

BACKGROUND PAPER
May 22, 2007 Hearing

Recent History and Current Status
Container Fee Legislation

In both California and Washington State, legislative transportation committee leaders introduced bills imposing container fees at public ports in their state.

The recent history of such legislation goes back to 2001 when Senator Betty Karnette, then chair of the California Senate Transportation Committee, released the pre-print of a container fee bill that immediately generated more than 90 protest calls from industry. Senator Karnette explained that container fees were her approach to pay for needed port-related infrastructure, and invited industry to offer revenue alternatives. None were put forth.

From 2001-2006, California legislators and staff worked with industry, notably members of the Waterfront Coalition, to develop criteria and standards for a mutually agreed approach to container fees.

A set of key principles emerged based on the concept of placing container fees in a “lock-box” that could be spent only on a project-by-project basis. Projects would be tied to a systematic build-out of capacity and vetted in each case with industry. Funding authority tied to specific projects would sunset with their completion.

In California’s 2005-06 legislative session, Senate Transportation and Housing Committee Chair, Senator Alan Lowenthal, introduced a container fee bill, Senate Bill 927 (initially Senate Bill 760). Senate Bill 927 successfully moved through the legislative policy process in the summer of 2005. At this point, the industry asked Senator Lowenthal to hold Senate Bill 927, in order to give the industry time to develop a fee structure implementation proposal. Over a year later, in August 2006, the industry offered the tolling of freight roadways as a fee structure implementation proposal. This option was not acceptable. Senator Lowenthal’s bill passed the legislature and was vetoed by the Governor, who stated the following:

Although the policy objectives of Senate Bill 927, to develop more secure ports, congestion relief and environmental mitigation, are laudable, this measure is flawed in its construction, application, lack of accountability and failure to coordinate with other public and private financing sources ignoring opportunities to leverage additional funding.

Senator Lowenthal introduced container fee legislation, Senate Bill 974, in the current 2007-08 California legislative session (see attached Senate Transportation and Housing Committee analysis).

The current position of industry is that it will fight state-level imposition of container fees by legal action based on the Commerce Clause of the U.S. Constitution and the General Agreement on Tariffs and Trade (GATT).

These laws and agreements contain prohibitions against imposition of taxes. However, it has been clearly laid out by several legal analysts including the Legislative Legal Counsel that the fee contained in SB 974 is a fee and not a tax and that it will not violate the Commerce Clause, Export Clause or GATT.

It is important to note that industry experts have estimated if the ports of Long Beach and Los Angeles grow by 8% a year, they will reach capacity by 2010 and that a multi-billion dollar investment in goods movement infrastructure is needed. SB 974 provides billions for air quality improvements and goods movement infrastructure which could alleviate the expected gridlock situation facing the ports. However, if SB 974 passes the Legislature and is signed into law, and industry attempts to delay implementation with frivolous lawsuits then it is possible that no infrastructure will be developed in southern California for years, stunting port growth and creating congestion chaos.

While opposing SB 974, industry has come to accept the notion that fees in some form are on the way. Attempts to resist legislation, even if successful, are now seen as less beneficial than negotiating a workable structure. A negotiated approach between government and industry would likely be expressed in a Memorandum of Understanding (MOU), implemented through a Joint Powers Agreement (JPA) and/or a Public-Private Partnership (PPP). The MOU would be based on principles similar to those described above that were negotiated with then-Senator Betty Karnette, including placing container fees in a "lock-box" that could be spent only on a project-by-project basis.

The best scenario for industry is a negotiated approach. The fact that bills have been introduced in both Washington and California could be quite useful as a way to bring private parties to the negotiating table.