Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

MEMORANDUM

TO: **Interested parties**
FR: **Lori Wallach, Public Citizen Global Trade Watch**
DT: **June 28, 2006**
RE: **Oman FTA provisions that grant foreign investors the right to own or operate sensitive infrastructure within the United States**

The Oman Free Trade Agreements' (FTA) service sector and investment agreements include provisions that create an absolute "right of establishment" for "enterprises of a Party."[1] The "right of establishment" is the right to acquire, own, and operate certain services under the FTA's regulatory terms. This FTA right of establishment requires the United States government to allow firms incorporated and operating in Oman to operate within the United States. The United States made specific commitments in its Annex II schedule to extend these new foreign investor rights to "landside activities" of ports, a category which covers the very port activities about which Congress expressed national security concern during the Dubai Ports World debate.

For service sectors, such as landside activities of ports, to which the FTA's right of establishment is provided, the United States (or Oman) may not ban enterprises of a Party from owning and operating covered services or, according to the FTA's "Market Access" provisions. Countries also may not limit the number of such services or the size of such services or require the form of ownership (i.e. cannot require U.S. partners; cannot require it is a non-profit; etc.)

In addition to the "Market Access" right of establishment, the Oman FTA's Most Favored Nation (MFN) rule (Article 10-4) requires that if the United States allows *any* foreign port-operating firms to operate within the United States (we have many), then the United States is required to allow port firms incorporated in Oman to have the same rights and access as port operating firms from other foreign countries.[2]

Any action by the U.S. government to deny or limit these FTA rights would subject the United States to challenge before UN or World Bank tribunals of foreign jurists empowered under the FTA to order the U.S. government to pay our tax dollars to the foreign firm to compensate their denied FTA rights. These landside port provisions in the Oman FTA raise significant national security concerns given these

[1] Oman FTA Article 11.4.
[2] Oman FTA Article 10.4: Most-Favored-Nation Treatment: 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

commitments would establish new rights for foreign companies to own sensitive U.S. infrastructure relating to landside activities in U.S. ports.

Thus, these FTA provisions could pose a serious threat to Congress' ability to ensure the security of our port infrastructure.

Generally the service sectors to which the "right to establish" for foreign companies applies in these FTAs is the same service sector that the United States agreed to bind to the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) in 1994. However, the Oman FTA adds to the U.S. GATS commitments and includes (as covered by the Oman FTA) landside operations of ports.

Annex II of the Oman FTA lists the broadest exceptions from the FTA – areas of policy in which a country reserves the right to establish future policies that conflict with the FTA's obligations. In the Oman FTA, while the U.S. Annex II schedule excludes many categories of maritime-related services so as to allow future policies to be established that would violate the FTA rules, there is a new note to the U.S. maritime exception that explicitly states that many "landside aspects of port activities"[3] are not covered by the exception to the FTA's service sector and investment agreements' terms.

The FTA texts defines this category as: "operation and maintenance of docks; loading and unloading of vessels directly to or from land; marine cargo handling; operation or maintenance of piers; ship cleaning; stevedoring; transfer of cargo between vessels and trucks, trains, pipelines and wharves; waterfront terminal operations;" and more. These are precisely the sorts of activities that the Congress just insisted not be allowed to come under the operation of the Dubai Ports World company.

Thus, if implemented as signed, the U.S. commitments in the Oman Free Trade Agreement's investment and service sector provisions would immediately provide foreign investors incorporated and operating in Oman the right to acquire, own and operate landside port activities in U.S. ports.

Further, the FTA defines "enterprises of a Party" to include all firms that are "constituted or organized under the law of a Party."[4] A related clause notes that simply having a post office box does not qualify, but that an enterprise must have some actual presence. That means that any firm incorporated in Oman that, for instance, also has a small front office operation – including foreign-owned companies – would gain the FTA's foreign investor and service sector privileges, including the "right to establish" within the United States.

Thus, if Dubai Ports World incorporates a subsidiary and opens a two-person local cargo tracking office in Peru or Oman, the company would obtain these FTA rights to operate ports within the United States. Dubai Ports World's recent announcement that it has acquired a port operation contract in Peru moves this scenario from hypothetical to actual. Opening even a small tracking office in Oman would establish Dubai Ports World's rights to use that FTA's "right to establish" in the United States.

If either of these FTAs were implemented, a Peru- or Oman- incorporated company would thus obtain new rights to establish port services within the United States. It would be a violation of the FTA, subject to dispute resolution and trade sanctions, if the U.S. government took action to deny such a company its new right to establish.

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[3] See e.g. Oman FTA Annex II-US-6: "landside aspects of port activities including operation and maintenance of docks; loading and unloading of vessels directly to or from land; marine cargo handling; operation or maintenance of piers; ship cleaning; stevedoring; transfer of cargo between vessels and trucks, trains, pipelines and wharves; waterfront terminal operations… "

[4] Oman FTA Article 11.14.3.

Under the FTAs, such disputes can be brought in two fora. Government-to-government dispute resolution would involve the Omani government challenging (say, on behalf of a port company that is an enterprise incorporated in Oman) any U.S. government actions to restrict operation of landside activities in U.S. ports. These cases are not heard in U.S. courts, but in three-person trade tribunals without the normal due process rights guaranteed in U.S. courts. In these cases, each country in the dispute may select one "judge" from its country and then these two tribunalists choose the third "judge" – all from a list of trade experts provided by each country. Among other problems with this system, it results in "judges" with a narrow trade expertise and perspective, including non-U.S. individuals, being empowered to balance competing U.S. interests – for instance in this case balancing our national security needs and our trade commitments to decide which comes first. If a tribunal rules that U.S. policy or practice has violated the FTA's rules, the United States must bring the law into compliance or face permanent annual trade sanctions for the amount claimed lost by the other country due to the U.S. policy or practice. In practice, the United States does not allow such sanctions – it changes its laws to comply as it has done with each of dozens of WTO rulings against U.S. law. (Only Europe has ever chosen to face long term trade sanctions. It pays over $150 million annually to keep in place a law banning imports of meat containing artificial growth hormones.)

The U.S. Trade Representative (USTR) might argue that the Sultan of Oman would not want to pick a fight with the United States over port services after the fireworks around the Dubai Ports World case. However, these provisions are also enforceable through a second venue over which the Omani government has no control. The Oman FTA includes investor-state enforcement. This is a system enumerated in the FTA's investment chapter in which the actual investor/company has the right to privately enforce its FTA rights against the United States.

Under this system, if the Oman FTA was approved, any foreign company incorporated and operating in Oman would have the right to initiate its own enforcement case against the United States at the United Nation's Commission on International Trade Law (UNCITRAL) or the World Bank's International Center for Settlement of Investment Disputes (ICSID) if the United States denied it the right to own and operate land side port facilities. In this system, UN and World Bank tribunalists are empowered to determine if an investor's FTA rights have been denied, and if so to order the U.S. government to pay the foreign company for its lost future profits denied by the U.S. government action or policy. (This system exists under NAFTA and of the 11 cases decided under this system to date, NAFTA country governments have been ordered by tribunals to pay foreign investors over $35 million in disputes concerning land use, construction permits and bans on toxics.)

Under the investor-state enforcement scenario, even if the Omani government would not pursue a case, a company such as Dubai Ports World operating from Oman could demand that the United States pay it damages of the expected future profits it would be denied if Congress or the President pressured to undermine its FTA-granted right to operate U.S. ports.

The Oman FTA has the standard "Essential Security" exception included in all of these agreements that can be raised as a defense before a trade tribunal if a country's law is challenged as violating the agreement's rules. If, such as in the case of Dubai World Ports, a Committee on Foreign Investments in the United States (CFIUS) review had been completed without a finding of a security threat, there is no doubt that an FTA panel would not permit use of the FTA's Essential Security exception to excuse consequent U.S. government action that interfered with the FTA investor right to establish U.S. port operations.

However, the converse is not necessarily true. If a CFIUS review did determine that an acquisition was not in the security interest of the United States, this would not shut down an FTA claim.

First, because the investor initiates these claims and the FTA requires that a government respond without a set amount of time in certain ways, at a minimum even with a CFIUS review to defend its action, the United States would be forced to engage in the process and respond in a UN or World Bank tribunal to a suit and then raise the Essential Security defense. One recent NAFTA investor-state case that was dismissed cost the United States over $3 million in legal fees to get dismissed. Thus, if Congress allows the FTA to include a commitment that conflicts with CFIUS and also with Congress maintaining authority outside of CFIUS to determine an foreign acquisition is risky, at a minimum Congress would be exposing us to expensive litigation in UN and World Bank arbitral proceedings to get the case dismissed IF Congress insisted on following through with blocking activities. (Which is to say that merely having this provision in an FTA changes the balance of power and the pros and cons on such decisions, as the prospect of an FTA case would be lurking.)

In the instance of the hypothetical of Dubai Ports World using the Oman FTA, it is hard to imagine how the United States could successfully use the exception because there was no CFIUS adverse finding. But for the moment, let's assume there was an adverse CFIUS report that was the triggering action for the U.S government taking action that violated the FTA by limiting a foreign company's right to own or operate U.S. port operations. The United States would still face problems in getting an FTA panel to excuse actions regarding foreign operation of ports specifically.

This is the case because the United States allows foreign companies from *other* countries to establish such operations. This would be deemed discriminatory policy – in technical terms it is a Most Favored Nation violation and the FTA's Investment chapter explicitly provide MFN for an Omani enterprise relative to the foreign investors of ANY country allowed to operate in the United States. Thus, to be blunt, by allowing, for instance, Singaporean port operators in the United States despite known **Al Qaeda** cells in Singapore, the United States makes it very hard for an FTA panel to allow it to use the Essential Security exception.

What would be required is for the United States to establish for the FTA panel, by providing sufficient information from the otherwise secret CFIUS review report, a specific and credible threat related to a specific company. Instead of – best case scenario – having to expose U.S. intelligence information to FTA tribunalists to obtain an Essential Security exception excuse to violate the FTA, why wouldn't Congress insist that the provisions limiting Congress' national security related authority are just snipped out?

It hardly seems a good risk to allow in provisions you <u>know</u> would make certain national security-related action an FTA violation relying on the <u>hope</u> that in the end an FTA tribunal decides to give us a pass because we can prove to their satisfaction that violating an FTA provisions (that could easily be removed now) is protected by an essential security exception.

Certainly few in Congress would knowingly vote for any free trade agreement that would impose such a restriction on future congressional activities regarding national security and U.S. ports.

Thus, it is rather startling that as members of Congress have raised concern about this issue, the main response back from the office of the U.S. Trade Representative is that these provisions were also in the CAFTA and Bahrain Free Trade Agreements. That Congress did not *catch* that USTR changed the coverage of the FTA by changing a few sentences buried in an Annex (for instance the Singapore FTA does NOT provide such rights nor does NAFTA nor the WTO) is hardly a counter-argument for why providing foreign ownership rights over U.S. ports is good policy!