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FUNDING PORT-RELATED INFRASTRUCTURE AND DEVELOPMENT: THE CURRENT DEBATE AND PROPOSED REFORM

Christopher T. Cook[*]

INTRODUCTION

> "[W]e can put Americans to work today building the infrastructure of tomorrow. From the first railroads to the interstate highway system, our nation has always been built to compete."[1]

> "Our infrastructure used to be the best, but our lead has slipped . . . . [W]hen our own engineers graded our nation's infrastructure, they gave us a 'D.'"[2]

President Barack Obama's State of the Union Addresses in 2010 and 2011 focused on the need to rebuild trade-related infrastructure as an aspect of revitalizing the United States' economic condition.[3] American seaports are a central component of the President's discussion.[4] Port[5]-related activities contribute more than $649 billion annually to the U.S. Gross Domestic Product, sustain more than thirteen million jobs, and contribute over $212 billion annually in federal, state, and local taxes.[6] United States seaports—much like the rest of the United States' infrastructure—are in desperate need of improvement.[7] Federal, state, and industry actors agree that freight rail and

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1. *See* President Barack Obama, State of the Union Address (Jan. 27, 2010).

2. President Barack Obama, State of the Union Address (Jan. 25, 2011) (referencing AMERICAN SOCIETY OF CIVIL ENGINEERS, 2009 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 2 (2009), *available at* http://www.infrastructurereportcard.org/sites/default/files/RC2009_full_report.pdf (assigning U.S. inland waterways a grade of D-, U.S. roads a grade of D-, U.S. rail a grade of C-, and U.S. bridges a grade of C)).

3. *See* President Barack Obama, State of the Union Address (Jan. 25, 2011); President Barack Obama, State of the Union Address (Jan. 27, 2010).

4. *See* President Barack Obama, State of the Union Address (Jan. 25, 2011) ("To help businesses sell more products abroad, we set a goal of doubling our exports by 2014–because the more we export, the more jobs we create here at home."); *see also Marine Transportation System (MTS)*, U.S. DEP'T TRANSP., MAR. ADMIN., http://www.marad.dot.gov/ports_landing_page/marine_transportation_system/MTS.htm (last visited July 29, 2011) (estimating that ninety-nine percent of the volume of overseas trade enters or leaves the U.S. by ship).

5. "Port" is defined as a "geographic term referring to a harbor with piers or docks where ships can load and unload cargo." FED. MAR. COMM'N, http://www.fmc.gov/marine_terminal_operators/ (last visited July 29, 2011).

6. *See Marine Transportation System (MTS)*, *supra* note 4.

7. *See* DEP'T OF THE TREASURY, AN ECONOMIC ANALYSIS OF INFRASTRUCTURE INVESTMENT 13 (2010), *available at* http://www.treasury.gov/resource-center/economic-policy/Documents/infrastructure_investment_report.pdf ("[The United States] spend[s] approximately 2 percent of GDP on infrastructure, a 50 percent decline from 1960. China and Europe, by contrast, spend close to 9 percent and 5 percent of GDP on infrastructure, respectively."); Press Release, Am. Assoc. of Port Auth.,

roadways servicing seaports require significant repair and expansion.[8] What they cannot agree upon, however, is how to generate the funds necessary to meet current and future capacity needs.[9]

Modern container ports[10] have witnessed a sea change in how global trade is conducted.[11] From 1990 to 2007, trade in containerized

AAPA Port Members Testify on Crumbling Infrastructure (Mar. 17, 2010), *available at* http://www.aapa-ports.org/Press/PRdetail.cfm?itemnumber=17380; AMERICAN SOCIETY OF CIVIL ENGINEERS, *supra* note 2; Press Release, John Kerry, Introduction of the BUILD Act (Mar. 15, 2011), *available at* http://kerry.senate.gov/press/speeches/speech/?id=5b9c0dc5-9c4d-4aae-b651-64a4f8c10c83 ("[E]xperts say we will need to invest $250 billion for each of the next fifty years just to meet our nation's surface transportation needs and it will cost more than $2 trillion to bring our country's existing infrastructure to an acceptable level.").

8. *See* Press Release, John Kerry, *supra* note 7; *see also* Bill Mongelluzzo, *New View on Fees*, J. COM., Aug. 18, 2008, at WP [hereinafter Mongelluzzo, *New View on Fees*] ("While the entire U.S. transportation network is in need of repair and expansion, the needs are greatest and more immediate in some regions. Los Angeles and Long Beach have not initiated a major infrastructure project in seven years. Community groups and local politicians said they would block future expansion unless the ports implement fees to fund infrastructure and environmental improvements."); Press Release, Am. Assoc. of Port Auth., *supra* note 7.

9. Mongelluzzo, *New View on Fees*, *supra* note 8, at 4 ("Proposals at the local, state and national levels indicate that user fees are inevitable, and the debate now centers on how to structure them and whether a national fee is preferable to a series of state and local fees."); *see also* Anna Fifield, *Obstacles to Progress*, FIN. TIMES, Aug. 1, 2011, at 5.

10. The FMC explains that "most major port facilities in the United States are publicly owned and maintained by multi-state, state, county, district or other public or quasi-public organizations" that are commonly referred to as "port authorities." FEDERAL MARITIME COMMISSION, http://www.fmc.gov/marine_terminal_operators/ (last visited July 29, 2011). Port authorities are responsible for the overall administration of the property, terminals, and other facilities at a public port. *Id.* As examples, the Port of Los Angeles is a department of the City of Los Angeles. *See A Profile of the Port of Los Angeles*, PORT OF LOS ANGELES, http://www.portoflosangeles.org/about/profile.asp (last visited July 29, 2011). The Port of Long Beach is an agency operated by the City of Long Beach Harbor Department. *See Port of Long Beach FAQs*, PORT OF LONG BEACH, http://www.polb.com/about/faqs.asp#530 (last visited July 29, 2011). The ports of New York and New Jersey are operated by the Port Authority of New York and New Jersey (a quasi-governmental entity created through bi-state compact). *See Port Authority of N.Y. & N.J. History*, PORT AUTHORITY OF N.Y. & N.J., http://www.panynj.gov/port/history.html (last visited July 29, 2011). The Port of Oakland is operated by an independent Board of Commissioners that is nominated by the Mayor of Oakland and appointed by the City Council to staggered four-year terms. *See Port of Oakland Commissioners*, PORT OF OAKLAND, http://www.portofoakland.com/portnyou/portoffi.asp (last visited July 29, 2011).

11. The revolution in containerized trade was recognized with the advent of containerization in 1956. *See Impact of Containerization on Laws Concerning the Maritime Shipping Industry*, 18 CATH. U. L. REV. 417, 417 (1969) ("The maritime shipping industry is undergoing a revolution. The coming of age of containerized ocean shipping is having a profound effect in the United States and throughout the world.").

cargo—i.e., cargo transported in a truck trailer body that can be detached from the frame of the truck for loading into a vessel or rail car[12]—in the United States' four largest container ports increased as follows: Ports of New York and New Jersey (279%), Port of Los Angeles (395%), Port of Long Beach (456%), and Port of Savannah (621%).[13] Driven by the surging market in containerized trade, the size of ships calling on U.S. ports has grown from 4500 twenty-foot equivalent units ("TEUs")[14] to 12,000 TEUs,[15] which has increased the number of trucks and miles of freight rail necessary to transport cargo from seaports to interior manufacturing and distribution points.[16] Consequently, many roadways have become inadequate,[17]

On April 26, 1956, the IDEAL X sailed as the first modern containership carrying fifty-eight truck trailers (without chassis). *See* Marva Jo Wyatt, *Ports, Politicians and the Public Trust: The Los Angeles Port Funds Controversy Comes Face to Face with Federal Law*, 9 U.S.F. MAR. L.J. 357, 357 n.3 (1996); John Davies, *40 Years Later, Boxes Rule*, J. COM., Apr. 26, 1996, at 1C-2C. In 1958, the Hawaiian Merchant carried twenty containers from the Port of Los Angeles, which was the first time containers were used in Pacific trade. *See* Erich E. Toll, *Ports Reinvented Themselves to Provide Box Infrastructure*, J. COM., Apr. 26, 1996, at 5C. The Federal Maritime Administration estimates that over forty-five million TEUs (twenty-foot equivalent units) and 1.5 billion tons of foreign traffic were handled in 2006, with a value of nearly 1.3 trillion dollars. *See Marine Transportation System (MTS)*, *supra* note 4.

12. Mar. Admin., *Glossary of Shipping Terms*, U.S. DEP'T TRANSP., MAR. ADMIN. 32 (2008), http://www.marad.dot.gov/documents/Glossary_final.pdf [hereinafter *Glossary of Shipping Terms*]. A container may be 20 feet, 40 feet, 45 feet, 48 feet or 53 feet in length, 8'0" or 8'6" in width, and 8'6" or 9'6" in height. *See id.* Containerized cargo is different than "bulk" cargo, which is unpackaged commodity cargo (e.g., oil, grain, coal, etc.). *See id.* at 22. Break-bulk cargo is loaded individually (e.g., boxes, drums, crates, barrels, etc.). *See id.* at 21.

13. *See* AM. ASSOC. OF PORT AUTH., NORTH AMERICA: CONTAINER PORT TRAFFIC IN TEUS, http://aapa.files.cms-plus.com/Statistics/CONTAINER%20TRAFFIC%20NORTH%20AMERICA%201990%20-%202009.xls (last visited July 29, 2011).

14. TEU relates to the size of the container used to transport goods. *See* PORT OF LONG BEACH, http://www.polb.com/economics/stats/latest_teus.asp (last visited July 29, 2011). A TEU is the size of the container that is generally hauled by an eighteen-wheel truck.

15. *See* Kevin Cullinane & Mahim Khanna, *Economies of Scale in Large Container Ships*, 33 J. TRANSP. ECON. & POL'Y 185, 185 (1999) (stating that container ships in 1984 could hold 4500 TEUs); *cf.* Bill Mongelluzzo, *Is the West Coast Canal-Resistant?*, J. COM., Oct. 18, 2010, at WP [hereinafter Mongelluzzo, *Is the West Coast Canal-Resistant?*] ("The widening of the Panama Canal, expected to be complete in 2014, will allow passage of vessels up to 12,000 TEUs, double the size of today's Panam[a] ships . . . .").

16. *See* Mongelluzzo, *Is the West Coast Canal-Resistant?*, *supra* note 15; *see also* Jones Lang LaSalle, *Port, Airport and Global Infrastructure Outlook*, ON POINT, Summer 2010, 6, *available at* http://www.us.am.joneslanglasalle.com/ResearchLevel1/US_PAGI_Report_Summer_2010_v2_JLL.pdf.

17. *See* Fifield, *supra* note 9 ("The number of miles travelled by cars and trucks has doubled in the past 25 years, but highway lane miles have increased by only 4.4

resulting in roadway congestion,[18] increased fuel emissions,[19] and related environmental and public health concerns.[20]

Additionally, East Coast ports are uniquely concerned with port-related capacity and infrastructure issues.[21] Historically, the largest ships transporting containerized cargo have been unable to pass through the Panama Canal in calling on East Coast ports.[22] This is about to change. The Panama Canal is currently being expanded to accommodate ships carrying up to 12,000 TEUs.[23] The anticipated completion of the Panama Canal Expansion Project in 2014 has forced ports on the eastern seaboard to dredge channels deeper to ac-

per cent."); Peter T. Leach, *Blocking that Diversion: Taking a Discretionary View, the Latest New York-New Jersey Port Budget Includes Significant Infrastructure Investment*, J. COM., Dec. 20, 2010 [hereinafter Leach, *Blocking that Diversion*] (stating that the Port Authority of New York and New Jersey is very close to roadway failures in port areas); Mongelluzzo, *Is the West Coast Canal-Resistant?*, *supra* note 15 ("Inadequate capacity and congestion at terminal gates and road and rail connectors are limitations all ports must contend with as cargo volume increases in the years ahead. The biggest short-term loss of market share at a U.S. port complex came after Los Angeles-Long Beach experienced crippling congestion problems in 2004 . . . .").

18. *See* Mark Bernstein, *The More Trade Grows, the Worse U.S. Port Congestion Becomes*, WORLD TRADE, Aug. 1, 2006, *available at* http://www.worldtradewt100.com/articles/the-more-trade-grows-the-worse-u-s-port-congestion-becomes; Mongelluzzo, *Is the West Coast Canal-Resistant?*, *supra* note 15.

19. *See generally* COALITION FOR HEALTHY PORTS, HAZARDOUS TO OUR HEALTH: THE HUMAN IMPACT OF PORT TRUCK POLLUTION ON TRUCK DRIVERS AND RESIDENTS OF NEW YORK AND NEW JERSEY (2009); L. BRUCE HILL, CLEAN AIR TASK FORCE, THE CARBON DIOXIDE-EQUIVALENT BENEFITS OF REDUCING BLACK CARBON EMISSIONS FROM U.S. CLASS 8 TRUCKS USING DIESEL PARTICULATE FILTERS: A PRELIMINARY ANALYSIS (2009); NATURAL RESOURCE DEFENSE COUNCIL, HARBORING POLLUTION: THE DIRTY TRUTH ABOUT AMERICA'S PORTS (2004).

20. *See* NATURAL RESOURCE DEFENSE COUNCIL, *supra* note 19, at 9-10.

21. *See* Jones Lang LaSalle, *supra* note 16, at 6.

22. *See* Bill Armbruster, *Game Changer: Expansion of the Panama Canal Will Reshape Global Trade Patterns*, CARGO BUS. NEWS, http://www.cargobusinessnews.com/Feb10/portcomm_game_changer.html (last visited July 29, 2011) ("Two new sets of locks—one on the Pacific side, the other on the Atlantic side—will be able to accommodate 12,000-TEU ships. That's more than twice the current maximum capacity of 5,000 TEUs."); Joseph Bonney, *MSC Puts 8,085 TEU Ships Into East Coast*, J. COM., Feb. 19, 2010, http://www.joc.com/maritime/msc-puts-8085-teu-ships-east-coast ("U.S. East Coast ports . . . have been rushing to prepare for the larger ships that will be able to transit the Panama Canal after 2014 when a multibillion-dollar lock-expansion project is completed."). The only way for ships larger than 5000 TEUs to arrive at East Coast ports is to travel around South America.

23. *See* PANAMA CANAL AUTH., PROPOSAL FOR THE EXPANSION OF THE PANAMA CANAL: THIRD SET OF LOCKS PROJECT 44 (2006), http://www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf. *See generally* PANAMA CANAL AUTH., PANAMA CANAL EXPANSION PROGRAM (2011), http://www.pancanal.com/eng/expansion/informes-de-avance/components/components-2011.pdf.

commodate the larger ships[24] and expand intermodal facilities[25] to transport containerized cargo quicker and more efficiently.[26]

Containerized cargo is here to stay, but what is less certain is how the United States will fund new infrastructure and development to accommodate its proliferation within the shipping industry.[27] In recent years, members of Congress have proposed legislation to fund infrastructure and development at U.S. seaports.[28] Three of these proposals create a fund based on a tax or fee assessed on the value of goods entering or leaving the United States.[29] A separate proposal concerns the creation of an infrastructure bank that, with an initial government contribution of $10 billion, would "leverage private-public partnerships and maximize private funding" to fund infrastructure and development projects.[30] Two of these proposals died in committee during the 111th Congress,[31] and the other two have been reintroduced in the 112th Congress after failing to be enacted in previous legislative sessions.[32]

24. *See* Peter T. Leach, *Locked in for Growth*, J. COM., Feb. 1, 2010, http://www.joc.com/maritime/locked-growth [hereinafter Leach, *Locked in for Growth*].

25. *See* H.R. REP. NO. 98–53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 168. Congress has directly addressed the need to encourage "intermodalism" at U.S. seaports, which Congress has historically defined as "when a container moves between shipper and consignee under a single intermodal tariff." *Id.* at 177. The term "intermodalism" refers to the movement of goods by ship, rail, and/or truck from origin to destination. *Id.* at 177–78; *see also Glossary of Shipping Terms*, *supra* note 12, at 57 (providing that "intermodal" is "[u]sed to denote movements of cargo containers interchangeably between transport modes, i.e., motor, rail, water, and air carriers, and where the equipment is compatible within the multiple systems").

26. *See* Leach, *Locked in for Growth*, *supra* note 24; Jones Lang LaSalle, *supra* note 16, at 6 ("As trucking costs increase due to volatile gas pricing, tolls or other road usage fees, there will be a continued push toward freight rail. This will help curb congestion on the nation's roadways, offset auto-related emissions and could potentially drive more cargo to interior, regional distribution hubs. Rail produces forty to sixty percent fewer greenhouse gas emissions than trucks. Additionally, freight costs on rail are much lower, approximately one-third the cost of trucking.").

27. *See* Jones Lang LaSalle, *supra* note 16, at 8; Mongelluzzo, *New View on Fees*, *supra* note 8; *see infra* Part II (discussing congressional and local proposals to remedy infrastructure funding needs).

28. *See infra* Part II.A.

29. *See* ON TIME Act, H.R. 526, 112th Cong. (2011); MOVEMENT Act of 2009, H.R. 2355, 111th Cong. (2009); National Freight Mobility Infrastructure Fund, H.R. 2702, 111th Cong. (2009).

30. Building and Upgrading Infrastructure for Long-Term Development Act, S. 652, 112th Cong. (2011); Press Release, John Kerry, *supra* note 7; *see infra* Part II.B.

31. H.R. 2355 and H.R. 2702.

32. *See* H.R. 526; S. 652; *see also infra* Part II.A, II.B. The concept for an infrastructure bank was originally introduced by Senator Chris Dodd and former Senator

The hands of local port authorities, however, are tied by constitutional and statutory constraints, rather than a lack of consensus.[33] Port authorities generate revenues through the management of port facilities.[34] The ability of port authorities to assess taxes on shippers "for the privilege of entering, or trading, or lying in a port or harbor"[35] is precluded by the United States Supreme Court's interpretation of the Constitution's Tonnage Clause.[36] The Court has, however, recognized a State's ability to assess a charge on shippers for actual use of port facilities that is fairly apportioned to "opportunities, benefits, or protection conferred or afforded by the taxing [authority]."[37] Congress placed additional constraints on state regulatory authority with the passage of the Shipping Act.[38] The Shipping Act provides that port authorities cannot "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property [at ports]"[39] or impose "any undue or unreasonable prejudice or disadvantage with respect to any person."[40] Courts and the Federal Maritime Commission ("FMC") have interpreted this as requiring any fee imposed on a shipper, trucker, marine terminal operator,[41] or beneficial

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Chuck Hagel as the National Infrastructure Bank Act of 2007, S. 1926, 110th Cong. (2007).

33. *See infra* Part I.

34. *See generally* PORT OF L.A., FINANCIAL STATEMENTS, http://www.portoflosangeles.org/finance/financial_statements.asp (last visited July 29, 2011); PORT OF LONG BEACH, FINANCIAL STATEMENTS, http://www.polb.com/finance/financialstatements.asp (last visited July 29, 2011); PORT AUTH. OF N.Y. & N.J., FINANCIAL STATEMENTS, http://www.panynj.gov/corporate-information/financial-statements.html (last visited July 29 2011).

35. Transportation Co. v. Parkersburg, 107 U.S. 691, 696 (1883).

36. U.S. CONST. art. I, § 10, cl. 3.

37. Polar Tankers, Inc. v. Valdez, 129 S. Ct. 2277, 2281 (2009) (quoting Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949)).

38. *See* 46 U.S.C.A. §§ 40101–44106 (West 2006).

39. *Id.* § 41102.

40. *Id.* § 41106.

41. The term "marine terminal operator" means "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." *Id.* § 40102(14). "A 'common carrier' is a person that (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country." *Id.* § 40102(6).

cargo owner[42] (collectively "Port Users") to generate actual benefits to the user on a reasonably equivalent basis.[43] The problem with this fee structure is that it limits the ability of port authorities to assess a fee for the construction and development of large-scale, port-related infrastructure and development projects[44]—the benefits of which would accrue to both those paying and not paying the fee, or the costs of which would be incurred by those not enjoying the benefit.

As this Note will discuss, the largest port authorities have proposed or implemented such a fee.[45] These fees are to be assessed on cargo entering or leaving the port and allocated to meet new and existing infrastructure and development needs.[46] The fees are also viewed as necessary revenue generating mechanisms to meet new security mandates adopted by Congress in the wake of September 11, 2001[47] and

42. "Beneficial Cargo Owner" refers to the importer of record, who physically takes possession of a cargo at the destination and does not act as a third party in the movement of such goods. *Glossary of Shipping Terms*, *supra* note 12, at 16.

43. Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968); *see also infra* Part I.B, I.C.

44. *See generally Volkswagenwerk*, 390 U.S. 261; Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536 (D.C. Cir. 1988); Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210 (D.C. Cir. 1981); Cargill v. Fed. Mar. Comm'n, 530 F.2d 1062, 1068–69 (D.C. Cir. 1976); Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 S.R.R. 1123 (F.M.C. 1997); Port of Ponce v. Puerto Rico Ports Auth., 25 S.R.R. 883 (F.M.C. 1990); Gulf Container Line v. Port of Houston Auth., 25 S.R.R. 1141 (F.M.C. 1990); Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist., 21 S.R.R. 219 (F.M.C. 1981); West Gulf Mar. Ass'n v. Port of Houston Auth., 18 S.R.R. 783 (F.M.C. 1978).

45. *See* Port Auth. of N.Y. & N.J, FMC Schedule No. PA 10, Section H, Subrule 34 (Mar. 14, 2011), *available at* http://www.panynj.gov/corporate-information/pdf/tariffs-rr-port-authority-ny-nj--0210.pdf [hereinafter Section H, Subrule 34]; Port of Los Angeles, Tariff No. 4, Section 21 (Aug. 2, 2010), *available at* http://www.portoflosangeles.org/finance/tariff_4.asp [hereinafter Tariff No. 4, Section 21]; *see infra* Part II.D for a more detailed discussion.

46. The Port Authority of New York and New Jersey implemented a charge assessed on all cargo—container, vehicle, bulk, and break bulk—entering or leaving the ports of New York and New Jersey. Section H, Subrule 34, *supra* note 45. The Port of Los Angeles and Port of Long Beach have proposed a similar charge that will be assessed only on containerized cargo. Tariff No. 4, Section 21, *supra* note 45.

47. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, U.S. SENATE, MARITIME SECURITY: NATIONAL STRATEGY AND SUPPORTING PLANS WERE GENERALLY WELL-DEVELOPED AND ARE BEING IMPLEMENTED 18 (2008) ("The national strategy addresses investments and risk management in a general way . . . but the strategy does not contain an investment strategy for implementing this strategic action nor does it determine how costs will be borne among the involved parties . . . . Without guidance on resources, investments, and risk management, implementing parties may find it difficult to allocate resources and investments according to priorities and constraints, track costs and performance, and shift investments and resources as appropriate.").

environmental initiatives designed to reduce the environmental impacts of port operations.[48] Shipping lines, however, have challenged the validity of port authority fees assessed for port-related freight rail and roadway improvement projects before the FMC.[49] Whether these fees can or will withstand scrutiny under the Tonnage Clause or Shipping Act has yet to be determined.

Given the lack of consensus and certainty in how funding should best be generated to meet critical infrastructure and development needs, this Note proposes an amendment to the Shipping Act to provide port authorities with the express power to impose fees for the construction, operation, and maintenance of qualifying port-related infrastructure and development initiatives.[50] The amendment would effectively spread the costs specific to qualifying initiatives over the useful life of the project. The U.S. Department of Transportation would first be required to approve any project qualifying for funding under the amendment.

Following the terrorist attacks of 9/11, Congress committed $8 billion to airport security, but promised seaports only $350 million of the more than $6 billion the Coast Guard estimated would be needed over the following ten year period. *See* Daniel Machalaba, *Safe Harbors? About 12 Million Containers Enter U.S. Ports Annually; Only 4% Get Security Checks*, WALL ST. J., Apr. 21, 2003, at B1. As reported in 2003, only four percent of the twelve million containers entering the United States were x-rayed or visually inspected. *Id.*; *see also* Deborah Schoch, *Port Security Upgrades Welcomed, but Industry Asks Who Will Pay*, L.A. TIMES, Feb. 6, 2003, at Desk 3.

48. *See Environmental Initiatives at the Port of New York and New Jersey*, PORT AUTHORITY OF N.Y. & N.J., http://www.panynj.gov/about/port-initiatives.html (last visited July 29, 2011); *Port of Los Angeles Environmental Mitigation*, http://www.portoflosangeles.org/environment/mitigation.asp (last visited July 29, 2011); *see also* NATURAL RESOURCE DEFENSE COUNCIL, *supra* note 19, at 1 ("The diesel engines at ports, which power ships, trucks, trains, and cargo-handling equipment, create vast amounts of air pollution that affect the health of workers and people living in nearby communities and contribute significantly to regional air pollution."); *EPA Submits Proposal to Reduce Shipping Pollution at U.S. Ports*, 39 NATION'S HEALTH 9 (2009).

49. On August 5, 2011, nine shipping lines filed a Complaint for Cease and Desist Order and Reparations against the Port Authority of New York and New Jersey alleging that its charge on all cargo entering the ports of New York and New Jersey to fund general infrastructure and development projects is a violation of the Shipping Act's prohibition on unreasonable and discriminatory practices. *See* Complaint for Cease and Desist Order and Reparations, China Shipping Container Lines Co. v. Port Auth. of N.Y. & N.J. (F.M.C. Aug. 5, 2011), at V; *see* 46 U.S.C.A. §§ 41102(c), 41106 (West 2006); *infra* Part I.B, II.D; *see also infra* note 287 (discussing the significance of this litigation to the proposal outlined in this Note).

50. *See infra* Part III.

Shippers vehemently oppose a congressional green light for port authorities to assess fees for general improvements,[51] but shippers also recognize that there is a significant problem arising out of increasingly modernized and automated shipping operations and the United States' currently outdated and outmoded port infrastructure.[52] A carefully crafted amendment to the Shipping Act can provide the shipping industry with reasonable assurances that a new fee will be accompanied by a proportionate benefit.[53]

Part I discusses the relevant provisions and judicial standards associated with the Tonnage Clause and Shipping Act. Part II addresses the efforts by both Congress and port authorities to generate funding for port-related infrastructure and development initiatives. Part III proposes a legislative amendment to the Shipping Act that provides port authorities with the express power to impose fees on cargo over a reasonable investment horizon for qualifying infrastructure and development projects. This amendment would ensure that port authorities are best able to meet pressing infrastructure and development needs.

I. CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON PORT OPERATIONS

The ability of port authorities to assess charges on Port Users is governed primarily by the Tonnage Clause of the Constitution and the federal Shipping Act. Part I first discusses the application of relevant constitutional and statutory provisions, and then illustrates the courts' more exacting standard in evaluating the validity of a fee assessed upon a Port User by a port authority under the Shipping Act. As discussed below, the Shipping Act significantly restrains port authorities' ability to generate funds for general port-related infrastructure and development projects.

51. *See* Mongelluzzo, *New View on Fees*, *supra* note 8.

52. *See* Bill Mongelluzzo, *Fees, Fees and More Fees; LA, Long Beach Will Add a Per-Container Fee on Loaded Boxes Moving Through the Ports*, J. COM., Jan. 21, 2008, at 24 [hereinafter Mongelluzzo, *Fees, Fees and More Fees*] ("Many shippers accept the 'user pays' concept of container fees to help finance needed roadway, bridge and rail corridor projects. But they aren't willing to carry the load for free riders."); Mongelluzzo, *New View on Fees*, *supra* note 8, at 2 ("Shippers and carriers have come to view user fees with a certain amount of resignation, and as the most practical and expeditious approach to repairing and expanding a national freight transportation infrastructure network that all agree is inadequate.").

53. *See infra* Part III.

A. The Tonnage Clause

The Tonnage Clause of the Constitution provides that "[n]o State shall, without the consent of Congress, lay any Duty of Tonnage."[54] It is intended to safeguard the Constitution's general prohibition against states laying duties on imports or exports[55] by preventing states from imposing duties on the ships transporting goods in commerce.[56] Congress may, however, grant exceptions to this general prohibition.[57]

A "Duty of Tonnage" is a tax assessed by a state actor on a vessel solely for the privilege of entering, remaining in, or departing from a port.[58] Critical to the Supreme Court's analysis of what constitutes an impermissible duty of tonnage is the distinction between a tax and a user fee.[59] For example, in *Cannon v. City of New Orleans*,[60] the City of New Orleans imposed a charge on any vessel landing on the riverbank, regardless of whether the vessel was utilizing a city-constructed wharf.[61] The Supreme Court held that the charge violated the Tonnage Clause:

> [T]he dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mis-

54. U.S. CONST. art. 1, § 10, cl. 3.

55. *See* U.S. CONST. art. 1, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.").

56. *See* Cannon v. New Orleans, 87 U.S. (20 Wall.) 577, 583 (1874).

57. *See id.* ("If hardships arise in the enforcement of this principle, and the just necessities of a local commerce require a tax which is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its consent requested.").

58. *See* Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935); Packet Co. v. Keokuk, 95 U.S. 80 (1877); *Cannon*, 87 U.S. at 577; Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536 (D.C. Cir. 1988); Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157 (D. Haw. 2001).

59. *See* Erik M. Jensen, *Quirky Constitutional Provisions Matter: The Tonnage Clause, Polar Tankers, and State Taxation of Commerce*, 18 GEO. MASON L. REV. 669, 703 (2011) ("One reason the user fee-tax distinction does not appear in the founding debates is that the founders, when discussing taxation, were not talking about charges for specific benefits.").

60. 87 U.S. 577.

61. *See id.* at 577.

sissippi River within the city of New Orleans, for the privilege of so landing or mooring.[62]

In other words, the charge could not be attributed to any identifiable benefit provided by the state to the vessel and was, therefore, an impermissible duty of tonnage.

The Supreme Court recognized the ability of states to charge ship owners for "services rendered or for conveniences provided."[63] Put another way, if a state actor improved a port facility, such as through the construction of a wharf[64] or by providing pilotage or towage services,[65] and ship owners availed themselves of those improvements, then the state could charge a reasonable fee for the use of that im-

62. *Id.* at 581; *see also* Inman Steamship Co. v. Tinker, 94 U.S. 238 (1876) (holding that the substance of the tax rather than its name is critical in determining that a fee imposed on ships based on their tonnage was unconstitutional); *In re* State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204 (1870) (holding that an Alabama tax levied on ships at the rate of one dollar per ton violated the Tonnage Clause, since it reflected a duty on the ship for the privilege of using Alabama's ports); Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth., 566 F. Supp. 2d 81, 102 (D. Conn. 2008), *aff'd*, 567 F.3d 79 (2d Cir. 2009) (holding that "[t]he Passenger Fee imposed by the Port Authority is used for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers . . . . Instead, a significant portion of the Passenger Fee funds projects completely unrelated and unavailable to the fee payers, such as negotiations, legal fees, and [various] development proposals."). Most recently, the Supreme Court invalidated a tax imposed by the City of Valdez on certain vessels using city ports as a violation of the Tonnage Clause. *See* Polar Tankers, Inc. v. City of Valdez, 129 S. Ct. 2277 (2009). For a more detailed discussion of the Court's ruling in *Polar Tankers*, see Jensen, *supra* note 59; Taylor Simpson-Wood, Polar Tankers, Inc. v. City of Valdez, Alaska*: A New Spin on the Tonnage Clause Leaves Lower Courts and Government Taxing Authorities High and Dry*, 33 HAMLINE L. REV. 19 (2010); Angelo J. Suozzi, *The Misinterpretation of the Tonnage Clause in* Polar Tankers, Inc. v. City of Valdez, 26 ALASKA L. REV. 289 (2009).

63. *Packet Co.*, 95 U.S. at 85 ("It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed as a right of proprietorship.").

64. *See id.*; *Cannon*, 87 U.S. at 582. Wharfage is a "[c]harge assessed by a pier or dock owner against freight handled over the pier or dock or against a steamship company using the pier or dock." *Glossary of Shipping Terms*, *supra* note 12, at 109.

65. *See* Clyde Mallory Lines v. Alabama, 296 U.S. 261, 266–67 (1935). "Pilotage" is defined as "the charge . . . assessed against a vessel . . . for the service rendered or proffered of piloting such vessel on entering, leaving, or shifting in [a port]." Port of Los Angeles, Tariff No. 4, Section 3 (Jan. 20, 1997), *available at* http://www.portoflosangeles.org/Tariff/SEC03.pdf. "Towage" is defined as "the charge made for towing a vessel." *Glossary of Shipping Terms*, *supra* note 12, at 101.

provement.[66] The Court has upheld these charges as reasonable regardless of whether a ship's tonnage is a basis for the fee calculation.[67]

Fees imposed on ship owners for general services have also been upheld as reasonable under the Tonnage Clause, regardless of whether the ship owners availed themselves of those services. In *Clyde Mallory Lines v. Alabama*,[68] the Port of Mobile adopted a schedule of harbor fees that included a fee on vessels 500 tons and over to recoup the costs of providing policing services to put out fires and implement other public safety measures.[69] The plaintiff ship owner claimed that the fee was unconstitutional under the Tonnage Clause because it was imposed on all vessels entering the port, regardless of whether the vessel received the benefit of the service.[70] In upholding the fee, the Court distinguished between fees charged for pilotage and towage and fees that inure to the benefit of all port users.[71] "[A] charge for a service such as the present is neither within the historic meaning of the phrase 'duty of tonnage' nor the purpose of the constitutional prohibition."[72] In other words, a charge for general services actually received is not a tax and therefore is not prohibited by the Tonnage Clause.

The Supreme Court has directly addressed the distinction between a tax and a user fee, albeit in the context of the Constitution's Export

66. *See* Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 545 (D.C. Cir. 1988).

67. *See* Clyde Mallory Lines, 296 U.S. at 266; THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNTIED STATES OF AMERICA 87 (1880) ("Wharfage dues are not taxes, and they may, therefore, be laid in proportion to tonnage.").

68. 296 U.S. 261.

69. *See id.* at 263.

70. *See id.* at 266.

71. *See id.* ("The benefits that flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it.").

72. *Id.* at 267. Although it is not addressed in the opinion, courts have extrapolated from the *Clyde Mallory* decision that the Tonnage Clause does not prohibit a fee when non-paying individuals receive the benefit of the general services provided by the fee. *See, e.g.*, Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 n.11 (D.C. Cir. 1988); Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157, 1173 (D. Haw. 2001); *see also* Barber v. Hawaii, 42 F.3d 1185, 1196 (9th Cir. 1994). In *Clyde Mallory*, this would relate to vessels less than 500 tons or any other beneficiary of the emergency services. *See* Jensen, *supra* note 59, at 707–08 (arguing that the fee assessed in *Clyde Mallory* is actually more akin to a tax than a user fee); *cf.* Polar Tankers, Inc. v. Valdez, 129 S. Ct. 2277, 2284 (2009) (holding that a tax imposed by the city on large ships which is designed to raise revenue for general municipal consumption is a violation of the Tonnage Clause).

Clause.[73] In *United States v. U.S. Shoe Corp.*,[74] the Supreme Court considered arguments on whether the congressionally enacted Harbor Maintenance Tax ("HMT") was a violation of the Export Clause's categorical prohibition against taxes on goods exported from any state.[75] The HMT assessed a charge equal to 0.125% of the cargo's value "at the time of loading for exports and unloading for other shipments."[76] Once collected, Congress could use fees to fund qualifying harbor maintenance and development projects.[77] Understanding the Court's hard line rule against taxing exports, the Government argued that the tax was actually a user fee.[78] The Court relied on *Pace v. Burgess*[79] in holding the HMT unconstitutional.

> [T]he connection between a service the Government renders and the compensation it receives for that service must be closer than what is present here . . . . [T]he HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter . . . . This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities.[80]

Although the Court has never applied the *U.S. Shoe* standard in the context of the Tonnage Clause,[81] some experts have argued that

73. U.S. CONST. art. I, § 9, cl. 4 ("No Tax or Duty shall be laid on Articles exported from any State."); *see* Jensen, *supra* note 59, at 705 ("Although the Supreme Court has recently emphasized that the Export Clause is unique and that, in general, the principles of other clauses should not be used to interpret it (and vice-versa), there is no obvious reason why that should be so—at least not on this issue. A fee for services is a fee for services, regardless of the constitutional provision involved.").

74. 523 U.S. 360 (1998).

75. *See id.* at 368 ("*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxes authority." (citing United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 843, 852 (1996))).

76. *Id.* at 363.

77. *See id.*

78. *See id.* at 367.

79. 92 U.S. 372, 375 (1876) (holding that the stamp on exported tobacco was a user fee, not a tax, and was therefore not prohibited by the Export Clause because the charge "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed").

80. *Id.* at 369–70.

81. *See* Jensen, *supra* note 59, at 706 ("The HMT failed constitutionally because the measure of the charge was 'not a fair approximation of services, facilities, or benefits furnished to the exporters.' If a harbor usage *fee* is going to be measured by value, it should be measured by the benefit provided and not the goods being

its application is appropriate given that the circumstances for charging fees for services are sufficiently analogous.[82] In other words, if the charge does not constitute a tax under the Export Clause because it is actually a user fee, the same charge would also not constitute an impermissible duty of tonnage.[83] Here, a port authority may avoid challenge under the Tonnage Clause by tying a charge to a definable benefit flowing to the user. Importantly, there is "no requirement that the fee charged in return for the services rendered be an exact dollar for dollar scheme."[84] Rather, in evaluating the reasonableness of the fee a court looks to whether the fees approximate the cost of the services.[85] Under *U.S. Shoe*, it would follow that if a charge is a "fair[] match [to] the . . . use of port services and facilities,"[86] then it is a user fee and not an impermissible duty of tonnage.

B. The Shipping Act

The actions of ocean carriers, ports, and marine terminal operators ("MTO")[87] are regulated by the Shipping Act[88] as enforced by the

shipped. The same sort of analysis ought to be appropriate under the Tonnage Clause: Is the charge 'a fair approximation of services, facilities, or benefits furnished?' If so, it is ipso facto a user fee and not a duty of tonnage." (quoting United States v. U.S. Shoe Corp., 523 U.S. 360, 363 (1998))).

82. *See id.* at 705 ("Although the Supreme Court has recently emphasized that the Export Clause is unique and that, in general, the principles of other clauses should not be used to interpret it (and vice-versa), there is no obvious reason why that should be so—at least not on this issue. A fee for services is a fee for services, regardless of the constitutional provision involved."); *see also supra* note 81.

83. *See id.*

84. Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157, 1175 (D. Haw. 2001); *see e.g.*, Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 545 n.8 (D.C. Cir. 1988).

85. *See Plaquemines*, 838 F.2d at 545 n.8; *see also* Indiana Port Comm'n v. Bethlehem Steel Corp., 653 F. Supp. 604 (N.D. Ind. 1987) (holding fee imposed by the Port Commission on all users for constructing an access road and for dredging an impermissible duty of tonnage because the benefits will primarily pertain to other users).

86. United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998).

87. *See* 46 U.S.C.A. § 40102(14) (West 2006) (defining a "Marine Terminal Operator" as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier"). A port authority is a marine terminal operator as defined under the Shipping Act because "they own and maintain the docks and other facilities that ocean common carriers use, and because they sometimes directly operate the terminals as well." FED. MAR. COMM'N, http://www.fmc.gov/marine_terminal_operators/ (last visited July 29, 2011).

88. 46 U.S.C.A. §§ 40101–44106 (West 2006).

FMC.[89] Congress first enacted the Shipping Act in 1916 as a response to developing wartime activities in Europe[90] and has since amended the Act on numerous occasions during the near century since its passage.[91]

Currently, the Shipping Act is designed to accomplish four goals:

> 1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
>
> 2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
>
> 3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
>
> 4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing greater reliance on the marketplace.[92]

The Shipping Act's fair practice provisions, which support the first goal enumerated above, regulate the ability of port authorities to impose and collect fees.[93] In part, the Shipping Act provides that an MTO may not "fail to establish, observe, and enforce just and reason-

89. *See id.*; *see also* 46 C.F.R. 525.1 (2010) (providing that the Code is "necessary to enable the [Federal Maritime] Commission to meet its responsibilities with regard to identifying and preventing unreasonable preference or prejudice and unjust discrimination pursuant to . . . the [Shipping] Act").

90. *See* Michael W. Lodwick, *Who Governs the Ports? A Lacuna in the Law of Shipping Regulation*, 26 LOY. L. REV. 627, 637 (1980); Harold A. Shertz, *The Shipping Act of 1984: A Return to Antitrust Immunity*, 14 TRANSP. L.J. 153, 155 (1985). Amendments to the Shipping Act in 1920 provided:

> [I]t is necessary for the national defense and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval reserve or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.

Ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.).

91. *See* 46 U.S.C.A. § 40101 (2006) (formerly cited as 46 U.S.C.A. § 1701); Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916)(codified as amended at 46 U.S.C. §§ 801-42 (1982)); Shipping Act of 1984, Pub. L. No. 109-304, 120 Stat. 1523; Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

92. 46 U.S.C.A. § 40101.

93. *See id.* §§ 41102(c), 41106.

able regulations and practices relating to or connected with receiving, handling, storing, or delivering property"[94] or "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person."[95] In determining that a rate or fee assessed by a port on a shipper or MTO imposes an "undue or unreasonable prejudice," the Supreme Court has held that the FMC is authorized to order and enforce prohibitions on the assessment of unreasonable fees and to substitute a reasonable regulation or practice.[96] These broad provisions have been the subject of significant challenges through litigation.[97]

Courts generally uphold fees as valid under the Shipping Act when the benefits actually inuring to a user are proportionate to the charge.[98] In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, the Supreme Court revised the standard for analyzing discriminatory claims under the Shipping Act in holding that "the question under [§ 41106] is not whether the [user] has received some substantial benefit . . . but whether the correlation of that benefit to the charges imposed is reasonable."[99] In other words, when the FMC reviews the impact of a charge on a person under Section 41106, it

94. *Id.* § 41102(c).

95. *Id.* § 41106(2). The Shipping Act omits the definition of "person" as unnecessary, relying instead on 1 U.S.C.A. § 1, which states that in construing an act of Congress "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C.A. § 1 (West 2010).

96. *See* California v. United States, 320 U.S. 577, 584 (1944); *see also In re* Storage Charges Under Agreements 6205 & 6215, 2 U.S.M.C. 48, 53 (1939).

97. *See generally* Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968); Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536 (D.C. Cir. 1988); Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210 (D.C. Cir. 1981); Cargill v. Fed. Mar. Comm'n, 530 F.2d 1062, 1068–69 (D.C. Cir. 1976); Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 S.R.R. 1123 (F.M.C. 1997); Port of Ponce v. Puerto Rico Ports Auth., 25 S.R.R. 883 (F.M.C. 1990); Gulf Container Line v. Port of Houston Auth., 25 S.R.R. 1141 (F.M.C. 1990); Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist., 21 S.R.R. 219 (F.M.C. 1981); West Gulf Mar. Ass'n v. Port of Houston Auth., 18 S.R.R. 783 (F.M.C. 1978).

98. *See Volkswagenwerk*, 390 U.S. at 282. The Shipping Act standard for evaluating a reasonable practice differs from what passes muster under the Tonnage Clause in that the Tonnage Clause does not evaluate proportionality, but merely examines whether the individual paying the fee is receiving a reasonable benefit in exchange. *See Plaquemines*, 838 F.2d at 545 n.8 ("[T]he slight divergence between the class that benefits and the class that pays seems of no significance under the rationale of *Clyde Mallory*. No ship is charged without receiving a benefit." (referencing Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935))).

99. 390 U.S. at 282.

must determine "whether the charge levied is reasonably related to the service rendered."[100]

Applying the *Volkswagenwerk* test, courts have undertaken a detailed analysis of the costs and benefits associated with a particular fee. In *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Commission*,[101] the Court of Appeals for the District of Columbia Circuit reversed the FMC's determination that a fee imposed by an MTO on stevedores for the use of a grain elevator was a reasonable practice under the Shipping Act.[102] The MTO charged the stevedores five cents for each ton of grain loaded or unloaded by the MTO and charged the same amount to shippers for the same service.[103] In rendering its decision, the court relied heavily on a report issued by the FMC finding that

> [s]tevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel. . . . [T]he cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores.[104]

The court explained that "if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under [the Shipping Act]."[105] This type of granular analysis has been common among courts and the FMC when reviewing challenges under the Shipping Act.[106]

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100. *Id.*

101. 655 F.2d 1210 (D.C. Cir. 1981).

102. *Id.*

103. *See id.* at 1211.

104. *Id.* at 1212 (quoting from Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 18 F.M.C. 140, 161 (1975)).

105. *Id.* at 1217.

106. *See* Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968); Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536 (D.C. Cir. 1988); *Baton Rouge Marine Contractors*, 655 F.2d at 1217; Cargill v. Fed. Mar. Comm'n, 530 F.2d 1062, 1068-69 (D.C. Cir. 1976); Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 S.R.R. 1123 (F.M.C. 1997); Port of Ponce v. Puerto Rico Ports Auth., 25 S.R.R. 883 (F.M.C. 1990); Gulf Container Line v. Port of Houston Auth., 25 S.R.R. 1141 (F.M.C. 1990); Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist., 21 S.R.R. 219 (F.M.C. 1981); West Gulf Mar. Ass'n v. Port of Houston Auth., 18 S.R.R. 783 (F.M.C. 1978).

Courts have struck down fees as invalid under the Shipping Act when imposed on a user for services that it did not practically receive[107] and for optional services that the shipper chose to perform itself.[108] The Shipping Act has also been held to preclude a port from assessing fees disproportionately for services that affect users based on geography,[109] the type of cargo carried,[110] or the size or ownership of the vessel.[111] In short, courts' primary concern is that MTOs apportion the charges and the benefits as closely as possible.[112]

C. *Plaquemines*: Courts' Exacting Standard Under the Shipping Act

Both the Tonnage Clause and the Shipping Act preclude the assessment of a charge that does not reasonably correlate to the benefits conferred on the user. Courts have, however, interpreted the reasonableness of the correlation differently under the two laws. This distinction is aptly illustrated in *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*, where the D.C. Circuit Court held that the challenged assessment passed constitutional muster under the Tonnage Clause, but failed the comparative analysis test under the Shipping Act. [113]

In *Plaquemines*, the Port levied a "harbor fee" on "all commercial cargo vessels which dock, moor, or anchor"[114] for various emergency services and related equipment.[115] The Port, however, carved out certain exceptions for "commercial fishing vessels, crew boats, and supply boats for oil rigs,"[116] as well as "all privately owned commer-

107. *See Baton Rouge Marine Contractors*, 655 F.2d at 1215 (stating that the port's analysis did not demonstrate how stevedores received a benefit from an automated shipping gallery); *Flanagan Shipping*, 27 S.R.R. at 1131–32 (stating that benefits that merely promoted efficiency in the shipping business as a whole but could not be tied to the user charged were not reasonable).

108. *See Gulf Container Line*, 25 S.R.R. at 1147 (holding that the port was unreasonable in insisting that a vessel must avail itself of additional services such as refrigeration monitoring).

109. *See Port of Ponce*, 25 S.R.R. at 890 (stating that uniform charge is unreasonable if benefit level is substantially different between two ports).

110. *See Volkswagenwerk*, 390 U.S. at 281.

111. *See Plaquemines*, 838 F.2d at 548 (holding fee unreasonable where nonpaying small vessels and private terminals receive fire and emergency benefits provided by port authority, which are paid for with charges assessed on larger vessels).

112. *See id.* at 548 n.11.

113. *Id.* at 536.

114. *Id.* at 541.

115. *See id.* at 540.

116. *Id.* at 541.

cial wharves and docks."[117] Like *Clyde Mallory Lines v. Port of Alabama*, the court upheld the charge under the Tonnage Clause because "[a]ll vessels whether or not they catch fire or need rescue services, benefit from their availability."[118] The court found that such services were particularly important in light of the high traffic surrounding the Plaquemines Port.[119] The Port argued that imposing the fee on smaller vessels created an administrative burden, which justified the practice of subsidizing the services for smaller ships from the fees imposed on the larger vessels.[120] The court, however, refused to uphold the FMC's determination that the charge was reasonable under the Shipping Act.[121] Applying the *Volkswagenwerk* standard, the court reasoned that where parties exempt from a charge are deriving a significant benefit from the emergency services, the charge violates the Shipping Act.[122]

Although the distinction is not clearly stated, the court does provide some illustration in the footnotes of the case. The court noted that, under the Tonnage Clause, "the slight divergence between the class that benefits and the class that pays seems of no significance under the rationale of *Clyde Mallory*. No ship is charged *without receiving* a benefit."[123] In other words, the nexus between the charge and the services rendered was close enough for the court to view the charge as a user fee, rather than a tax. The Shipping Act, however, precluded the charge on grounds that a significant number of ships receive the full benefit of the service without paying the fee.[124] Therefore, a fee that is not a tax may still be invalidated under a court's more exacting standard under the Shipping Act.

II. ADDRESSING THE FUNDING PROBLEM

There is minimal dispute over the need for investment in port-related infrastructure and development.[125] Instead, the debate focuses on how to best generate new funding mechanisms for this investment.[126] The shipping industry has voiced two primary concerns: (1)

117. *Id.*
118. *Id.* at 545.
119. *See id.*
120. *See id.* at 548.
121. *See id.* at 546–48.
122. *Id.*
123. *Id.* at 545 n.8 (emphasis added).
124. *See id.* at 548 n.11.
125. *See supra* notes 7–8 and accompanying text.
126. *See* Mongelluzzo, *New View on Fees*, *supra* note 8.

who will absorb short-term costs[127] and (2) which regulatory authority will administrate the funding mechanism—federal, state, or local?[128]

As to the first concern, regardless of whether port users incur immediate costs associated with general infrastructure and development fees, costs will ultimately pass through to the consumer. In *Baton Rouge Marine Contractors, Inc. v. Federal Maritime Commission*, the court noted:

> One can make the economic argument that there is no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel, because the charges will be passed on to the party, usually the vessel, employing the stevedore to load and trim the vessel. In the long run, the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or shipper. But at least in the short run, different consequences will attach to differences in the immediate incidence of the charges.[129]

Industry actors could argue that, regardless of whether the consumer will ultimately shoulder rising costs, short-term costs may be sufficiently onerous to price out struggling Port Users—particularly in a protracted economic recession.[130] Further, short-term costs tied to charges assessed by port authorities are subject to the Shipping Act's prohibition on unreasonable or discriminatory practices.[131] The problem with these arguments is that strict deregulatory measures have adversely affected Port Users by impeding modernization of new infrastructure and development.[132]

127. *See id.* (quoting Anne Kappel, vice president of the World Shipping Council, as stating, "It is difficult to accept the concept of user fee if all users aren't paying.").

128. *See id.* ("[T]he debate now centers on how to structure [user fees] and whether a national fee is preferable to a series of state and local fees.").

129. 655 F.2d 1210, 1213 (D.C. Cir. 1981) (citing Cargill v. Fed. Mar. Comm'n, 530 F.2d 1062, 1068–69 (D.C. Cir. 1976)).

130. *See* Leach, *Blocking that Diversion*, *supra* note 17 ("[L]ast year, the port [of New York and New Jersey] handled 3.6 million loaded 20-foot equivalent unit containers, down 12 percent from 4.1 million loaded TEUs of imports and exports in 2008."); Jones Lang LaSalle, *supra* note 16, at 7 ("Between 2007 and 2009, the nation's top 13 ports witnessed an 18.5 percent decline in total throughput as both domestic and international consumption waned.").

131. *See* Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 (D.C. Cir. 1988).

132. *See* Bill Mongelluzzo, *Shippers More Accepting of User Fees*, J. COM., Oct. 17, 2007, at WP ("Importers and exporters support an aggressive program to expand the nation's freight transportation infrastructure, and they realize that this effort may result in paying user fees to help fund roadway and bridge projects."); *cf.* Mongelluzzo, *New View on Fees*, *supra* note 8 ("For years, the freight transportation industry's

As to the second concern, industry actors want assurance that new fees will provide equivalent benefits, without additional onerous administrative requirements.[133] A federal authority may be best equipped to ensure a uniform administration; however, members of Congress have in the past raised significant funds for port-related maintenance and development and subsequently failed to disburse them.[134] As one example, Congress created the Harbor Maintenance Trust Fund ("HMTF") for the purposes of generating revenues for harbor dredging projects.[135] In the last six years the HMTF has accumulated a surplus in excess of $5 billion. Meanwhile, many harbor deepening projects have stalled without funding.[136] Local port authorities, alternatively, compete for the business of MTOs and shippers who process and transport discretionary cargo (i.e., goods that are unloaded from ships and transported to locations more than 260 miles from the port).[137] In a market with high elasticity, such as with discretionary cargo, the business flows to the most efficient bidder.[138]

attitude toward user fees designed to fund infrastructure projects was one of denial. Shippers and carriers hoped that if they ignored user fee proposals, they would just go away.").

133. *See* Mongelluzzo, *New View on Fees*, *supra* note 8; Mongelluzzo, *Fees, Fees and More Fees*, *supra* note 52.

134. *See infra* notes 178–81 and accompanying text.

135. *See* Water Resources Development Act of 1986, 33 U.S.C.A. §§ 2236–2238 (West 2010).

136. *See* JOHN FRITTELLI, CONG. RESEARCH SERV., HARBOR MAINTENANCE TRUST FUND EXPENDITURES (2011); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL USER FEES—SUBSTANTIVE REVIEWS NEEDED TO ALIGN PORT-RELATED FEES WITH THE PROGRAMS THEY SUPPORT 5–6 (2008), *available at* http://www.gao.gov/products/GAO-08-321 (last visited July 29, 2011) [hereinafter FEDERAL USER FEES].

137. *See* Wayne K. Talley, *Ocean Container Shipping: Impacts of a Technological Improvement*, 34 J. ECON. ISSUES 933, 940 (2000) ("Port competition has intensified under containerization, i.e., intensified in attracting and retaining shipping lines. The lines put pressure on ports to reduce the time and cost of ship calls; if they do not, ships might call at a rival port."). About twenty percent of the containers moved through New York harbor are categorized as discretionary. *See* Leach, *Blocking that Diversion*, *supra* note 17. Discretionary cargo can also be in the form of vehicles that must be processed before transportation to a point of distribution or sale.

138. *See* Leach, *Blocking that Diversion*, *supra* note 17 ("The ports of Baltimore and Virginia hunger for the cargo that moves through the Ports of New York and New Jersey to and from points beyond the densely populated region around the East Coast's biggest port . . . . An estimated 20 percent of the containers that move through New York harbor is categorized as discretionary . . . ."); Bill Mongelluzzo, *Are Shipper Decisions Elastic?*, J. COM., Oct. 4, 2010, at WP [hereinafter Mongelluzzo, *Are Shipper Decisions Elastic?*] (quoting Professor Robert Leachman as saying, "[A]t some point, the business response is to change networks by pushing goods elsewhere. Where that tipping point comes—how much a supply chain will stretch to

Greater volumes of discretionary cargo result in more jobs, taxes, and growth in infrastructure—meaning that ports have an incentive to minimize charges.[139] Additionally, shippers and MTOs are stakeholders in port operations. Dialogue and responsiveness between local and industry actors would likely result in reinvestments in those areas most beneficial to users paying the fee. Both of these factors would contribute to a reduction in transaction costs and place control over the allocation of funds in the hands of those who are most invested in the region's critical revenue enhancing projects—local authorities.[140]

Shipping industry concerns will not dictate the administration of new funding mechanisms, but they do provide a helpful lens through which to analyze the costs and benefits associated with certain policy decisions. This Part discusses the various schemes by which Congress and port authorities have sought to generate new funding sources, despite economic downturns[141] and constitutional and statutory restrictions.[142]

A. Congressional Proposals

Congressional representatives have introduced several bills designed to generate funding for investment in infrastructure at U.S. seaports. These bills rely primarily on the constitutionally delegated power to tax and spend.[143] Tax and spend measures, however, are limited by the Constitution's Export Clause, which categorically bars Congress from imposing a tax on exports.[144] Alternatively, user fees

accommodate new costs before it breaks and is rebuilt elsewhere—is a question public policy planners, shippers and carriers are trying to understand."); Mongelluzzo, *Fees, Fees and More Fees*, *supra* note 52 ("As the cost of shipping through LA-Long Beach increases, there are indications that some discretionary cargo is already being diverted to other ports—the ports' import volumes last year were flat. However, an inability by the ports to provide sufficient road, rail and terminal infrastructure would cause even more diversion.").

139. *See generally* Leach, *Blocking that Diversion*, *supra* note 17; Mongelluzzo, *Are Shipper Decisions Elastic?*, *supra* note 138.

140. *See generally* Leach, *Blocking that Diversion*, *supra* note 17; Mongelluzzo, *Are Shipper Decisions Elastic?*, *supra* note 138.

141. *See supra* note 130.

142. *See supra* Part I.

143. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

144. U.S. CONST., art. I, § 9, cl. 4; *see also supra* notes 73–80 and accompanying text.

assessed on Port Users may capitalize on both imports and exports, thus allowing for a more effective revenue generating mechanism for reinvestment in infrastructure and development.

1. H.R. 526: ON TIME Act

On February 8, 2011, Congressional Representative Ken Calvert (R-Cal.) reintroduced[145] the Our Nation's Trade, Infrastructure, Mobility, and Efficiency Act ("ON TIME Act"),[146] which would establish National Trade Gateway Corridors ("NTGC") at 300 different points of entry, including seaports, airports, and border crossings.[147] The bill provides for the assessment of a fee equal to 0.075% ad valorem of each good transported through an NTGC, or $500—whichever is less.[148] The fees collected would be used to establish a NTGC Fund, which would be dedicated for use in carrying out eligible transportation projects in trade corridors within a 300-mile radius around the collection site.[149] The bill defines an eligible project as "a project for construction of or improvements to a publicly owned intermodal freight transfer facility, for providing access to such a facility, or for making operational improvements to such a facility."[150] The U.S. Secretary of Transportation would be responsible for approving project eligibility and disbursing funds to the department of transportation of the state where the project would take place.[151] The ON TIME Act would allow funds disbursed to state departments of transportation to remain available for six years from the last day of the fiscal year when funds were appropriated.[152] Finally, the bill could provide eligible projects with up to eighty percent of required funding.[153]

145. Rep. Calvert also introduced the ON TIME Act in the 110th Congress (H.R. 5102) and in the 111th Congress (H.R. 947).

146. *See* H.R. 526, 112th Cong. (2011); *Calvert Reintroduces Goods Movement Bill*, PRESS ENTERPRISE (Feb. 8, 2011, 1:48 PM), http://blogs.pe.com/politics/2011/02/calvert-reintroduces-goods-mov.html.

147. *See* H.R. 526 §§ 3(a), (b).

148. *See id.*

149. *Id.* § 7(b).

150. *Id.* § 10(1)(B).

151. *Id.* § 4(b).

152. *Id.* § 4(b)(3).

153. *Id.* § 6(d)(1).

It is important to note that this bill purportedly imposes a fee on exports.[154] Presumably, the argument could be made that the 300-mile geographic restriction on spending ensures that the benefits of the charge would be enjoyed by or, at the very least, available to the payor.[155] The nexus between the charge and the services provided would likely be of significant debate. If a court deemed the fee a tax under *U.S. Shoe*,[156] the fee would be an unconstitutional violation of the Export Clause.[157] This bill straddles the line between what constitutes a tax and a user fee.

2. *H.R. 2355: MOVEMENT Act of 2009*

Congresswoman Laura Richardson (D-Cal.) in 2009 reintroduced the Making Opportunities Via Efficient and More Effective National Transportation Act ("MOVEMENT Act"),[158] which creates a National Goods Movement Improvement Fund ("NGMIF") for use with eligible improvement projects, environmental projects, and homeland security projects.[159] Unlike the ON TIME Act, this bill imposes a tax on the value of commercial cargo entering a U.S. seaport.[160] The bill directs the U.S. Secretary of Transportation to pre-approve projects eligible for funding[161] and distribute funds to state departments of transportation for investment.[162] Further, the bill imposes a forty-mile district around the collection site for eligible project construction,[163] which is nearly one-eighth the size of the area encompassed in the ON TIME Act.[164] Also, the MOVEMENT Act reallocates

154. *See* Mongelluzzo, *New View on Fees*, *supra* note 8 ("The Calvert bill . . . require[s] that the money be spent within 300 miles of where it's collected. This would establish the charge as a user fee rather than a tax . . . .").

155. *See* United States v. U.S. Shoe Corp., 523 U.S. 360 (1998); *see also supra* notes 74–80 and accompanying text.

156. *See supra* notes 74–80 and accompanying text.

157. *See U.S. Shoe Corp.*, 523 U.S. at 370.

158. H.R. 2355, 111th Cong. (2009).

159. *See id.* § 201. The bill breaks down funding allocations that limit the amount of funds ports can allocate to homeland security projects (three percent) and environmental projects (seven percent). *Id.* § 103(d)(2).

160. *See id.* § 202(a) (amending Internal Revenue Code, 26 U.S.C. § 4461). The ON TIME Act states that the charge is a fee rather than a tax and does not include any amendment to the Internal Revenue Tax Code. *See generally* H.R. 526, 112th Cong. (2011).

161. H.R. 2355 § 103(c)(3).

162. *Id.* § 103(c)(1).

163. *Id.* § 103(e).

164. *Cf.* H.R. 526, 112th Cong. § 7(b)(2). Neither H.R. 526 nor H.R. 2355 provide any justification for the prescribed geographic boundaries. A critical reader, howev-

71.43% of the funds held in the HMTF[165] to the NGMIF.[166] Finally, the bill provides a federal grant share of up to ninety percent of eligible project cost with a possible waiver for states of up to twenty percent of grant share if certain conditions are met.[167]

One particular problem with this bill is that its revenue generating potential is constrained by the Export Clause,[168] which exempts all exported goods from taxation. Additionally, this bill creates a second fund for infrastructure-related projects that overlaps with the existing HMTF.[169]

3. H.R. 2707: National Freight Mobility Infrastructure Fund

In 2009, Representative Adam Smith (D-Wash.) introduced H.R. 2707 to raise funds for reinvestment in the freight network, including both highways and railways, through a national competitive grant program managed by the U.S. Department of Transportation.[170] This bill creates a funding mechanism by amending the Internal Revenue Code to impose a tax on ground transportation equal to one percent of the fair market value of the cost of transporting the property.[171] "Taxable ground transportation" is transportation of property by freight rail or commercial motor vehicle.[172] Revenues collected are then deposited into a National Freight Mobility Infrastructure Fund, which are dedicated for use with eligible projects. Eligible projects include, among others,

> expansion of rail and highway tunnels to accommodate larger, taller, and additional volumes of vehicular and rail freight and container

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er, could reason that the bills are designed to take into account intermodal facilities that may be located interior to the State of California, such as the Alamaeda Corridor.

165. Water Resources Development Act of 1986, 33 U.S.C.A. §§ 2236–2238 (West 2010); s*ee infra* notes 178–181 and accompanying text (stating that the Harbor Maintenance Trust Fund—a Congressional fund dedicated for channel dredging and other harbor maintenance activities—has accrued a surplus of more than $5 billion due to annual revenue collections totaling more than $1.4 billion and disbursements averaging less than $800 million during the 2005 to 2009 period).

166. H.R. 2355 § 201(a). This reallocation suggests that the funds from the NGMIF would also be allocated to accommodate qualifying dredging projects.

167. *See id.* § 104(f).

168. *See* United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998).

169. *See infra* notes 178–181 and accompanying text (explaining that congressional inaction has resulted in the HMTF having a $5 billion surplus, while the busiest harbors need maintenance funding).

170. H.R. 2707, 111th Cong. § 102 (2009).

171. *Id.* § 202(a).

172. *Id.*

> stacks; the addition of railroad track and intermodal facilities at international gateways . . . and sea ports . . . and highway and road construction . . . at international gateways and sea ports.[173]

H.R. 2707 limits grants to eighty percent of the project cost, which would require a local contribution.[174] The bill does, however, provide that a proposer may qualify for a full-funding grant agreement.[175]

4. Congressional Analysis

Two long-term problems with the bills discussed above are that the Export Clause limits the revenue generating potential of congressional tax and spend measures[176] and that the bills only partially fund qualifying projects.[177] A broader fee assessed on all cargo—not just imports—would generate revenues more quickly and best provide fund-funding in full for capital-intensive infrastructure and development projects.

A third problem with a congressional solution is that the distribution of funds would be contingent on congressional action. The HMTF is one example of how the members of Congress can create a fund to meet an existing need and subsequently fail to allocate funds to needy projects. The HMTF is funded with tax revenues assessed on the value of imported goods, which Congress may use for the dredging and maintenance of waterways and channels.[178] "In recent years, HMTF annual expenditures have remained relatively flat while [Harbor Maintenance Tax] collections have increased due to rising import volume . . . . Consequently, a large 'surplus' in the HMTF has developed. Despite the surplus, the busiest U.S. harbors are not being fully maintained . . . ."[179] This surplus has engendered debate over whether members of Congress are adequately responsive to the needs of ports[180] and has even prompted Senator Carl Levin to sponsor the

173. H.R. 2707 §§ 104(a)(3)(D)–(F).

174. *Id.* § 106(c).

175. *Id.* § 201(c).

176. *See supra* notes 73–86 and accompanying text.

177. The ON TIME Act limits funding to eighty percent of project cost, H.R. 526, 112th Cong. § 6(d). The MOVEMENT Act of 2009 limited funding to ninety percent of project cost, H.R. 2355, 111th Cong. § 104(f). The National Freight Mobility Infrastructure Fund limited funding to eighty percent of project cost, H.R. 2707, 111th Cong. § 106(c).

178. FRITTELLI, *supra* note 136; *see also* FEDERAL USER FEES, *supra* note 136, at 5–6.

179. *Id.*

180. S. 412, 112th Cong. (2011); AM. ASSOC. OF PORT AUTH., HARBOR MAINTENANCE TAX (Mar. 2010), http://aapa.files.cms-plus.com/PDFs/Harbor%20Maintenance

Harbor Maintenance Act of 2011 to guarantee that funds collected are disbursed for necessary projects.[181]

The short-term problem with these bills is that they must be passed and implemented. The proposed solutions are complex and produce significant bureaucratic hurdles with respect to their implementation. For example, the ON TIME Act requires establishing 300 separate collection points at different border locations before the collection of funds can begin.[182] Further, the ON TIME Act, the MOVEMENT Act of 2009, and the National Freight Mobility Infrastructure Fund provide for a broad range of road, freight rail, airport, and seaport-related projects.[183] Agreeing upon and administrating a broad range of eligible projects could create an administrative backlog and hinder timely congressional action. As discussed below, local authorities could administrate a more efficient and sustainable solution.

B. National Infrastructure Bank

President Obama resurrected the discussion of a National Infrastructure Bank during a 2010 Labor Day speech[184] and in his calls for increased infrastructure investment during the 2011 State of the Union Address.[185] On March 15, 2011, Senators John Kerry and Kay

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%20Tax%202010.pdf (stating that a surplus of more than $5 billion exists in the Harbor Maintenance Trust Fund with annual revenue of more than $1.4 billion and disbursements averaging less than $800 million from the 2005 to 2009 period); Eric Kulich, *Rep. Mica Urges Action on HMT Bill*, AM. SHIPPER (May 28, 2010), http://www.americanshipper.com/NewWeb/News/shippers-newswire/ports-terminals/159510--rep-mica-urges-action-on-hmt-bill.html; Wayne K. Talley, *Financing Port Dredging Costs: Taxes vs. User Fees*, TRANSP. J., Summer 2007, at 53.

181. The Harbor Maintenance Act of 2011 would require Congress to appropriate funds for eligible projects in an amount equal to the receipts for the respective fiscal year. *See* S. 412 § 2(a)(1).

182. H.R. 526, 112th Cong. §§ 3(a), (b) (2011).

183. *See supra* Part II.A.1–3.

184. *See* Editorial, *One Jobs Idea from Obama that Should Fly*, CHRISTIAN SCI. MONITOR, Sept. 7, 2010, http://www.csmonitor.com/Commentary/the-monitors-view/2010/0907/One-jobs-idea-from-Obama-that-should-fly (quoting President Obama as saying, "reforming the haphazard and patchwork way we fund and maintain our infrastructure to focus less on wasteful earmarks and outdated formulas and more on competition and innovation that gives us the best bang for the buck."). This concept was originally introduced by Senator Dodd and former Senator Hagel as the National Infrastructure Bank Act of 2007. S. 1926, 110th Cong. (2007).

185. *See supra* note 2 and accompanying text; *see also* DEP'T OF THE TREASURY, *supra* note 7, at 19; EVERETT EHRLICH, A NATIONAL INFRASTRUCTURE BANK: A ROAD GUIDE TO A DESTINATION 1 (2010), *available at* http://www.progressivefix.com/wp-content/uploads/2010/09/09.2010-Ehrlich_A-National-Infrastructure-Bank.pdf.

Bailey Hutchison introduced the Building and Upgrading Infrastructure for Long-term Development ("BUILD") Act.[186] The BUILD Act creates an American Infrastructure Financing Authority ("AIFA"), a type of infrastructure bank, to help "facilitate investment in, and long-term financing of, economically viable infrastructure projects of regional or national significance . . . ."[187] An eligible project could include roads, bridges, rail, water systems, or power grids.[188] The BUILD Act provides for an initial government investment of $10 billion[189] that could "leverage up to $600 billion in private investments to repair, modernize, and expand . . . [the United States'] ailing infrastructure system."[190] The AIFA's Board of Directors would be responsible for monitoring and overseeing the funding of eligible projects.[191] In meeting eligibility requirements, projects must have a minimum estimated cost of $100 million; however, qualifying projects in rural areas would need to demonstrate costs equal to or greater than $25 million.[192]

Setting a lower cost threshold for rural areas is an improvement over a previous infrastructure bank proposal,[193] which would have allocated funds only for projects with an estimated cost equal to or greater than $75 million.[194] In the context of addressing the current infrastructure and development crisis specific to U.S. ports, however,

186. S. 652, 112th Cong. (2011); *see* Press Release, John Kerry, U.S. Chamber, AFL-CIO Urge Infrastructure Bank (Mar. 15, 2011), http://kerry.senate.gov/press/release/?id=c53e83c0-b95d-4e2d-9816-d5726d2b0d6c; *see also* S. 1926, 110th Cong. (2009); Michael Cooper, *Group Wants New Bank to Finance Infrastructure*, N.Y. TIMES, Mar. 15, 2011, at A21, *available at* http://www.nytimes.com/2011/03/16/us/politics/16infrastructure.html?_r=1&partner=rss&emc=rss (noting that the infrastructure bank advocated for by President Obama would only fund transportation-related projects, whereas the BUILD Act would also finance water systems and power grids).

187. S. 652 § 2(b).

188. *See* Cooper, *supra* note 186.

189. *See* S. 652 § 303.

190. Press Release, John Kerry, *supra* note 187 (quoting the Chief Executive Officer of the AFL-CIO, Thomas J. Donahue).

191. *See* S. 652 § 104.

192. *See id.* § 201(d).

193. *See* S. 1926, 110th Cong. (2007).

194. *Id.* § 202(b); Daniel Indiviglio, *Would a National Infrastructure Bank Help?*, ATLANTIC, Sept. 15, 2010, http://www.theatlantic.com/business/archive/2010/09/would-a-national-infrastructure-bank-help/63052/ (stating that smaller and less populous states would fight the creation of the infrastructure bank because funding would be distributed according to determined importance of the project, and less populous areas would be at a clear disadvantage); *cf.* Felix G. Rohatyn, *The Case for an Infrastructure Bank*, WALL ST. J., Sept. 15, 2010, at A17.

the BUILD Act presents two potential issues: (1) establishing a functional infrastructure bank could take a significant amount of time, and (2) the scope of project eligibility is very broad. A more targeted and expedited funding mechanism could be achieved through the assessment of cargo-based fees, which would be collected and reinvested by local authorities.[195]

C. Structured User Fees

The *Volkswagenwerk* comparative analysis standard requires that the charges imposed by a port authority on a user of the port be reasonably proportionate to the benefits generated by the charge.[196] Port authorities have implemented several targeted fee structures in connection with providing twenty-four-hour terminal access, added security measures, and subsidies for new trucks entering port facilities. This Section examines each of these three fee structures and analyzes whether each fee would withstand a challenge under the Tonnage Clause and Shipping Act.[197]

1. PierPASS

In February 2004, California Assemblyman Alan Lowenthal introduced a bill into the General Assembly that would impose a fee on any truck entering the ports of Long Beach and Los Angeles from 8:00 AM to 5:00 PM, Monday through Friday, for the purpose of transporting cargo.[198] The bill was intended to reduce congestion in the ports associated with increasing trade volumes and, in turn, combat the adverse environmental and public health-related effects attendant with increased truck emissions.[199] MTOs in both ports strongly opposed the bill, particularly because a governmental authority would manage and control the fee revenue.[200] Recognizing that the health and safety concerns were driving legislators toward

195. *See infra* Part III.

196. *See supra* notes 98–100 and accompanying text.

197. *See supra* Part I.

198. *See* A.B. 2041, 2003–04 Gen. Assemb., Reg. Sess. (Cal. 2004). A.B. 2041 was not passed into law, but did ultimately lead to the creation of the PierPASS system.

199. Trucks transporting cargo run on diesel fuel, which, when burned, generates greater levels of particulate than passenger automobiles running on unleaded gasoline. *See supra* note 19. Congestion on roadways results in increased truck idling time, which then results in less efficient fuel usage and increased emissions.

200. *See Freight Mgmt. & Operations*, U.S. DEP'T OF TRANSP., http://ops.fhwa.dot.gov/publications/fhwahop09014/sect2.htm (last visited July 29, 2011).

passing the bill, MTOs decided to form a privately managed corporation to achieve the intent and purpose of the proposed legislation.[201]

In 2005, PierPASS was created.[202] "PierPASS is a not-for-profit company created by marine terminal operators at the ports of Los Angeles and Long Beach to address multi-terminal issues such as congestion, security and air quality."[203] PierPASS charges beneficial cargo owners fifty dollars per TEU[204] for most cargo moved during peak hours.[205] The fees collected by PierPASS are then used to operate and maintain points of entry during off-peak hours.[206] There is no charge for off-peak hour access.[207] By 2006, PierPASS shifted to off-peak hours forty percent of the containers transported by truck through the ports of Los Angeles and Long Beach.[208]

PierPASS would withstand challenge under the Tonnage Clause because it is assessed on the beneficial cargo owner, rather than a shipper entering, remaining in, or departing from a port.[209] The fee would also likely be upheld as a reasonable practice under the Shipping Act because each user receives a tangible benefit, and the fee assessed is a fair match to the benefit enjoyed by the user.[210] First, any truck paying the fee is granted peak-hour gate access.[211] Second, the fee paid by beneficial cargo owners for peak-hour entry funds twenty-four-hour gate access at the ports.[212] This benefit structure, in turn, incentivizes truckers to utilize off-peak hour access, which reduces peak-hour congestion, results in quicker peak-hour cargo pick-up and delivery, and reduces fuel consumption. Thus, the fifty-dollar charge

201. *See id.* Although private MTOs created PierPASS, the analysis under the Shipping Act is the same regardless of whether the entity imposing the fee is public or private.

202. PIERPASS, http://pierpass.org/about/ (last visited July 29, 2011).

203. *Id.*

204. Bill Mongelluzzo, *LA-LB to Keep PierPass Rates*, J. COM., Aug. 4, 2009, at WP, *available at* http://www.joc.com/maritime/la-lb-keep-pierpass-rates.

205. *See id.* Peak hours are designated as Monday through Friday, 3:00 AM to 6:00 PM. PIERPASS, *supra* note 202.

206. PIERPASS, *supra* note 202.

207. *Id.*

208. *See* Peter Tirschwell, *A Mixed Picture*, J. COM., Mar. 13, 2006, at 54.

209. *See* Clyde Mallory Lines v. Alabama, 296 U.S. 261, 267 (1935); Packet Co. v. Keokuk, 95 U.S. 80, 85–87 (1877); Cannon v. New Orleans, 87 U.S. 577, 582 (1874); Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 545 (D.C. Cir. 1988); Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157, 1172 (D. Haw. 2001).

210. *See supra* Part I.A., I.C.

211. PIERPASS, *supra* note 202.

212. *See id.*

assessed on the beneficial cargo owner for peak-hour gate access is accompanied by a reasonably proportionate benefit.[213]

The PierPASS fee structure starkly contrasts with those fees struck down as unreasonable under the Shipping Act in *Baton Rouge*[214] and *Plaquemines*.[215] In *Baton Rouge*, the court found invalid a marine terminal operator's charge on stevedores for the use of equipment that had the ultimate effect of reducing the need for services supplied by stevedores.[216] In *Plaquemines*, the court invalidated a charge on large ships that was used to subsidize the cost of emergency services for an entire class of nonpaying smaller ships.[217] In both *Baton Rouge* and *Plaquemines*, the definable benefit was found to be disproportionate to the charge assessed on the individual enjoying that benefit.[218] Alternatively, PierPASS's fee structure ensures that the benefits of peak-hour access are proportionate to the charge assessed on those who choose to incur it, irrespective of whether twenty-four-hour gate access provides benefits to truckers enjoying off-peak access.

The PierPASS system operates fairly smoothly within the framework of the Shipping Act; however, the comparative costs and benefits of security-related fees are more difficult to reason.

2. Security-Related Fees

A host of port authorities assess an approximate six-dollar charge[219] on all containers unloaded from a ship at the port to offset the cost of federally mandated security measures.[220] The surcharge is generally invoiced to the shipper[221] and is used to fund various security measures, such as port-wide radio and emergency notification sys-

213. *See supra* notes 101–06.

214. *See supra* Part I.B.

215. *See supra* Part I.C.

216. Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210, 1217 (D.C. Cir. 1981).

217. Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 (D.C. Cir. 1988).

218. *See id.*; Baton Rouge Marine Contractors, 655 F.2d at 1217.

219. *See generally* AM. ASSOC. OF PORT AUTH., SECURITY FEES AND SURCHARGES AT U.S. PORTS 34 (2008), *available at* http://aapa.files.cms-plus.com/Statistics/USPortSecurityFeesAndSurcharges.pdf.

220. *See id.* at 2; s*ee, e.g.*, Maritime Transportation Security Act of 2002, Pub. L. No. 107–295, 116 Stat. 2064; *see also* FRITTELLI, *supra* note 136.

221. AM. ASSOC. OF PORT. AUTH., *supra* note 219, at 7.

tems, port-wide cameras and surveillance systems, and security improvements to roadways and other common areas, among others.[222]

The fees would almost certainly withstand challenge under the Tonnage Clause because definable benefits inure to shippers paying the charge, regardless of whether all users of the port avail themselves of the services. Similar to the fees for general emergency services in *Clyde Mallory* and *Plaquemines*, all users of the port avail themselves of port-related security measures. Therefore, the fee is not likely an impermissible duty of tonnage.

The Shipping Act analysis of security-related fees is more akin to the *Plaquemines* case.[223] Security-related fees are assessed on all loaded containers.[224] Those opposing such a charge could argue that the fee is discriminatory because cargo also enters the port secured in boxes, crates, drums, or barrels. Arguably, shippers of these goods enjoy the same security benefits funded through assessments on the shippers of containerized cargo. In form and substance, the security fee closely resembles the fee for emergency services shouldered by large ships in *Plaquemines*, which was struck down as invalid under the Shipping Act.[225] Port authorities defending the fee, however, could argue that containerized trade comprises a highly disproportionate share of all cargo entering the port relative to bulk and break-bulk cargo. Therefore, the failure to assess the charge on marginal cargo volumes results in a *de minimis* discriminatory effect.[226]

Security-related fees assessed on a per-container basis is not a perfect fit within the framework of the Shipping Act; however, the high value associated with port security could be viewed as reasonably proportional to the approximate six dollar per-container charge. The arguably proportional measure of benefits to costs could dissuade

222. *See* 46 U.S.C.A. § 70107 (2010). In response to the September 11th terrorist attacks, Congress passed the Maritime Transportation Security Act ("MTSA"). It requires ports to develop Area Marine Transportation Security Plans, which involve the implementation of "security monitoring and recording, security gates and fencing, marine barriers for designated security zones, security-related lighting systems, remote surveillance, concealed video systems, security vessels, and other security-related infrastructure or equipment that contributes to the overall security of passengers, cargo, or crewmembers." *Id.*

223. Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 (D.C. Cir. 1988).

224. AM. ASSOC. OF PORT AUTH., *supra* note 219, at 2.

225. 838 F.2d at 548.

226. *See id.* (stating that the FMC's determination that excluding a marginal group of small boats from a fee structure acted as a reasonable *de minimis* exception).

shippers from risking additional cost associated with litigating whether the fee is unreasonable or discriminatory under the Shipping Act.

The nexus between costs and actual benefits flowing to a user become even more attenuated in a system designed to reduce adverse environmental and public health effects.

3. Clean Truck Program

The ports of Los Angeles and Long Beach implemented the Clean Truck Program as an environmental initiative designed to phase out the use of older and less efficient trucks, while subsidizing the purchase of newer and cleaner models.[227] Together the ports established a timeline for phasing out the use of pre-2007 model trucks in the transportation of goods at the ports of Los Angeles and Long Beach.[228]

The ports of Los Angeles and Long Beach created a not-for-profit organization known as PortCheck to collect and manage the Clean Trucks Fee.[229] Fees are used to subsidize the purchase of 2007 or newer model trucks.[230] The fee is charged on beneficial cargo owners and consists of a thirty-five dollar per-loaded-TEU charge on trucks manufactured between 1994 and 2006.[231] The Clean Truck Program is scheduled to sunset in 2012, when all trucks have been replaced by

227. *See* Port of Los Angeles, Tariff No. 4, Section 20, Item No. 2035 (Dec. 17, 2009), *available at* www.portoflosangeles.org/Tariff/SEC20.pdf; *see* Bill Mongelluzzo, *The Coming Storm: Port Trucking in South California Will Undergo Big Changes During the Next Several Months*, J. COM., Jan. 28, 2008, at 12 [hereinafter Mongelluzzo, *The Coming Storm*].

228. On October 1, 2008, all pre-1989 trucks were banned, and on January 1, 2010, trucks manufactured between 1989 and 1993 were banned. Trucks with engine model years 2004 and newer will continue to have access until January 1, 2012, at which time, trucks that do not meet the 2007 federal clean truck emissions standard will be banned from port terminals. *See About the Port of Los Angeles Clean Truck Program*, PORT OF LOS ANGELES, http://www.portoflosangeles.org/ctp/idx_ctp.asp (last visited July 29, 2011).

229. *See* PORTCHECK, http://www.portcheck.org/ (last visited July 29, 2011).

230. PORT OF LOS ANGELES, THE PORT OF LOS ANGELES CLEAN TRUCK PROGRAM: PROGRAM OVERVIEW AND BENEFITS (2008), *available at* http://www.portoflosangeles.org/ctp/CTP_O&B.pdf (last visited July 29, 2011) [hereinafter PORT OF LOS ANGELES CLEAN TRUCK PROGRAM]; *see* Mongelluzzo, *The Coming Storm*, *supra* note 227.

231. *See* PORT OF LOS ANGELES CLEAN TRUCK PROGRAM, *supra* note 230.

2007 or newer models.[232] Unlike PierPASS, the Clean Truck Fee will be charged only on domestic cargo.[233]

This program met considerable resistance from the trucking industry, but was not challenged as an unreasonable or discriminatory practice under the Shipping Act.[234] An analysis under the Shipping Act, however, is instructive. Although the Clean Truck Fee is narrow in the sense that it is assessed only on beneficial cargo owners for the transportation of domestic cargo by truck,[235] the benefits accruing from the collection of those fees do not appear to be reasonably proportioned.[236] First, the fee is collected to subsidize the purchase of newer and less polluting trucks.[237] This benefit arguably provides a greater benefit to truck owners and truck drivers than to the beneficial cargo owner.[238] Second, the purpose for subsidizing the new trucks is to combat the adverse environmental impacts associated with older model diesel engines.[239] This benefit accrues to the general public, including the class of individuals paying the Clean Truck Fee. The general benefits tied directly to the fee are akin to the invalid charge for emergency services subsidized by larger ships in *Plaquemines*.[240] Regardless of whether the beneficial cargo owner is a member of the public enjoying this benefit, under *Volkswagenwerk*, the fee and benefit must be closely apportioned.[241] Here, classes of non-paying individuals seem to be benefitting as much, if not more, than

232. *See id.*

233. For example, mainland trade destined for Hawaii, Guam, or Alaska would be charged a fee. *See id.*

234. *See* Am. Trucking Ass'ns v. City of Los Angeles, CV 08-4920, 2010 U.S. Dist. LEXIS 88134 (C.D. Cal. Aug. 26, 2010), *aff'd in part*, *rev'd in part*, 2011 U.S. App. LEXIS 19609 (9th Cir. Sept. 26, 2011) (defendants claiming that Clean Truck Program was a violation of the Dormant Commerce Clause and void under Federal Preemption doctrine); *see also* Am. Trucking Ass'ns v. City of Los Angeles, No. CV 08-4920, 2010 U.S. Dist. LEXIS 118949 (C.D. Cal. Oct. 25, 2010) (granting preliminary injunction for employee driver provision and denying injunctive relief for off-street parking provision). It is still undetermined whether the Clean Truck Program will ultimately withstand challenge; but claims were likely not brought under the Shipping Act for strategic reasons, such as possible concern over the creation of undesirable precedent and a greater likelihood of success under a different legal theory.

235. *See* PORT OF LOS ANGELES CLEAN TRUCK PROGRAM, *supra* note 230.

236. *See supra* notes 73–86 and accompanying text.

237. *See* PORT OF LOS ANGELES CLEAN TRUCK PROGRAM, *supra* note 230.

238. *See* COALITION FOR HEALTHY PORTS, *supra* note 19.

239. *See* PORT OF LOS ANGELES CLEAN TRUCK PROGRAM, *supra* note 230.

240. *See supra* Part I.C.

241. *See supra* Part I.B.

those paying the fee. Therefore, on its face, such a fee appears to be a violation of the Shipping Act.

Although not challenged under the Shipping Act, the Clean Truck Fee is an example of how the *Volkswagenwerk* comparative analysis would likely preclude ports from undertaking initiatives where the actual benefits flowing to a user are difficult to define. Similar difficulties are encountered in the assessment of a cargo-based fee, where benefits accrue disproportionately to users paying and not paying the charge.[242]

D. Port Authority Cargo-Based Fees

Despite the exacting analysis applied by courts in a challenge under the Shipping Act, the United States' three largest port authorities have proposed or implemented a cargo-based fee for general port improvements. The Infrastructure Fee proposed by the ports of Los Angeles and Long Beach is not scheduled to become effective until January 2012.[243] The Port Authority of New York and New Jersey's ("PANYNJ") Cargo Facility Charge was implemented in March 2011,[244] and in May 2011 invoices assessing the charge were issued to MTOs.[245] Shipping lines acted quickly. On August 5, 2011, nine shipping lines filed suit against PANYNJ before the FMC alleging that the Cargo Facility Charge is a violation of the Shipping Act's prohibition on unreasonable and discriminatory practices.[246] Although no determination has been made as to whether the charges and benefits associated with the Cargo Facility Charge are sufficiently apportioned, the litigation illustrates the costs and challenges to port authorities associated with funding port-related infrastructure and development. This section will first outline the structure and purpose behind each fee, and then analyze their validity under the Shipping Act and Tonnage Clause.[247]

242. *See infra* Part II.D, III.

243. Tariff No. 4, Section 21, *supra* note 45.

244. Section H, Subrule 34, *supra* note 45.

245. *Id.*

246. *See* Complaint for Cease and Desist Order and Reparations, *supra* note 49. Plaintiff shipping lines allege that enforcement of the Cargo Facility charge is an "unlawful exaction of fees not commensurate with services provided," and that "the threat of expulsion from all Port facilities, impose[s] unreasonable, undue and unlawful detriment, prejudice and harm" in violation of the Shipping Act. *Id.* at V; 46 U.S.C.A. §§ 41102(c), 41106 (West 2006); *see infra* Part II.D.2–3; *see also supra* note 287 (discussing the significance of this litigation to the proposal outlined in this Note).

247. *See supra* Part I.

1. Ports of Los Angeles/Long Beach—Infrastructure Fee

The ports of Los Angeles and Long Beach first proposed a per-container user fee for implementation in 2008;[248] however, implementation of the fee is now estimated to become effective on January 1, 2012.[249] The Infrastructure Fee would be assessed on beneficial cargo owners for each TEU that enters or leaves the ports of Los Angeles or Long Beach.[250] The fee would vary between ten and eighteen dollars per TEU over a five-year period and is estimated to raise $1.4 billion,[251] which would fund a portion of costs for trade-related infrastructure and emission-reduction projects.[252] The State of California would contribute the balance of the estimated $2.9 billion cost for the specified port-area infrastructure projects.[253] The fee would not apply to environmental review processes, but would cover a portion of the costs for the later stages of projects, including final design, utility relocation, right-of-way acquisition, construction, and construction management.[254] Finally, the tariff provides that the Infrastructure Fee would cease to be collected

> (a) after the share of Approved Infrastructure Project costs allocable to be recovered by the Port Infrastructure Fund have been paid in full; (b) after the Executive Directors determine that the Infrastructure Fund balance is sufficient to pay all such costs; or (c) if the Clean Truck Fee cannot be collected . . . whichever occurs first.[255]

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248. Bill Mongelluzzo, *LA-LB Lay Up Infrastructure Fee*, J. COM., Aug. 4, 2009, http://www.joc.com/maritime/la-lb-lay-infrastructure-fee (last visited July 29, 2011).

249. Tariff No. 4, Section 21, *supra* note 45. The Ports of Los Angeles and Long Beach have stated that the delay is due to poor economic conditions and fears that the industry actors may redirect their business to other ports in reducing transaction costs. *See* Art Marroquin, *Harbor Commissioners Delay Decision on Cargo Fee*, ALLBUSINESS, Mar. 5, 2010, http://www.allbusiness.com/economy-economic-indicators/economic-conditions-decline/14052467-1.html (last visited July 29, 2011).

250. Tariff No. 4, Section 21, *supra* note 45.

251. *See* PORT OF LOS ANGELES, Q&A: INFRASTRUCTURE CARGO FEE 2–3 (2010), *available at* www.portoflosangeles.org/CAAP/ICF_Tariff_QA.pdf (last visited July 29, 2011).

252. The listed projects include the Gerald Desmond Bridge Replacement; the SR-47 Expressway; Navy Way/Seaside Avenue Interchange; South Wilmington Grade Separation; I-110 Connectors Program; and Ports rail systems to facilitate use of on-dock rail. *See* Tariff No. 4, Section 21, *supra* note 45, at Item No. 2100.

253. *See supra* note 252.

254. *Id.*

255. Tariff No. 4, Section 21, *supra* note 45, at Item No. 2105.

2. Port Authority of New York & New Jersey—Cargo Facility Charge

Effective March 14, 2011, PANYNJ amended its tariff, FMC Schedule No. PA 10 (the "Tariff"), to include a charge equal to $4.95 per TEU, $1.11 per vehicle, and $0.13 per metric ton on bulk, which "shall apply to all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at PANYNJ leased and public berths."[256] PANYNJ is a landlord port authority, meaning that it leases land to private MTOs who then contract with ocean carriers for the delivery of goods.[257] The Cargo Facility Charge provides that shippers are responsible for payment, but requires MTOs to collect the fee and remit payment to PANYNJ.[258] If a shipper does not pay the Cargo Facility Charge for two consecutive billing periods, the Tariff provides that the shipper must be denied service by all MTOs in the ports of New York and New Jersey.[259] If an MTO continues to provide service to a shipper that should be denied service pursuant to Section H of the tariff, then that MTO becomes fully liable to PANYNJ indefinitely for the Cargo Facility Charges assessed on the shipper.[260] The single Cargo Facility Charge replaces a previous fee for port rail facility use and will finance several major roadways used to transport cargo to and from marine terminals as well as "a number of operational and physical security improvements at the marine terminal facilities."[261]

256. Section H, Subrule 34, *supra* note 45; *see* PORT AUTH. OF N.Y. & N.J., CARGO FACILITY CHARGE: THE PATH TO PROVIDING A MORE EFFICIENT, SAFE, AND ENVIRONMENTALLY FRIENDLY TRANSPORTATION SYSTEM (2010), *available at* http://www.pakair.net/upload/Cargo-Facility_New%20York-%20New%20Jersey_presentation.pdf. The Port Authority's jurisdiction is statutorily limited to a "Port District," which is defined geographically as an approximate twenty-five mile radius around the Statue of Liberty. N.J.S.A. 32: 1-3 (2006); *Overview of Facilities and Services*, PORT AUTH. OF N.Y. & N.J., http://www.panynj.gov/about/facilities-services.html (last visited July 29, 2011).

257. *See* ENVIRONMENTAL INITIATIVES AT THE PORT OF NEW YORK AND NEW JERSEY, http://www.panynj.gov/about/port-initiatives.html (last visited July 29, 2011).

258. Section H, Subrule 34, *supra* note 45.

259. *Id.* at Subrule 34-1220(3)(b)(iii).

260. *Id.* at Subrule 34-1220(3)(b)(iv).

261. Port Auth. of N.Y. & N.J. Board Minutes, Port of New York and New Jersey—Establishment of Cargo Facility Charge—Elimination of Sea Link Container Terminals Subscription Fee—Amendment of Agreements with Millennium Marine Rail, LLC, New York Container Terminal, Inc., and Port Newark Container Terminal, LLC 356 (Dec. 7, 2010), http://www.panynj.gov/corporate-information/pdf/board_minutes_dec_7_2010.pdf; *see also* Peter T. Leach, *NY-NJ Port to Spend $65 Million on Terminal Road*, J. COM., Dec. 8, 2010, at WP ("The road upgrades, which

These expansions will be undertaken to reduce congestion and travel time, accommodate future volume growth, decrease truck idling time, and enhance security and safety in the ports of New York and New Jersey.[262] "The fee is projected to generate $26 million a year."[263]

3. Analysis of Cargo-Based Fee Validity

Identifying the benefits from the Infrastructure Fee and the Cargo Facility Charge is critical in assessing the validity of the fee under the Tonnage Clause and Shipping Act. Equally important is recognizing who is actually enjoying those benefits. Under the Shipping Act, the reasonableness of the fee will need to be closely apportioned to the benefits actually enjoyed.[264] The Tonnage Clause commands a less exacting standard—that the fees are tied to an actual use enjoyed by the payor.[265]

The Port of Los Angeles and Port of Long Beach's Infrastructure Fee is assessed directly on beneficial cargo owners transporting containerized cargo.[266] The fees would be used to construct, repair, maintain, and operate various highway and freight rail projects designed to reduce roadway congestion and adverse environmental and public health-related impacts.[267] These benefits flow directly to beneficial cargo owners. For example, the savings attendant with reduced fuel consumption and quicker delivery and pick-up times would be passed through to the beneficial cargo owner in the form of reduced transaction costs.[268] What the Infrastructure Fee fails to address is the free ride given to trucks transporting vehicle, bulk, and break-bulk cargo, as well as every motorist traveling on the funded improvement.[269] A

are designed to ease traffic congestion, increase cargo capacity and enhance safety, will be financed by a new infrastructure fee on all cargo . . . .").

262. *See* Port Auth. of N.Y. & N.J. Board Minutes, *supra* note 261.

263. *Id.*

264. Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968).

265. *See* United States v. U.S. Shoe Corp., 523 U.S. 360 (1998); Clyde Mallory Lines v. Alabama, 296 U.S. 261, 266–67 (1935).

266. *See* cases cited *supra* note 265.

267. *Id.*

268. *See* Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210 (D.C. Cir. 1981).

269. *See* Mongelluzzo, *Fees, Fees and More Fees*, *supra* note 52 ("[T]rucks pulling empty containers or carrying bulk products will not have to pay. Neither will the hundreds of motorists who drive their cars each day in the harbor area . . . . And the plan will invite litigation because it raises fairness issues under the Shipping Act, and possibly constitutional questions if it is judged to be a tax on exports.").

court is not likely to view these exceptions as *de minimis*.[270] Further, the environmental benefits of the various transportation projects inure to the benefit of everyone.[271] Although the benefits of cleaner air and reduced fuel consumption could be seen as ancillary to the construction and maintenance of new and existing freight rail and roadways, the Shipping Act provides that the actual benefits flowing to a user must be as closely apportioned as possible to the charge.[272]

Alternatively, PANYNJ's Cargo Facility Charge is assessed on almost all shippers loading or unloading cargo at the port.[273] Like the Infrastructure Fee, fees collected under the Cargo Facility Charge will be used to construct, repair, maintain, and operate roadway and freight rail projects.[274] New roadways and freight rail facilities would benefit shippers utilizing those improvements by reducing time in the port to load and unload cargo. The problem is that not all shippers avail themselves of these benefits. Nine shipping lines assert this argument, claiming that PANYNJ's Cargo Facility Charge unreasonably prefers shippers who are largely reliant on freight rail to those shippers who minimally utilize freight rail, if at all.[275] Further, challengers could argue that freight rail and roadway improvements inure to truckers and beneficial cargo owners—who do not pay the Cargo Facility Charge—in greater proportion than to shippers. This fee structure was specifically struck down in the *Baton Rouge* decision, which held that "if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under [the Shipping Act]."[276]

All three ports will likely have a difficult time defending a challenge to cargo-based charge under the Shipping Act. With a sophisti-

270. *See* Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 (D.C. Cir. 1988).

271. Environmental benefits are significantly broader than the fire and emergency benefits discussed in *Plaquemines*. *See id.*

272. *See generally Baton Rouge Marine Contractors*, 655 F.2d 1210 (stating port's analysis did not demonstrate how stevedores received a benefit from an automated shipping gallery); Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 27 S.R.R. 1123 (F.M.C. 1997) (stating benefits that merely promoted efficiency in the shipping business as a whole but could not be tied to the user charged were not reasonable).

273. Section H, Subrule 34, *supra* note 45; *cf.* Tariff No. 4, Section 21, *supra* note 45.

274. *See* sources cited *supra* note 273.

275. *See* Complaint for Cease and Desist Order and Reparations, *supra* note 49, at IV(cc); *see also infra* note 287 (discussing the significance of this litigation to the proposal outlined in this Note).

276. *Baton Rouge Marine Contractors*, 655 F.2d at 1217.

cated economic analysis, however, the ports could demonstrate that the reduced congestion and development of intermodal facilities accrues a tangible benefit on shippers and beneficial-cargo owners in proportion to the cost by reducing the overall cost of transporting goods through more efficient loading, unloading, and delivery times.[277] Additionally, if the short-term costs of the Infrastructure Fee and Cargo Facility Charge were immediately absorbed into the price of shipping services, it could be argued that the costs attendant with the fee would actually be borne by the consumer and were thus *de minimis*.[278]

Finally, the Infrastructure Fee and Cargo Facility Charge would not likely constitute a tax under the Tonnage Clause. Both fees, at least in part, fund the repair, maintenance, and operation of existing freight rail and roadway projects.[279] Under *Clyde Mallory*, these fees would be justified on grounds that the use of these projects confers a measurable benefit on the payor in the form of reduced time for loading and unloading and, consequently, less fuel consumption in the ports. Even under *U.S. Shoe*, one could argue convincingly that the fees—approximately $4.95 per TEU under the Cargo Facility Charge and $10 per TEU under the Infrastructure Fee—are a "fair[] match [to] the . . . use of port services and facilities"[280] and, therefore, are not an impermissible duty of tonnage.[281]

The cargo-based fees proposed or implemented at the three largest U.S. ports generate revenue for reinvestment in port-related infrastructure and development projects. Both fees likely withstand challenge under the Tonnage Clause, but their sustainability is uncertain under the Shipping Act.[282] Given the need to generate new funding for infrastructure and development at U.S. seaports, Congress should expressly authorize port authorities to assess fees on Port Users for

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277. *See generally* Port Auth. of N.Y. & N.J. Board Minutes, *supra* note 261 ("In addition to those who directly utilize the rail system, given the long-standing issues of road congestion in the Port, those who ship by truck have benefited from the investment in the [rail] system and continue to do so. Accordingly, it is fair and appropriate that they share in the cost of the investment in the [rail] system."). *See also* sources cited *supra* note 273.

278. *See* Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 548 (D.C. Cir. 1988).

279. *Cf.* Tariff No. 4, Section 21, *supra* note 45. *See generally* Section H, Subrule 34, *supra* note 45.

280. United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998).

281. *See supra* Part II.A.

282. *See generally* Complaint for Cease and Desist Order and Reparations, *supra* note 49.

reinvestment in port-related improvements by amending the Shipping Act.

III. PROPOSED REFORM

Port authorities have not openly considered the imposition of a cargo-based fee on Port Users since 2008.[283] Prior to March 2011, no port authority had implemented this type of fee structure to fund port-related infrastructure and development projects.[284] The FMC has followed the instruction and guidance provided by courts in analyzing whether particular fees are permissible under the Shipping Act.[285] Given that the cargo-based fees as proposed or implemented by the three largest U.S. container ports do not have the express consent of Congress, they are vulnerable to challenge under the Shipping Act and Tonnage Clause.[286] In fact, on August 5, 2011, nine shipping lines challenged PANYNJ's Cargo Facility Charge as a violation of the Shipping Act's prohibition on unreasonable and discriminatory practices.[287]

As discussed above, federal, state, and industry actors agree that investments in infrastructure and development are critical to the future competitive position of the United States.[288] The concerns expressed by stakeholders can best be mitigated through an amendment to the Shipping Act expressly providing port authorities with the power to assess cargo-based fees on Port Users for qualifying trans-

283. *Cf.* Mongelluzzo, *LA-LB Lay Up Infrastructure Fee*, *supra* note 248.

284. Section H, Subrule 34, *supra* note 45.

285. *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 282 (1968); Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536 (D.C. Cir. 1988); Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210 (D.C. Cir. 1981); Cargill v. Fed. Mar. Comm'n, 530 F.2d 1062, 1068–69 (D.C. Cir. 1976).

286. *See* Complaint for Cease and Desist Order and Reparations, *supra* note 49, at V; *supra* Part I.B, II.D.2.

287. *See* Complaint for Cease and Desist Order and Reparations, *supra* note 49, at V. This litigation holds little significance for the proposal outlined in this Note. While the litigation could result in the FMC or a court upholding the Cargo Facility Charge as valid under the Shipping Act, the opposite result is just as, if not more, likely. Further, the litigation may end in settlement or be dismissed on grounds other than the merits of the claim. Congressional action would eliminate ongoing and future litigation over the validity of cargo-based fees under the Shipping Act. The cost savings accruing to port authorities from reduced litigation—both in terms of monetary and human capital—could instead be allocated to rebuild port-related infrastructure.

288. *See supra* notes 8–9 and accompanying text.

portation projects, environmental initiatives, and port security measures.[289]

Under this amendment, fees would be assessed and collected directly by port authorities and may be assessed on any individual in the supply chain (i.e., shipper, trucker, marine terminal operator, or beneficial cargo owner) at the discretion of the port authority.[290] This amendment would allow port authorities broad power to incorporate fees into their current business model in a flexible and seamless manner.

Port authorities would only be authorized to invest in infrastructure projects that have been approved by the U.S. Department of Transportation.[291] Project eligibility would be determined by criteria designed to measure the project's effectiveness in meeting current and future capacity, security, and environmental needs. Factors such as geographic location, population density, and accessibility to highway and freight rail facilities should be considered. Further, in closely apportioning the benefits to the charges imposed, proposed projects would be located within a geographic area that begins at the cargo's point of origin and extends along the coast or waterway in either direction for ten miles.[292] Eligible projects would fall within a one-mile radius from that coast or waterway. Recognizing that densely populated areas present unique concerns with respect to port-related congestion and pollution, an exception to the foregoing geographic limitations would be made for metropolitan areas measuring a population density greater than 1000 people per square mile of land.[293] For ex-

289. *See supra* Part II.A.4.

290. This structure would support the existing East Coast Cargo Facility Charge, which is assessed on the shipper but collected through the marine terminal operator, as well as the West Coast Infrastructure Fee, which is assessed on the beneficial cargo owner. *See supra* Part II.D.

291. The U.S. Department of Transportation is better suited for this task than state departments of transportation because there is a less likely chance that the federal government will use its political power to obstruct planning and construction in exchange for reallocations of funds collected under this provision.

292. *Cf.* ON TIME Act, H.R. 526, 112th Cong. § 7(b) (2011) (providing that funds may be used within a 300-mile radius of the collection site); MOVEMENT Act of 2009, H.R. 2355, 111th Cong. § 103(e) (2009) (imposing a forty-mile district around the collection site for eligible project construction).

293. The population density would be determined by the most recent census data provided by the U.S. census. *Cf. United States and Puerto Rico—Metropolitan Area*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US25&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-10|US-10S&-_lang=en.

ample, if a ship were to dock in New York Harbor, this amendment would allow PANYNJ to assess a cargo-based fee to fund the construction, maintenance, and repair of a qualifying project from Bayonne, New Jersey to Fort Lee, New Jersey, and from parts of Brooklyn, New York to Hoboken, New Jersey. Given the population density of the region, PANYNJ would be permitted to fund eligible projects outside of this initial funding zone, provided that the population density extending from the point of origin to the project location was greater than 1000 people per square mile. These restrictions would limit the ability of states to divert funds to non-port-related infrastructure projects and ensure that the benefits of the investment are most likely to flow to the users paying the charge.[294]

The amendment would also require that all design and build plans be submitted and approved before the fifth-year anniversary of the amendment's passage. Charges assessed under the amendment would be tied to the estimated useful life of the project. Beginning on the fifth-year anniversary, no new projects would be approved and, therefore, the charges assessed for a specific project would remain static throughout the useful life of the project.[295]

This proposal might give pause to federal and industry actors. These parties would likely argue that a more uniform implementation, collection, and distribution of the fee could be achieved under the direction of the federal government. This argument, however, fails to recognize that port authorities are local actors who can best determine which projects will best generate value for users and beneficiaries of that particular port.[296] Additionally, port authorities are in direct competition for discretionary cargo,[297] which provides an incentive to develop a fee tailored to specific projects that would best grow the region and cater to the needs of the shippers and cargo owners calling at that port.[298] Port authorities and shippers alike can draw a lesson from the federal government's handling of the HMTF, which

294. This scheme reflects the principles of the Shipping Act and Tonnage Clause, as discussed in Part I.

295. If project costs were to exceed estimates due to any number of reasons, the charge would, of course, need to be adjusted accordingly.

296. *See supra* notes 133–39 and accompanying text.

297. *See* Mongelluzzo, *Are Shipper Decisions Elastic?*, *supra* note 138 ("Ports, ocean carriers and railroads compete fiercely for market share, but most shippers base their decisions on how to build distribution networks and route freight on one very basic number: the one that tells them how much it costs to deliver the freight."); *supra* notes 133–38 and accompanying text.

298. *See supra* notes 133–38 and accompanying text.

has accrued a surplus of more than $5 billion due to annual revenue collections totaling more than $1.4 billion and disbursements averaging less than $800 million during the 2004 to 2009 period.[299] A federally regulated infrastructure fund—like those proposed in the ON TIME Act,[300] The MOVEMENT Act of 2009,[301] and the National Freight Mobility Infrastructure Fund[302]—would subject disbursements to congressional approval and political posturing.[303] Providing port authorities with the power to impose and invest fees collected under the amendment would best ensure responsive and efficient investment in critical port-related infrastructure projects.[304]

Industry actors cannot argue that, regardless of how the charges are assessed, the payor would shoulder an unequal burden of the short-term costs. In contrast, the amendment would reduce the amount of the fee that is imposed by providing adequate cost spreading over the useful life of the project. Further, short-term costs could be alleviated by quick adjustments in the cost of services, ultimately passing expenses through to the ultimate beneficiary—the consumer.[305]

The structure of the amendment also addresses the argument that once enacted, the charge would be difficult if not impossible to repeal. Fees would only be collected for qualifying projects, which once completed would no longer qualify for additional funding. The amendment would ensure that projects are begun and funded in a timely manner by requiring port authorities to receive U.S. Department of Transportation approval on design and build plans for eligible projects before the end of the fifth year following enactment. Once the useful life of the project expires, maintenance and operation funds could then be collected directly from the users availing themselves of those facilities.

299. *See supra* notes 178–81 and accompanying text.

300. *See supra* Part II.A.1.

301. *See supra* Part II.A.2.

302. *See supra* Part II.A.3.

303. *See supra* Part II.A.4.

304. *See supra* notes 133–40.

305. For example, a forty-foot container holds approximately 600 thirty-two-inch flat screen televisions, which would result in an increase to the consumer of $0.015 per television; a forty-foot container holds approximately 4000 pairs of athletic shoes, which would result in an increase to the consumer of $0.002 per pair; a twenty-foot container holds approximately 4600 six-packs of bottled beer, which would equal $0.001 per six-pack. *See* PORT AUTH. OF N.Y. & N.J., *supra* note 256; *see also* Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n, 655 F.2d 1210, 1212–13 (D.C. Cir. 1981).

Finally, the proposed amendment would not preclude the ability of port authorities to form private-public ventures to generate funding and develop infrastructure. The amendment would provide port authorities with complete discretion as to whether the fees should be assessed at all.[306] The amendment would only provide port authorities with Congress' express authority to impose fees within reasonable parameters established by the amendment and the Constitution's Export Clause.[307] In this way, port authorities could modernize the way goods are transported through U.S. ports with the requisite flexibility and authority to maximize the benefits for all stakeholders and shareholders.

CONCLUSION

Significant debate has arisen over how to address the need for new infrastructure and development at U.S. seaports. The proposal outlined in this Note is intended to address several shortcomings in the solutions proposed by federal and state actors; however, this proposal requires that federal, state, and industry actors unify their goals and cooperatively support a statutory amendment to the Shipping Act. In this way, port authorities can work with all stakeholders to ensure that the costs associated with this monumental undertaking provide a lasting solution that generates proportionate benefits. One express purpose behind the drafting of the Shipping Act is to "promote the growth and development of U.S. exports through competitive and efficient ocean transportation and by placing greater reliance on the marketplace." The construction, maintenance, and operation of U.S. seaports by port authorities is just such a market. Allowing port authorities to control the collection and reinvestment of a per-container cargo fee would be regulated through market forces (i.e., competition between ports), while facilitating economic recovery through job cre-

306. This aspect of the amendment is similar to permissible user fees at airports. The federal Passenger Facility Charge ("PFC") Program allows the collection of PFC fees up to $4.50 for every enplaned passenger at commercial airports controlled by public agencies. *See* FED. AVIATION ADMIN., http://www.faa.gov/airports/pfc/ (last visited Oct. 18, 2010). Airports use these fees to fund FAA-approved projects that enhance safety, security, or capacity, reduce noise; or increase air carrier competition. *See id.* Federal law limits use of PFC funds strictly to the above categories. *See id.*; *see also* Mongelluzzo, *New View on Fees*, *supra* note 8 (reporting that Moffat & Nichol Engineers stated that all airports have the authority to charge a fee for facility improvements, but they are also free not to levy the fee).

307. Note that the Tonnage Clause will not limit the ability of ports to assess charges under the amendment because Congress will have specifically consented to the charge. *See* U.S. CONST. art. I, § 10, cl. 2.

ation, the generation of federal, state and local tax revenues, and global competitiveness in the fast-evolving trade in containerized cargo.