



Trade Facts

Office of the United States Trade Representative
June 2006

www.ustr.gov

Free Trade Agreements and the Supply of Services at U.S. Ports

Critics of the United States-Peru Trade Promotion Agreement and the United States-Oman Free Trade Agreement wrongly claim that it will give foreign service suppliers unprecedented access to U.S. ports and thereby endanger U.S. security.

Trade Agreement Coverage of Port-Related Services

- Q: What access to U.S. ports does the United States make available to service suppliers from countries that are trade agreement partners?

A: A basic obligation of free trade agreements to which the United States is a party is the obligation (subject to specified exceptions) to treat service suppliers and investors of other parties no less favorably than we treat our own service suppliers and investors. That obligation applies to what are known as “landside aspects of port activities,” provided that the other parties to the trade agreement provide comparable access to those activities to U.S. service suppliers and investors. The category “landside aspects of port activities” includes operation and maintenance of docks; loading and unloading of vessels directly to or from land; marine cargo handling; operation and maintenance of piers; ship cleaning; stevedoring; transfer of cargo between vessels and trucks, trains, pipelines, and wharves; waterfront terminal operations; boat cleaning; canal operation; dismantling of vessels; operation of marine railways for drydocking; marine surveyors, except cargo; marine wrecking of vessels for scrap; and ship classification societies.

- Q: Isn't this commitment on landside aspects of port activities new in the agreements with Oman and Peru, respectively?

A: No. The United States made virtually identical commitments in NAFTA, and in the free trade agreements with Australia, Bahrain, Central America, Chile, and Morocco.

- Q: Does access to landside aspects of port activities have the potential to give foreign persons control of U.S. ports?

A: No. When a person participates in landside aspects of port activities it does not control, manage, or operate a U.S. port. That remains the responsibility of the port authority. Additionally, the U.S. Coast Guard and Customs and Border Protection play an integral role in ensuring security at U.S. ports.

- Q: Given that the trade agreement commitment the United States makes with respect to landside aspects of port activities is conditioned on the provision of comparable access by the other party, will the commitment apply to Peru? Will the commitment apply to Oman?

A: It will not apply to Peru at this time. Peru does not presently provide access to U.S. service suppliers and investors that is comparable to the access the United States would provide with respect to landside aspects of port activities.

Although Oman does provide such access to U.S. service suppliers and investors and the commitment therefore does apply to Oman, we are not aware of any Omani companies that are currently involved in any U.S. port operations or that might be interested in such operations in the future. If an Omani company does express such interest in the future, the essential security exception, described below, would fully protect the United States' national security needs.

- Q: Couldn't a person from anywhere in the world just establish an enterprise in Oman and use that enterprise to make port-related investments in the United States, claiming entitlement to the benefits conferred by the FTA?

A: If non-Omani persons set up an enterprise in Oman that was merely a shell – i.e., that was engaged in no substantial business activity in Oman – and that enterprise sought to make an investment in the United States, the FTA would permit the United States to deny the FTA's investment- and services-related benefits to that enterprise. Moreover, even if the enterprise set up in Oman had substantial business activity in Oman, the United States could deny FTA benefits to it if its owners were nationals of countries subject to U.S. sanctions. Finally, the USG can block any potential investment pursuant to the essential security exception described below.

- Q: What happens if an Omani investor is entitled to investment-related rights under the FTA, but the United States believes that its proposed investment threatens our national security?

A: U.S. law – in particular the Exon-Florio Amendment to the Defense Production Act of 1950 – authorizes the President to block proposed foreign investment in the United States that threatens U.S. national security. If a transaction already has been completed, the law authorizes the President to require that it be undone. The President has delegated the interagency Committee on Foreign Investment in the United States (CFIUS) responsibility to continuously monitor foreign investment in the United States to ensure against threats to national security.

- Q: If the President were to block, condition, or require the unwinding of an investment by an Omani investor in order to protect the national security, would that be consistent with our obligations under the FTA?

A: Yes. All of our trade agreements include an article on “essential security.” Under that article, nothing in an agreement can prevent us from applying measures that we consider necessary for the protection of our essential security interests. This exception is self-judging. The validity of the defense turns on what the USG considers necessary to protect our essential security, not on a tribunal's assessment of our essential security. All the commitments we undertake in a trade agreement are subject to this overarching provision.