bilateral and regional basis to address these issues. Industry has also been active, nationally and internationally, both on a sectoral and cross-sectoral basis.

This chapter provides information on the legal frameworks governing seaborne trade, including presentation of the Hague-Visby Rules, Bill of Lading, Rotterdam Rules and legal standards that frame the containerized transport. This chapter also outlines the existing legal frameworks that directly or indirectly counter specific threats posed by illicit trade in maritime transport.

Hague-Visby Rules

The so-called Hague–Visby Rules is a set of international rules that frame carriage of cargo transport by sea. Initially they were known as the Hague rules, with the official title: "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading". After the 1968 amendment (the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", known as Brussel amendment) the Hague Rules became colloquially referred to as the Hague–Visby Rules.

The rules apply to carriers and shippers and cargo owners, and set the minimum duties of carriers and shippers and cargo owners.

The rules set a list of main duties of carries, including to "*properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried*" to "*exercise due diligence to ... make the ship seaworthy*" and to "*... properly man, equip and supply the ship*". According to the Rules, shippers are obliged to pay freight, to pack the goods sufficiently for the journey, and to have the goods ready for shipment as agreed. Importantly the shipper must also describe the goods honestly and accurately, and not to ship dangerous cargo (unless agreed by both parties).

Importantly, Hague-Visby Rules do not set strict duties, instead set requirements for reasonable standards of professionalism. In addition, the rules include a wide range of situations exempting parties from liability on a cargo claim.

Bill of Lading (BOL)

The Bill of Lading is the evidence of receipt, introduced by the Hague-Visby Rules. It is a document issued by a carrier that acknowledges receipt of cargo for shipment by sea. It is a critical document used in international trade to ensure that exporters receive payments and importers receive the goods.

The primary use of the bill of lading is a receipt issued by the carrier once the goods have been loaded onto the vessel. This receipt can be used as proof of shipment for customs and insurance purposes. Hence, the BOL and the information it contains become the key input into risk profiling carried out by the enforcement officials. Consequently, it is essential that the information on BOLs be up to date and accurate.

Currently, there are cases where there is no correspondence between the description filed by shipper and the actual goods shipped. In cases of full compliance, a "clean bill of lading" is used. A "dirty bill of lading" is issued if the goods to be shipped differ in quality or quantity from the contract description, and a "STC" ("container Said To Contain") is issued if the cargo cannot be effectively examined (e.g. the container is sealed). In that case the carrier issues a BOL referring to goods as "container (identified by number) said to contain".

A possible way to address the problem of inadequacies of information in BOL, would be an electronic bill of lading, with transparent ways of data handling. Proposals to utilize this have existed for quite some time, the adoption progress has been very slow (Box 3.1)

Box 3.1. Electronic BOL

An electronic bill of lading could be a potential solution to challenges surrounding data accuracy in the BOL description. It would also offer reductions in costs and the time required to prepare paper bills of lading. An electronic BOL is the legal and functional equivalent of a paper BOL that replicates its core functions – it acts as receipt and can be presented as evidence to enforcement officials.

The processes for introducing BOLs globally tend to be very slow. Some economies lack legislation that would enable introduction of electronic BOLs, others still need specific legal solutions to such regulations. In addition, there are issues with co-ordination of efforts. Generally, the lack of commonly agreed safe standard seems to be an obstacle.

In this context, new technologies such as Blockchain might be leveraged to speed up progress of adopting electronic BOLs. Such modern technological solutions could be also used in an e-BOL environment to prevent forgery, as well as facilitate keeping e-BOLs up to date, in light of the growing number of actors, and the fast pace of modern container trade.

Rotterdam Rules

To meet the rapidly evolving phenomenon of containerization, a new treaty including a new set of rules was adopted by the United Nations.

The "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" (known as "Rotterdam Rules") proposes new international rules to revise the legal framework for maritime affreightment and carriage of goods by sea. The Rules primarily address the legal relationship between carriers and cargo-owners. They establish a comprehensive, binding, uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door shipments that involve international sea transport.

The convention was adopted by the UN General Assembly on 11 December 2008. The process of ratification by countries has been rather slow, as of September 2020 the rules have been ratified by only five countries: Benin, Cameroun, Congo, Spain and Togo.

Multimodal containers – legal settings

There are several international conventions that frame international maritime container trade, including:

- Customs Convention on Containers (CCC)
- Convention for Safe Containers (CSC)
- Istanbul Convention
- BIC-CODE

The Customs Convention on Containers (CCC), signed in 1972 is administered by the World Customs Organization. It provides for the temporary importation of containers, free of import duties and taxes, subject to re-exportation within 3 months and without the production of customs or security documents. The Convention also provides for the approval of containers under customs seal.

The Convention for Safe Containers (CSC) provides uniform international safety regulations, equally applicable to all modes of surface transport. It decrees that every container travelling internationally be fitted with a CSC Safety-approval Plate. This holds essential information about the container, including age, registration number, dimensions and weights, as well as its strength and maximum stacking capability.

The Istanbul Convention, adopted in 1990 and administered by the WCO regulates the temporary admission of goods into a Customs territory with relief from duties and taxes.

From the private sector, the Bureau International des Containers et du Transport Intermodal (BIC) oversees standards for intermodal containers, commonly referred to as "shipping containers". It aims at promotion of cooperation among corporations, governments and independent organizations relating to intermodal freight transport, the process of containerization, and the transport and handling of shipping containers. BIC was established in 1933 under the auspices of the International Chamber of Commerce

In 1970, the BIC developed the international system for containers marking known as the 'BIC-CODE' system, adopted by the International Organization for Standardization (ISO) in 1972.

Since the mid-1980s, the BIC has also been involved in the development of combined transport (rail-road and barge-road). With its considerable experience in promoting the expansion of containerization, the BIC has been involved at regional and international levels in the further development of this form of intermodal transport.

The BIC has also contributed to the development and updating of the above-mentioned international conventions, which have contributed to the tremendous expansion of containerization.

Legal frameworks to counter illicit trade in maritime transport

In the specific context of misuse of containerized maritime transport, several initiatives have been taken by the public and private sectors to monitor and to limit misuse. These initiatives include:

- Improvement of information sharing,
- Standard setting, and
- Industry declarations of intent.

Information sharing

UNODC/WCO

The United Nations Office on Drugs and Crime (UNODC) and the World Customs Organization (WCO) launched a UNODC-WCO Container Control Programme (CCP) in 2004 (UNODC, 2020). The main purpose of the programme is to facilitate the tracking of containers from the port of origin to the port of destination, by collecting the information on the routes of the freight containers through CSM data.

ConTraffic

ConTraffic is a project developed by the European Commission – Joint Research Center in collaboration with the European Antifraud Office (OLAF) and the Directorate General for Taxation and Customs Union (DG TAXUD) (JRC, 2020). It aims at supporting customs authorities dealing with the control of containerised cargo, by developing novel methods and information technology (IT) tools that assist authorities in their risk assessment activities, based on Container Status Messages (CSM) that describes the status and movement of the containers.

The front end of ConTraffic is a web site, which provides access to a number of online services:

- "Track and Trace" allows users to get CSM information on one or more containers in a specified time period or in real time.
- Container Surveillance tracks in near real-time the movements of specific containers entered in the system by the users. The application notifies (by email) the users of any detected new movements of the containers they have been entered for tracking.
- Port2Port shows the results of pre-computed statistical analysis on the logistic routes followed by carriers to transport containers between particular departure and destination ports. The graphs for the pre-calculated pair or departure-destination ports (of a particular carrier) show which routes have been used by the carrier over a period of time and with what frequency, identifying any possible outliers (i.e. abnormal routes).
- Visual Analytics is an application that allows users to interactively explore all the data in the ConTraffic database. A Visual Analytics session entails selection of the data to be displayed, followed by the visualisation of the selected data; the data are then further refined, leading to new visualisations. Once the selection criteria have been set, the selected information is visualized as a geographical map, timelines and text tables. The map shows the spatial distribution of the selected information. Symbols are represented at some locations where information has been found. For each container, several timelines are shown, depending on the selected information.

The container-shipping sector has been active in digitalisation, leading to industry-driven platforms such as Tradelens and standard setting via the Digital Container Shipping Association. Although these initiatives could raise competition concerns especially when they lock in customers (ITF, 2018b), they could also possibly help shipping companies to use their pivotal role to better scrutinise their cargo. These digital projects could help to improve the traceability of cargo and its characteristics, including its legality. That way, shipping companies could show they are serious about implementing due diligence on the cargo they transport (Merk, 2020).

Seaports should also up their game and improve their capability for effective scrutiny of cargo. Several ports have created Wildlife Traffic Monitoring Units to detect and prevent the illegal transport of wildlife. Seaports should also include combating illegal timber and wildlife trade as objectives in their sustainability strategies and be accountable for their actions on this (Merk, 2020).

Standard setting

The International Standards Organization

The International Standards Organization (ISO) is an independent, non-governmental international organization with a membership of 164 national standards bodies (ISO 2020a). Through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market relevant international standards that support innovation and provide solutions to global challenges (ISO, 2020a).

A number of standards contribute to the effective running of the shipping industry, through its dedicated committee on ships and marine technology (ISO, 2017). The committee works closely with the International Maritime Organization (IMO) to ensure that its standards respect and contribute to meeting IMO regulations (ISO, 2017).

ISO standards are also instrumental in helping to connect ports with rail hubs, air freights and land-based distribution networks, offering greater efficiency in how goods are moved. Because ISO standards are a powerful tool to ensure collaboration and efficiency across the supply chain, they make an important contribution to connecting ships, ports and people (ISO, 2017).

Standardization Activity: ISO/TC 204 Intelligent Transport Systems

This standardization concerns information, communication and control systems, including intermodal and multimodal aspects thereof, traveller information, traffic management, public transport, commercial transport, emergency services and commercial services in the intelligent transport systems (ITS) field (ISO, 1992; ISO, 2019). ISO/TC 204 is responsible for the overall system aspects and infrastructure aspects of intelligent transport systems, as well as the co-ordination of the overall ISO work programme in this field, including the schedule for standards development (ISO, 1992; ISO, 2019).

Transport telematics at the worldwide level are being addressed mainly by technical committee ISO/TC 204 Intelligent Transport Systems (ISO, 1992; ISO, 2019). Standards concerning global trade involving container ships and maritime transport cover the security of intermodal freight, the transport of dangerous goods, real time tracking of transported goods and on-board computing and mobile communication with vehicles (Baldini et al., 2015).

Working Groups (WG) for container transportation include in particular (Baldini et al., 2015):

- WG1 - Architecture
- WG3 - TICS database technology
- WG4 - Automatic vehicle and equipment identification
- WG7 - General fleet management and commercial/freight
- WG9 - Integrated transport information, management and control systems
- WG11 - Route guidance and navigation systems

Standardization Activity: ISO TC 8 Maritime.

This committee deals with the design, construction, training, structural elements, outfitting parts, equipment, methods and technology, and marine environmental matters that are used in shipbuilding. It covers sea-going ships, vessels for inland navigation, offshore structures, ship-to-shore interface, the operation of ships, marine structures subject to IMO requirements and the observation and exploration of the sea (ISO, 2020b). Of particular relevance is:

Standard: ISO 17363:2013 Supply chain applications of RFID – Freight containers

This standard prescribes the usage of read/write radio-frequency identification (RFID) cargo shipment-specific tags associated with containerized freight for supply chain management purposes (Baldini et al., 2015). It defines the air interface communications, a common set of required data structures, and a commonly organized, through common syntax and semantics, set of optional data requirements (ISO, 2013); it:

- makes recommendations about a second-generation supply chain tag intended to monitor the condition and security of a freight resident within a freight container;
- specifies the implementation of sensors for a freight resident in a freight container;
- makes specific recommendations about mandatory non-reprogrammable information on the shipment tag;
- makes specific recommendations about the data link interface for GPS or GLS services;
- specifies the reuse and recyclability of the RF tag;
- specifies the means by which the data in a compliant RF tag is "backed-up" by bar codes and two-dimensional symbols, as well as human-readable information.

In addition, there are a number of pilot projects being conducted on secure shipping containers that not only can be tracked but contain sensors that show whether a container has been tampered with at any point in the supply chain.

ASTM International

ASTM International, formerly known as American Society for Testing and Materials, is a globally recognized leader in the development and delivery of voluntary consensus standards for a wide range of materials, products, systems, and services. (ASTM, 2020a). Membership in the organization is open to anyone with an interest in its activities, and is upon request, not by appointment nor by invitation. Standards are developed within committees, and new committees are formed as needed, upon request of interested members. ASTM International has no mandate nor role in requiring or enforcing compliance with its standards.

Today, there are more than 140 countries participating in ASTM International. There are over 12,000 ASTM standards used around the world to improve product quality, enhance health and safety, strengthen market access and trade, and build consumer confidence (ASTM, 2020a).

With respect to counterfeit trade involving maritime trade, the following ASTM standards are relevant:

Standard: ASTM D5728-12: New Guide for Examination of Counterfeit Documents.

This guide provides procedures that should be used by forensic document examiners to determine whether a document is genuine or counterfeit (ASTM, 2020b). These procedures are applicable to the visual and mechanical examinations and comparisons of questioned documents to known authentic standards (ASTM, 2020b).

This standard does not purport to address all safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use (ASTM, 2020b).

Standard: ASTM D5728-12 Standard Practices for Securement of Cargo in Intermodal and Unimodal Surface Transport

This standard refers to sources that provide detailed information on the loading, blocking, bracing, and unloading of specific types of cargo in unimodal and intermodal transport. Some of these sources are proprietary, while others are massive and complex in scope; none are consistently provided to shippers, carriers, and consignees (ASTM, 2012). Many of the losses experienced by cargo in transport are due to the failure to practice proper basic cargo handling and loading techniques.

This standard is intended to outline those techniques in simple, clear, generic, and easy to promulgate formats, including posters, slides, videotapes, and pamphlets, and are further intended to serve as the basis upon which a comprehensive cargo handling methodology may be built (ASTM, 2012). Users of these practices should avail themselves of the detailed resource information available.

Even though standard ASTM D5728-12 does not seem directly related to trade in counterfeit goods, it refers to types of information that could be used to screen for potential infiltration by traffickers, including presence of counterfeits.

Industry declarations of intent

There are several industry initiatives dedicated to reinforcing supply chains and raising awareness to counter illicit trade. Two are of particular relevance in the context of misuse of containerized maritime transport:

- United for Wildlife Transport Taskforce's Buckingham Palace Declaration, and
- Declaration of Intent to Prevent the Maritime Transportation of Counterfeit Goods

United for Wildlife Transport Taskforce's Buckingham Palace Declaration

The United for Wildlife Transport Taskforce's Buckingham Palace Declaration (BPD) has been signed by a wide range of stakeholders committed to combatting wildlife crime, and counter the misuse of maritime transport in wildlife trafficking. Signatories of BPD include transport organizations and associations (incl. IATA, International Chamber of Shipping, IMO), governmental agencies (including UK Foreign and Commonwealth Office, Dubai customs), non-governmental organizations (e.g. Traffic and WWF), and individuals companies, including maritime operator. This initiative has produced positive results, including the creation of information-sharing systems, and publication of best practices for transport operators.

Closer to the scope of this report, the BPD has inspired the development of the Declaration of Intent to Prevent the Maritime Transportation of Counterfeit Goods.

Declaration of Intent to Prevent the Maritime Transportation of Counterfeit Goods

In 2016 leaders from global shipping firms, freight forwarders and brand owners whose products are counterfeited agreed on a joint "Declaration of Intent to Prevent the Maritime Transport of Counterfeit Goods" (ICC BASCAP, 2016).

The declaration marked the first time the global shipping industry and brand owners had made a public commitment to work together to stop the transport of counterfeit goods on shipping vessels (The Maritime Executive, 2016). Signatories include two leading global shipping firms, two freight forwarders and ten major multinational brand manufacturers, along with the International Federation of Freight Forwarders Associations (FIATA) and two ICC groups (the Business Action to Stop Counterfeiting and Piracy and the Commercial Crime Service). The signatories of the declaration in the maritime and transport industries include shipping companies: Maersk Line, CMA CGM Group, MSN and Arkas, as well as freight forwarding and logistics companies -- Kuehne and Nagel and Expeditors.

The declaration acknowledges the “destructive impact” of counterfeits on international trade, and encourages signatories to embrace a zero tolerance for counterfeiting and to collaborate through joint working groups in order to develop a detailed series of non-binding measures or best practices in five areas aimed at:

- Implementation of all applicable international, regional and national rules and mutually agreed standards aimed at preventing the carriage of counterfeit products;
- Reinforcement of supply chain controls, including the application of appropriate due diligence measures, such as “Know Your Customer processes”;
- Improving risk profiling;
- Raising awareness and conducting training; and
- Enhancing information sharing and co-operation.

The declaration is nonbinding, relying on the signatories to make their best efforts to achieve the goals of the agreement:

“This Declaration of Intent is a voluntary and non-binding statement of the signatories’ mutual intent to prevent, to the best of their abilities, to the extent possible and in compliance with all applicable laws including competition laws, the maritime transportation of counterfeit goods. The Declaration of Intent is not intended to create any legally enforceable rights or obligations in respect of any signatory, including any obligation on their part to enter into any additional binding agreements.”

Information sharing and risk profiling

One of the more effective ways to manage containerised cargo is through information-based risk analysis (Baldini et al., 2015). This can help customs authorities worldwide to target high-risk shipments and proceed with physical checks.

The standard procedures for risk analysis and controls performed by customs are based on the following components (Baldini et al., 2015):

- information about the entities involved (shipper, consignee, customs broker, agent, etc.);
- characteristics of the goods (tariff classification, value, weight, etc.); and
- other information provided by the entities involved, including the origin, destination, and routes of cargos, including transshipment points.

However, in most cases, authorities have very limited or incomplete information about the actual global routes of containerized cargos and they do not have data that describe the itinerary, status and movement of shipping containers in a systematic way. Shippers, however, collect and store Container Status Messages (CSM). These records describe the global movement and status of containers and provide an independent source of information, which complements the information available to customs and other authorities. CSM data could thus be used to help reconstruct the route of containers, contributing importantly to route-based risk analysis, in support of investigations.

Points C. and E. of the declaration address this as follows:

Point C: Risk profiling

Apply specific vigilance measures and common early warning indicators in order to identify high-risk shipments of counterfeits.

Co-operate in order to review and refine, when appropriate, pre-agreed criteria by all signatories for screening and early warning indicators of counterfeits.

Point E: Sharing information and co-operating

Identify a point of contact for each signatory to co-ordinate with national and supra-national authorities.

Support processes developed by competent authorities such as the World Customs Organization and national customs agencies to aid in the detection and seizure of counterfeit products.

Contribute to information exchanges between the parties on detection and seizure of counterfeit products, subject to compliance with i) signatory's relevant contractual obligations, such as those pertaining to confidentiality of customer information, and ii) applicable laws and regulations, including, but not limited to, competition and data protection laws.

Co-operate and collaborate with competent law enforcement authorities on investigations relating to the carriage of counterfeits.

Reinforcing supply chain controls and raising awareness

While risk profiling can be highly useful to combat counterfeiting, by helping public authorities to identify abnormal trade routes, it does not provide any information on the exact content of these shipments, and are only helpful when the cargo shipped by containers is known to the authorities.

Another way to fight against counterfeit seaborne trade is to reinforce supply chain controls. The declaration highlights the different areas that need to be addressed in Section C:

Point C: Supply chain controls

Apply appropriate due diligence measures, such as "Know Your Customer processes".

Include appropriate conditions prohibiting the carriage of counterfeit products.

Take appropriate steps in order to ensure there is no co-operation with companies, entities or individuals with serious or proven involvement in counterfeiting.

Encourage, wherever deemed appropriate by the signatory, the implementation of similar measures by other players in the extended supply chains.

Application of all applicable international, regional and national rules and mutually agreed standards: a zero-tolerance policy regarding counterfeiting

There are numerous international, regional and national rules and mutually agreed standards aimed at combatting the carriage of counterfeit products. One of the key provisions of the 2016 ICC/BASCAP declaration is to encourage industry to apply these instruments, to the maximum extent possible. Point A of the declaration provides guidance on how this can be achieved:

Point A. A zero-tolerance policy regarding counterfeiting

Implement applicable international, regional and national rules and mutually agreed standards aimed at preventing the carriage of counterfeit products.

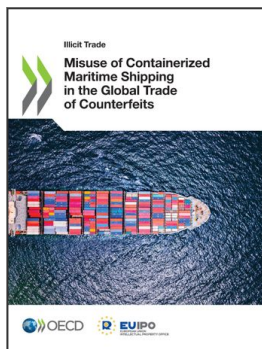
Inform all customers and sub-contractors of these commitments and our zero-tolerance policy towards counterfeits.

Ensure compliance with all applicable laws, regulations and rules including, but not limited to, those relating to customs regulation"

Shipping lines and the majority of brand owners who signed the declaration in 2016 remain committed to collaborate with respect to risk profiling and control of the supply chain.

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