

# **The Association of the Bar of the City of New York Committee on International Trade**

## **The Ramifications of the Port Security Legislation On Trade and National Security**

### **Introduction**

Maritime trade is vital to the U.S. economy. Thirty-five percent of the U.S. gross domestic product (GDP) is derived from trade.<sup>1</sup> Ninety-five percent of American overseas trade passes through 361 ports.<sup>2</sup> Approximately 9 million containers transit through U.S. ports every year.<sup>3</sup> The amount of international container traffic will double over the next 20 years.<sup>4</sup> Currently, according to the American Association of Port Authorities, \$1.3 billion worth of U.S. goods moves in and out of U.S. ports every day<sup>5</sup>. Maritime shippers increasingly concentrate their traffic through major cargo hubs because of their superior infrastructure. As a result, in the United States, fifty ports account for approximately 90 percent of all cargo tonnage.<sup>6</sup> Their specialized equipment is essential for the loading and off-loading of container ships, which constitute a growing and profitable segment of maritime commerce.<sup>7</sup> The rising use of container shipping and major cargo hubs has lowered costs and improved the reliability and cargo security of maritime commerce.

The important position that U.S. ports hold both as cargo hubs and as critical infrastructure to national security was highlighted in March of this year by the purchase by Dubai Ports World (“DP-World”), a United Arab Emirates (“U.A.E.”) owned company, of the British-owned Peninsular and Oriental Steam Navigation Company (P&O). The purchase gave DP-World control over twenty-four terminals in six major U.S. ports in New York, New Jersey, Philadelphia, Miami, Baltimore and New Orleans. DP-World is already one of the largest firms in the international ports sector.<sup>8</sup> Had the P&O deal been successful, it would have added two more terminals in Chinese ports, as well as terminals in Indonesia, Thailand and the Philippines, four Australian ports and berths in northern and southern Europe to the holdings of DP-World.<sup>9</sup>

In January of this year, the possibility of the U.A.E.-owned company managing U.S. ports produced strong opposition in the U.S. Congress, based on the fear that critical U.S. infrastructure was being sold off to an Arab government. As a result, legislation has been proposed to prevent such future bids for American port terminals. DP-World ultimately agreed, under political pressure, to sell its U.S. ports division.<sup>10</sup> Last year a political backlash helped to quash a bid by China’s CNOOC to acquire Unocal, a Los Angeles-based oil and gas producer.<sup>11</sup> Now, in the wake of the DP-World purchase of P&O, the Senate and House have passed different port security bills; S.3549 and H.R. 5337, which would reform the process by which the Committee on Foreign Investments in the United States reviews acquisitions of American companies by foreign companies, with a focus on national security concerns. Clearly, the thrust of these bills is to deal with concerns about threats to national security exemplified in the outcry over port security and the DP-World acquisition.

In addressing those concerns, Congress should consider both the immediate and far-reaching consequences for foreign investment in the United States and provide a practical solution to foreign ownership of sensitive commercial facilities and infrastructure. In particular, the legislation must address the application of “National Treatment” of foreign companies. National Treatment is a principle embodied in all three of the principal World Trade Organization (“WTO”) agreements: the General Agreement on Tariffs and Trade (“GATT”, Article 3), General Agreement on Trade in Services (“GATS”, Article 17) and Trade-Related aspects of Intellectual Property Rights (“TRIPS”, Article 3). The principle of National Treatment is simply that signatories to the agreement must give other signatories (i.e. companies from that country) the same treatment as they give their own nationals.

In this paper, we examine the provisions that should be incorporated into any port security legislation and frame them in the context of the applicable WTO Agreements (GATT and GATS). We identify the potential consequences for foreign direct investment (FDI) and national security and urge Congress to consider these factors in enacting any port security legislation.

### **THE BILL SHOULD NOT PROHIBIT FOREIGN GOVERNMENT-OWNED ENTITIES FROM OWNING OR LEASING REAL PROPERTY OR FACILITIES AT U.S. PORTS.**

Throughout the debate that followed DP-World’s bid for the British firm, a general misconception has persisted that the sale would place the security of container shipping traffic through the six U.S. ports in question solely in the hands of the United Arab Emirates.<sup>12</sup> Politicians concerned with the bid cited the U.A.E.’s role as an operational and financial base for al-Qaeda.<sup>13</sup> For example, in addressing DP-World’s bid, Senator Menendez (D-NJ) has said: “Ports are the front lines of the war on terrorism. We wouldn’t turn the Border Patrol or the Customs Service over to a foreign government, and we can’t afford to turn our ports over to one either.”<sup>14</sup>

In fact, DP-World is not the first U.A.E. company to manage port facilities in the United States. Another company owned by the United Arab Emirates, Inchcape Shipping Services (ISS), services the U.S. Navy.<sup>15</sup> ISS has had extensive interests in the U.S. for many years. ISS arranges pilots, tugs and dock workers for shipping companies and works with the U.S. customs at the ports of New York, New Jersey and San Francisco.<sup>16</sup>

Port security legislation should address the status of shipping companies with close ties to foreign governments who are currently leasing U.S. port facilities. For example, companies such as COSCO (a Chinese holding company) and Port of Singapore Authority (“PSA”, wholly owned by the Singapore government’s investment arm, Temasek Holdings), Yang Ming Marine Transport Company (partially owned by the Chinese government), and Hutchison Port Holdings (20% of which is owned by PSA) could be affected. In banning future investments by foreign government-owned companies, but allowing those currently under contract to continue operating a bill sends an inconsistent message as to whether the goal of the law is to ban all investment by foreign governments or just investment by certain foreign governments.

The United States currently depends heavily on foreign public investment. The largest foreign public investor in the United States is the United Kingdom, followed by Japan, Germany, the Netherlands and France.<sup>17</sup> By the end of 2004, total foreign assets in the United States had an

estimated market value of \$2.7 trillion.<sup>18</sup> Middle Eastern entities, by contrast account for 0.5 percent of foreign investment in the United States, but they consist of some high-profile holdings such as New York's Plaza Hotel, Essex House, the Caribou Coffee Co. and the aircraft manufacturer Cirrus Industries, Inc.<sup>19</sup> We should be cautious to avoid legislation that would precipitate a reduction in foreign investment by countries such as these.

### **The Merchant Marine Act of 1920**

Legislation similar to some of the bills currently working through Congress has already worked to drive foreign investment away from the U.S. maritime market. For example, Section 27 of the Merchant Marine Act of 1920, otherwise known as the Jones Act, was enacted to protect barge operators on rivers, freighters on the Great Lakes and cargo carriers traveling to Hawaii, Alaska, Puerto Rico and Guam from competition from foreign ship owners in the U.S. domestic maritime market.<sup>20</sup> The Jones Act requires that all cargo transported between U.S. ports be carried on vessels built and owned by Americans and operated by American crews. In addition, the Jones Act was intended to ensure that a domestic fleet existed that could be commandeered by the Government in time of war. The justifications for this Act were similar to those currently being raised in favor of port security legislation.

The Jones Act no longer fulfills its purpose of providing a sizable domestic fleet for war-time use by the Government. Because of the costs associated with the requirements that the vessels be built, owned and operated by U.S. citizens, many owners of commercial shipping vessels have chosen to register their vessels overseas and simply exit the American market. As a result, the size of the domestic shipping fleet has dwindled. According to a recent U.S. International Trade Commission (USITC) report as of July 1999, the Jones Act fleet comprised 182 self-propelled vessels of 1,000 gross tons, 7 of which were tankers and 23 of which were container ships.<sup>21</sup> The Merchant Marine Act of 1920 is outmoded for modern military needs. The domestic fleet of barges and freighters is too small to be of much use to the U.S. military today and the restriction on foreign ownership of inland commercial vessels has made inland shipping expensive.<sup>22</sup> The USITC has estimated that removing the Jones Act would result in a 22 percent reduction in the price of shipping and a welfare gain of approximately a \$1.32 billion to the U.S. economy.<sup>23</sup>

In addition, the 1947 General Agreements on Tariffs and Trade, to which the U.S. is a signatory, prohibits the main requirements of the Merchant Marine Act of 1920.<sup>24</sup> In this respect Article V of GATT 1947 provides:

No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels, or of other means of transport. *GATT, 1947, Art. V: Freedom of Transit (2).*

Given the cost to the economy of maintaining the Jones Act, the size of the resulting fleet and the fact that law remains suspended following Hurricane Katrina, the requirements of the Jones Act should be reconsidered.

## **Maritime Transportation Security Act of 2002**

The majority of port terminals across the country are foreign-owned. Similar to commercial airlines, shipping companies want to have their own terminals to ensure that their ships can quickly discharge and receive new cargo. However, while foreign and U.S. shipping companies are able to lease terminals in American ports, they cannot own the land the port is on—the land remains the property of the local Port Authority. Each company is responsible for moving ships and goods in and out of its terminals, and may even hire a private security firm, but the U.S. Customs and Border Patrol remains ultimately responsible for checking the cargo and the U.S. Coast Guard is charged with overseeing security.<sup>25</sup> These responsibilities are mandated by the Maritime Transportation Security Act of 2002. An analogous relationship may be seen in U.S. airports, where foreign airlines may lease a terminal, but the U.S. Transportation Security Administration is responsible for security. These foreign companies have entered into leases with the Port Authority to operate a terminal in much the same way that foreign airlines lease terminals from the Port Authority in airports. For example, International Terminal 4 at New York's John F. Kennedy International Airport is operated under a long term agreement between the Port Authority of New York and New Jersey and a group of companies which includes Amsterdam's Schiphol Airport, a corporation run by the Dutch government.

Terminal operators do not “run” the port, they lease a terminal from the Port Authority. The stevedores or longshoremen, who are a separate, unionized group, load and unload the containers. Typically, if a foreign-owned company leases a terminal, there will only be a few senior foreign managers present at the leased terminal and they would not have any physical contact with the containers. The longshoremen are the ones who have contact with the containers. On the U.S. West Coast, the longshoremen are represented by the ILWU; the International Longshore and Warehouse Union. On the East Coast they are represented by the International Longshore Association.

Port security remains the responsibility of the Coast Guard and the Customs and Border Patrol. It is important that these agencies have sufficient funding and personnel to maintain security standards at the port, such as being able to check any suspicious containers at random.

## **TRANSPARENCY**

The language in the proposed bills that requires the President to provide Congress with a report listing each foreign government-owned shipping company currently operating facilities at a U.S. Port assumes that such entities will pose a threat to national security. However, this is not necessarily true in all cases. The United Arab Emirates, for example, is a member of U.S. Customs's Container Security Initiative (“CSI”), which allows American customs officials to inspect cargo in foreign ports before it leaves for destinations in the U.S.. In addition, DP-World's employees will either be American or will be subject to American visa approval. Currently there are 44 member ports of CSI. Certain long-standing trading partners, however, such as India and Thailand, are not members of CSI.<sup>26</sup>

There is already a process in place which allows the U.S. government to review foreign acquisitions in light of national security. The DP-World deal was approved by the Committee on Foreign Investment in the United States (“CFIUS”) which concluded that the deal did not pose a

threat to national security. CFIUS is an agency of the U.S. Government that reviews the national security implications of foreign acquisitions of U.S. companies or operations.<sup>27</sup> DP-World is a globally respected firm with an American chief operating officer (Ted Bilkey) which happens to be owned by the government of the U.A.E.. As a multi-national business, DP-World would have no incentive to allow terrorists to infiltrate its operations.

A successful bill will need to provide a response to Congressional frustration that the deliberations of the CFIUS, which approved DP-World's takeover in the minimum 30-day period required, were classified.<sup>28</sup> As mentioned above, CFIUS is an interagency committee created by the Department of the Treasury and authorized under the Exon-Florio Amendment to review and potentially block foreign acquisitions of U.S. companies that the committee deems pose a threat to national security.<sup>29</sup> Twelve departments and agencies are represented on the committee.<sup>30</sup> In addition, CFIUS is provided with an independent assessment of the contracting parties by U.S. Intelligence. In evaluating any potential threat posed by the foreign acquisition, CFIUS determines whether there is credible evidence that the foreign government exercising control might take action that could threaten national security, and if so, whether there exist laws other than the Exon-Florio Amendment and International Economic Powers Act that address this threat.<sup>31</sup> If there is no threat found, CFIUS issues a decision within 30 days, otherwise CFIUS investigates for another 45 days and delivers a report to the President. The President then has 15 days in which to make a decision on the transaction.<sup>32</sup>

While companies are not required by law to file a notice of foreign acquisition with CFIUS in most cases, parties will choose to file voluntarily since the Exon-Florio Amendment allows the President to dissolve an acquisition at anytime (even after completion), if any parties have not filed with the CFIUS.<sup>33</sup> However the Exon-Florio Amendment prohibits disclosure to the public of any document or information about a transaction that is provided to CFIUS or to the President during the course of the review process.<sup>34</sup>

Any potential port security bill must incorporate provisions for the protection of proprietary and business-sensitive matters. The information a foreign government-owned company under investigation can be required to divulge must be explicitly laid out and the committees to which such information will be provided must be identified. This will ensure that the bill will be consistent with U.S. obligations under two major WTO agreements. The first, the GATS Agreement which the U.S. signed in 1995, covers services. The second, GATT, addresses tariffs and has two versions one in 1945 and one in 1994 that largely served to supplement the 1945 agreement. The U.S. is a signatory to both versions. Article XVII of GATS defines a government-owned enterprise as one "which has been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."<sup>35</sup> The GATT, adopting the GATS definition, in Article XVII, requires any such government-owned enterprise to "act in a manner consistent with the general principles of non-discriminatory treatment prescribed" by the GATT and allows any trading partners of the state-owned enterprise to request the state in question to provide information about its operations."<sup>36</sup> Finally, the 1994 GATT further provides with respect to the information that can be requested by trading parties:

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which...would prejudice the legitimate commercial interests of particular enterprises.(GATS Art. XVII, (d).

While it is inevitable in the post 9-11 climate that foreign companies will be asked to provide more detailed information to American authorities as to their organizational structure and financing, it is important that the bill provide a guarantee that any proprietary or business-sensitive information provided will remain confidential and not be used for competitive purposes. Foreign companies must know before the application process begins what information will be required and whom it will be disseminated to. A law that does not meet these requirements will likely lead to a decline in foreign direct investment in U.S. port operations by foreign-owned companies.

### **BALANCE BETWEEN TRANSPARENCY AND EFFICIENCY**

Much of the public debate surrounding DP-World's bid for ports in the U.S. centered on the extent to which the public should participate in the decision to approve or deny the purchase. There appeared to be general resentment towards the closed-door deliberations of CFIUS. Some of the proposed bills winding their way through Congress require the President to inform the public by publishing a description of the proposed merger, acquisition or takeover in the Federal Register within seven days of the beginning of his investigation of the merger. The public is then allowed an opportunity to comment on the proposed merger. These public comments would then be published in the Federal Register no later than ten days before the President completes his investigation.

Such a provision singles out bids made by foreign government-owned companies for public scrutiny and comment. Returning to the example of government-owned airlines, it is unclear why shipping companies that are government-owned would be subject to public commentary recorded in the Federal Register upon making a bid for a marine terminal, while airline companies that are government-owned are not subject to published public commentary when they lease an air terminal from the local Port Authority. The discrepancy between the level of scrutiny such a provision will require foreign owned port operators seeking to bid on U.S. port facilities in comparison to that currently required of foreign owned airlines seeking to lease airport terminals is not justified.

### **THE PROPOSED LEGISLATION CANNOT APPLY RETROACTIVELY**

Any proposed legislation should apply prospectively to any merger, acquisition, or takeover bid considered or completed after the bill becomes law. This will ensure that the companies which are currently leasing terminals at U.S. ports are clear that their existing contracts will be not need to be renegotiated. This will avoid the creation of a backlog of investigations of state-owned foreign companies which have been operating for many years already. It will also allow CFIUS and Congress to focus on future acquisitions.

For example, currently, numerous terminals at the ports of Los Angeles and Seattle, New York, Long Beach, Philadelphia and Portland among others, are being leased by foreign companies that are owned in whole or in part by foreign governments. State-owned foreign companies have

controlled terminals at U.S. ports before. For example, Neptune Orient Line, which is 68 percent owned by the Singapore government, bought U.S.-based APL Limited in 1997 and now operates terminals in Los Angeles, Oakland, Seattle, and Alaska. In addition, Hutchison Whampoa, a Chinese company, signed a lease in 1999 giving it control over the U.S. shipping yards in the Panama Canal.<sup>37</sup>

There are fifteen main ports in the U.S. which have about one hundred terminals.<sup>38</sup> Seven of those one hundred terminals are operated by SSA marine, an American shipping company, twelve are managed by city or state governments and the rest, which comprise eighty percent of U.S. ports, are operated by foreign entities, mainly shipping lines.<sup>39</sup> Two Chinese companies, both with close ties to the Chinese government, manage terminals in New York and Long Beach, California. The government of Venezuela manages terminals at ports in Philadelphia and Portland.<sup>40</sup>

### **National Security Concerns**

Critics of the DP-World purchase of P&O's North American port terminals suggest that allowing companies owned by foreign governments to operate port terminals would create several scenarios:

First is what could be termed the Trojan horse scenario. The U.S. ports could be used as a conduit for terrorists or terrorists' weapons. Shipping companies owned by foreign governments hostile to the U.S. could smuggle containers of terrorists into the United States through the terminals leased to these shipping companies. A similar concern is that shipping companies owned by foreign governments with terrorist links could be used to target or facilitate threats against the environment. This could take the form of a liquefied natural gas (LNG) tanker being ignited while in berth or the release of infectious diseases into the water of the port.

Second, there is a concern that allowing government-owned foreign shipping companies to lease port facilities would result in a growth in maritime criminal activity. Proponents of this scenario point to the discovery in April of this year of twenty-two Chinese stowaways who were found in the Port of Seattle, packed into a 40-foot shipping container. However, the Port of Seattle had already flagged the container for inspection and the stowaways would have been discovered by an x-ray of the container.<sup>41</sup> There is also a concern that shipping companies owned by foreign governments could facilitate smuggling or that terrorists might mimic or partner with existing criminal enterprises.<sup>42</sup>

With regard to the first two scenarios, the responsibility for securing ports continues to lie with the U.S. Coast Guard and the U.S. Customs and Border Patrol. These agencies have and will continue to be responsible for securing U.S. ports.<sup>43</sup> Eliminating these safety fears will be determined by the ability of these agencies to secure additional funding and personnel power to search containers. Increased scanning of containers or requiring that suspect containers be searched would go far toward eliminating the possibility of unknowingly importing a container of terrorists or terrorist weapons. There are a number of new technologies being considered such as trace technology, which detects the presence of radiation and gamma ray technology which eventually may be used to determine the molecular components of a cargo. It is not perhaps even necessary to develop the capacity to search every container so long as the Customs and

Border Patrol can search some thoroughly. Random searches have proven to be an effective deterrent. Strategic decisions will have to be made by these agencies as to how to allocate their resources.

Third, there is a fear that if shipping companies owned by foreign government have substantial holdings in large port terminals, they may attempt to hold these ports hostage as a means to coerce, deter or defeat the United States on an issue of foreign policy. However, such investments by foreign companies are vetted by the CFIUS for precisely this purpose. It would be unlikely therefore that a hostile foreign government would be able to build up significant holdings in such critical infrastructure as port facilities.

Finally, the domestic ports industry is very small and is not prepared to take over operation of all of the nation's ports. This has resulted from the restrictions imposed by the Jones Act which make it is less expensive for shipping lines to register their cargo ships abroad. A possible result of foisting management of all U.S. ports on this industry could be the bankruptcy of poorly managed U.S. ports.

### **CONCLUSION: A WORD OF CAUTION**

An overly restrictive bill could have a detrimental effect on trade, specifically:

DP-World could be unable to divest itself of its U.S. ports if potential foreign buyers are barred from bidding under this bill;

Negotiations for the free trade agreement between U.S. and the U.A.E could be set back or killed;

Foreign direct investment in the United States could be chilled at a time when the U.S. is more dependent than ever on Foreign Direct Investment to reduce its trade deficit.

The political backlash against the DP-World deal has had a detrimental effect on the trade relationship between the United States and the U.A.E.: Talks on a free-trade agreement between the two countries were called off in March as a result of the strong opposition from Congress to the DP-World acquisition.<sup>44</sup> It seems unlikely that Congress would have mounted such resistance had the winning bid for P&O come from Temasek, a state controlled group from Singapore, rather than DP-World. Governments in the Middle East may reconsider investing in American ports and search for other countries in which to invest their petroleum revenues. This could be problematic for the United States which depends on large amounts of foreign investment in order to finance its trade deficit--which stood at \$68.5 billion in January 2006.<sup>45</sup> In addition, the U.S. may also find that legislation such as this will tarnish its credibility as an advocate of free trade at a time when it is trying to salvage the stalled Doha round of world trade negotiations. Lastly, during a time when the U.S. is trying to stabilize Iraq and fight Islamic terrorists, such legislation will damage the U.S.'s relationships with moderate Arab countries.

Unquestionably, security at United States ports needs to be improved, standards need to be put in place and increased funding needs to go to the agencies responsible for ensuring the security of

the ports. We suggest several courses of action which, if followed, could result in an increase in security at America's ports.

### **Increased budgets for port security operations**

While the Government currently spends \$3 billion on port security, more needs to be budgeted for personnel, training and scanning equipment, given the yearly increases in container traffic.<sup>46</sup> Currently, a system called the Automated Targeting System ("ATS") is used to screen and assess cargo containers before the containers are loaded onto ships.<sup>47</sup> If more detailed commercial data were submitted to the ATS, higher quality risk assessments of cargo would be facilitated before the containers even left the dock. In a related measure, security clearance procedures for port security officers could be enhanced by requiring officers to successfully complete a background check and qualify for a Transportation Worker Identification Credential (TWIC).

Instead of banning the leasing of port facilities by foreign government-owned companies, the U.S. Coast Guard could require a company to submit a security plan which the Coast Guard would approve as adequately addressing security concerns at the terminal. Once the acquisition has taken place, the Coast Guard could require regular evaluations of the company's security plan to make sure it continues to adequately address security concerns.

To these ends, a bill has been introduced in the U.S. Senate, entitled, "Real Security Act of 2006". Division D "Transportation Security- Maritime Security" of the bill addresses enhancing basic security at U.S. ports, developing arrangements with foreign ports, requiring some prior notification of shipments (with confidentiality provisions) and the charging additional fees to cover some of the increased security costs. In response to the complaint that there is not sufficient coordination between government agencies the bill proposes "Operation Safe Commerce" a program intended to "create a data sharing network capable of transmitting data required by entities participating in the international supply chain from every intermodal transfer point to the national Targeting Center" and requires the Secretary of Homeland Security to submit an annual report detailing the results of Operation Safe Commerce to several Congressional Committees.<sup>48</sup> In focusing primarily on improving security at U.S. port, the bill fails to confront the question of who should be allowed to operate U.S. ports, whether any company should be barred from bidding on such port operations by virtue of the national ties of its principal shareholder and who should get to make this decision.

### **Improved international cooperation in port operations**

The government could work to improve international cooperation. The bill, the Real Security Act of 2006, touches on the need for international and cooperation in §3105 by proposing that the Secretary of Homeland Security, in consultation with the Secretary of Transportation, the Secretary of State, the Secretary of Energy, and the Commandant of the United States Coast Guard, "shall identify foreign assistance programs that could facilitate the implementation of port security antiterrorism measures in foreign countries."<sup>49</sup> Ports are inherently international venues and good relations with trading partners are the most effective way to ensure that harmful items do not gain entry via the seaports. In addition to the political incentive that governments have to maintain cooperative relationships with trading partners, shipping companies also have a business incentive to keep their operations secure. Fundamentally, all companies in the shipping

industry are involved in a commercial enterprise. These companies make money by successfully transporting goods between ports. It is not in the interest of any of the companies, whether foreign or domestic, to allow the security of their operations to be compromised.

It is certainly true that port security should be regulated by the federal government and that companies with close ties to foreign governments should be scrutinized; however, legislation or policies that would result in a ban on access to U.S. markets for foreign companies will ultimately be detrimental to the American economy, given the size and profitability of the shipping industry.

As an alternative, Congress could require foreign companies that are state controlled to commit to assist federal, state and local authorities in port-related law enforcement. This could include requiring such companies to (i) disclose information on the design, maintenance, or operation of their U.S. facilities or operations as they relate to law enforcement investigations; (ii) provide any relevant records situated in the U.S. office of the company that relate to the foreign operations of the company; and (iii) commit to participation in the Customs–Trade Partnership Against Terrorism (C–TPAT). Penalties can be established for non-compliance with the above measures, which can be applied to any transfer of critical maritime infrastructure whether the receiving company is U.S. or foreign-based. In addition, Congress can require that major U.S. seaports share information and intelligence on container traffic.

Port facilities are just one of many features that should be considered in developing a comprehensive maritime security regime. The United States should approach cargo and port security from the perspective of a complex global system rather than attempting in isolation to make ports and containers impervious to terrorist threats. Ports are just one part of a system, designed to move people and things quickly in immense volumes. As such they are key components of our economy and are key to maintaining our prosperity in the global economy.

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<sup>1</sup> “Port Security and Foreign-Owned Maritime Infrastructure” Statement of Dr. James Jay Carafano, Senior Research Fellow, The Heritage Foundation, before the House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, March 9, 2006. See also the American Association of State Highway and Transport Officials 2006 report: “Role of State DOTs in Managing Urban Goods Movement”, John Horsley, executive director of AASHTO, 2006. Available at: [www.transportation.org](http://www.transportation.org).

<sup>2</sup> Homeland Security “Budget in Brief”, foreword by Tom Ridge, 2005, p. 6.

<sup>3</sup> Council on Foreign Relations “The U.A.E. Purchase of American Port Facilities” by Eben Kaplan, Feb. 21, 2006.

<sup>4</sup> “Port Security and Foreign-Owned Maritime Infrastructure” Statement of Dr. James Jay Carafano, Senior Research Fellow, The Heritage Foundation, before the House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, March 9, 2006.

<sup>5</sup> The American Association of Port Authorities (AAPA), is an "alliance of leading ports in the Western Hemisphere that protects and advances the common interests of its diverse members as they connect their communities with the global transportation system".

<sup>6</sup> For a list of the top 50 ports in the U.S. see: <http://www.aapa-ports.org/industryinfo/portfact.htm>. Twenty-five U.S. ports account for over 98 percent of all container shipments. <http://www.house.gov/transportation/cgmt/06-03-03/06-03-03memo.html>.

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<sup>7</sup> Due to decreased costs and lower rates, customer demand, and increasingly cost-efficient processes, the use of containers for seaborne cargo has seen a steady increase since its introduction in the mid-1960's. "Today, close to 95% of U.S. trade by volume is containerized, with the largest vessels capable of carrying over 8,500 TEUS." (Brendan McCahill, PIERS COO), <http://www.piers.com/>.

<sup>8</sup> DP World was formed as the result of the merger between Dubai Ports Authority and DPI Terminals. In January 2005, DPI bought CSX World Terminals, an international port business of the CSX Corporation in the U.S. Through its acquisition of the ports division of CSX International of the U.S. in 2005, DP World gained facilities in several ports in China, as well as three terminals in Hong Kong.

<sup>9</sup> See [www.unctad.org/en/docs/posdtetibm15.en.pdf](http://www.unctad.org/en/docs/posdtetibm15.en.pdf) and [www.dpworld.com](http://www.dpworld.com).

<sup>10</sup> "DP World will transfer fully the U.S. operations of P&O Ports North America, Inc. to a United States entity. This decision is based on an understanding that DP World will have time to effect the transfer in an orderly fashion and that DP World will not suffer economic loss." See: <http://www.dpworld.com/fullnews.asp?NewsID=45>.

<sup>11</sup> New York Times, August 3, 2005, "Chinese Company Drops Bid to Buy U.S. Oil Concern", By David Barboza and Andrew Ross Sorkin.

<sup>12</sup> See: <http://www.whitehouse.gov/news/releases/2006/02/20060225-1.html>.

<sup>13</sup> [www.usatoday.com/news/world/2004-09-02-terror-dubai\\_x.htm](http://www.usatoday.com/news/world/2004-09-02-terror-dubai_x.htm).

<sup>14</sup> "Bill Would Stop Sale of Port Operations to Arabs" by Nicholas Johnston, Bloomberg News, February 18, 2006.

<sup>15</sup> "Second Dubai firm in U.S. port link" March 10, 2006, <http://news.bbc.co.uk/1/hi/business/4792788.stm>.

<sup>16</sup> See: <http://www.iss-shipping.com/>.

<sup>17</sup> "Foreign Direct Investment in the United States" <http://www.state.gov/r/pa/prs/ps/2006/63553.htm>, "Foreign Direct Investment in the United States" CRS Report for Congress, James K. Jackson, March 23, 2005.

<sup>18</sup> *Id.* "Foreign Ownership of U.S. Infrastructure: <http://www.cfr.org/publication/10092/#6>. However only 2 percent of these holdings were owned by state-run companies

<sup>19</sup> Public Law 107-295 available at [www.CFR.org/publication/9912/](http://www.CFR.org/publication/9912/). "Mideast Investment Up in U.S. Proposed Ports Deal Is Just Part of Flood of Oil Wealth Spilling Ashore" By Paul Blustein, Washington Post Staff Writer, March 7, 2006.

<sup>20</sup> Title 46 U.S.C. Ch. 24 § 883 for the text of the act available at <http://uscode.house.gov>., [http://en.wikipedia.org/wiki/Jones\\_Act\\_\(sailor-rights\)](http://en.wikipedia.org/wiki/Jones_Act_(sailor-rights)).

<sup>21</sup> "The Economic Effects of Significant U.S. Import Restraints". Third Update June 2002, Publication 3519, USITC Report page 118.

<sup>22</sup> "During the Persian Gulf War only one Jones Act ship actually went to war. In fact, President Bush suspended the Jones Act during the Gulf War because there were not enough Jones Act ships to transport oil supplies". "The Hidden Cost of U.S. Shipping Laws" Institute Brief, Public Interest Institute, Volume 3, Number 16 October 1996.

<sup>23</sup> USITC Report. Enforcement of the Jones Act was temporarily suspended during the Gulf War and again in the wake of hurricane Katrina.

<sup>24</sup> The 1947 and 1994 GATT are congressional-executive agreements (ratified by normal legislative process) under U.S. law and are considered treaties. The U.S., as opposed to Europe, considers International Agreements to become a part of U.S. Federal law, which means that Congress can modify or repeal the treaties by subsequent legislative action (<http://www.wikipedia.com>).

<sup>25</sup> See: <http://www.whitehouse.gov/news/releases/2006/02/20060225-1.html>.

<sup>26</sup> 44 foreign CSI ports are operational as of 3/29/06. They include: Halifax, Montreal, and Vancouver, Canada (03/02), Rotterdam, The Netherlands (09/02/02), Le Havre, France (12/02/02), Marseille, France (01/07/05), Bremerhaven, Germany (02/02/03), Hamburg, Germany (02/09/03), Antwerp, Belgium (02/23/03), Zeebrugge, Belgium (10/29/04), Singapore (03/10/03), Yokohama, Japan (03/24/03), Tokyo, Japan (05/21/04), Hong Kong, China (05/05/03), Gothenburg, Sweden (05/23/03), Felixstowe, United Kingdom (U.K.) (05/24/03), Liverpool, Thamesport, Tilbury, and Southampton, U.K. (11/01/04), Genoa, Italy (06/16/03), La Spezia, Italy (06/23/03), Livorno, Italy (12/30/04), Naples, Italy (09/30/04), Gioia Tauro, Italy (10/31/04), Pusan, Korea (08/04/03), Durban, South Africa (12/01/03), Port Klang, Malaysia (03/08/04), Tanjung Pelepas, Malaysia (8/16/04), Piraeus, Greece (07/27/04), Algeciras, Spain (07/30/04), Nagoya and Kobe, Japan (08/06/04), Laem Chabang, Thailand (8/13/04), Dubai, United Arab Emirates (U.A.E.) (03/26/05), Shanghai, China (04/28/05), Shenzhen, China (06/24/05), Kaohsiung, Republic of China (Taiwan) (07/25/05), Santos, Brazil (09/22/05), Colombo, Sri Lanka (09/29/05)

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,Buenos Aires, Argentina (11/17/05) ,Lisbon, Portugal (12/14/05) ,Port Salalah, Oman (03/08/06) ,Puerto Cortes, Honduras (03/25/06). See: [http://en.wikipedia.org/wiki/Container\\_Security\\_Initiative](http://en.wikipedia.org/wiki/Container_Security_Initiative).

<sup>27</sup> See U.S. Treasury web site: <http://www.treasury.gov/offices/international-affairs/exon-florio/>.

<sup>28</sup> The Committee on Foreign Investment in the United States includes representatives from the Departments of Defense, State, Treasury, Commerce and, most important, Homeland Security.

<sup>29</sup> The Exon-Florio Amendment applies to Section 721 of the Defense Production Act of 1950.

<sup>30</sup> CFIUS includes the following 12 members: the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, Secretaries of Treasury (Chair), State, Defense, Homeland Security and Commerce, the Attorney General, the Director of the Office of Management and Budget, the U.S. Trade Representative, and the Chairman of the Council of Economic Advisers.

<sup>31</sup> Organization for International Investment Fact sheet on Committee on Foreign Investment in the United States (<http://ofii.org/Facts-Figures/ctius/cfm>).

<sup>32</sup> Section 3 requires the President to provide detailed information regarding the merger or acquisition to over 30 different groups and individuals: the majority leader and minority leader of the Senate, the speaker and minority leader of the House of Representatives, the Chairmen and Ranking Member of the Committee on Finance, the Committee on Homeland Security and Government Affairs, the Committee on Banking, Housing and Urban Affairs, the Committee on Armed Services, and the Select Committee on Intelligence of the Senate, the Chairmen and Ranking Members of the Committee on Ways and Means, the Committee on Homeland Security, the Committee on Financial Services, the Committee on Armed Services, and the Permanent Select Committee on Intelligence of the House of Representatives, and the Members of Congress representing the states and districts affected by the proposed transaction.

<sup>33</sup> Id.

<sup>34</sup> “CFIUS and the protection of the National Security in the Dubai Ports World Bid for Port Operations,” Feb. 24, 2006 Dept. of Treasury <http://www.treas.gov>). This is intended to assure foreign companies that proprietary information they provide to the Committee will be protected and not used for competitive purposes. Such confidential treatment is essential in order to assure full disclosure. Requiring that the CFIUS publicly disclose its deliberations would result in a greater threat to national security as classified methods of intelligence gathering would be divulged.

<sup>35</sup> GATS, Article XVII.

<sup>36</sup> GATT 1945 Article XVII.

<sup>37</sup> Council on Foreign Relations “The U.A.E. Purchase of American Port Facilities”, Eben Kaplan, Feb. 21, 2006.

<sup>38</sup> Interview with Bob Waters, SSA Marine President on National Public Radio, April 29, 2006.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> “22 stowaways nabbed--Chinese found in good health after 2-week trip in container” April 2005, Seattle Post Intelligencer, Paul Shukovsky, Brad Wong and Kristen Millares Bolt.

<sup>42</sup> For example, the Fulton Fish Market was finally moved in order to break up Mafia control over the shipping and delivery of fish to New York City. See: The New York Times “A Fish Story” August 17, 1997 Dilan Loeb McClain.

<sup>43</sup> U.S. Dept. Of Homeland Security “Securing U.S. Ports”, Feb. 22, 2006.

<sup>44</sup> Reuters, “U.S., U.A.E. postpone free-trade talks amid ports row”, Saturday 11 March 2006, Doug Palmer.

<sup>45</sup> “U.S. trade gap widens again in January” Greg Robb, MarketWatch, Mar 9, 2006.

<sup>46</sup> Washington State Senator Patty Murray has proposed and obtained funding for such a plan. To date, Senator Murray has obtained \$47 million for the Container Security Initiative, \$2.4 million to enhance the Coast Guard's Strike Teams, \$20 million for incident training for ports, \$12 million for Homeland Security Response Boats, and 6 million for Global Maritime Distress and Safety System (GMDSS) Defense Message System Implementation, and Commercial Satellite Communications. See: <http://murray.senate.gov/portsecurity/port-work.cfm>.

<sup>47</sup> “Enhance the Government's Security Targeting and Screening of Containerized Cargo Shipments” [http://www.secureports.org/improving\\_security/factsheet\\_screening.html](http://www.secureports.org/improving_security/factsheet_screening.html).

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<sup>48</sup> Proposed legislation: “Real Security Act of 2006”, § 3107 “International Cooperation and Coordination”, 109th Congress, 2D Session.

<sup>49</sup> Proposed legislation: “Real Security Act of 2006”, § 3105 “Assistance for Foreign Ports” to be changed to “International Cooperation and Coordination”, 109th Congress, 2D Session.

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