

Roger Williams University Law Review

Volume 18

Issue 2 Vol. 18: No. 2 (Summer 2013)

Article 4

Summer 2013

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Recommended Citation

Fialkoff, Marc R. (2013) "Shipping Lanes and Power Lines: The Port of Davisville and the Dynamic Role of Infrastructure," *Roger Williams University Law Review*: Vol. 18: Iss. 2, Article 4.

Available at: http://docs.rwu.edu/rwu_LR/vol18/iss2/4

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Notes and Comments:

Shipping Lanes and Power Lines: The Port of Davisville and the Dynamic Role of Infrastructure.

Marc R. Fialkoff*

“ALL THE PIECES ARE THERE”

The port is a versatile piece of infrastructure that has evolved from its beginning as merely a collection of docks and warehouses to centers of major supply chain operations and renewable energy production.¹ From a European perspective, the port has become

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1. Marc Fialkoff, Port Centric Logistics, Application at the Humber Ports of Hull and Immingham, at 79 (Sept. 1, 2011) (unpublished MSc dissertation, University of Leeds) (on file with author) [hereinafter Fialkoff, Port Centric Logistics]. The work is also on file with the Institute for Transport Studies (ITS) which uploads all dissertations to the University of Leeds online library (forthcoming).

an integrated part of transport networks, as well as an engine for economic development.² Using the Port of Davisville,³ located in North Kingstown, Rhode Island, as an illustration, this comment seeks to make new connections between the fields of law, transport, and renewable energy, glean lessons from the United Kingdom and Germany, and demonstrate how to approach new uses for ports that require individuals to “think like a lawyer” while simultaneously “thinking like a planner.”

The Port of Davisville is among a class of U.S. ports that are exempt from the Harbor Maintenance Tax (HMT).⁴ While this exemption has benefited the Port with respect to imports, making the Port the eighth largest⁵ automobile importer in North America, does this exemption have greater impact? Can this exemption help develop maritime transportation along the East Coast corridor in line with the aspirations of the Marine Highways program? Can such an exemption play a role in promoting the Davisville facility to be the staging ground for development of a wind farm off the coast of Rhode Island? Or does this exemption and all the aspirations just mentioned cause the Port to run afoul of the Port Preference Clause of the Constitution?⁶

Part I will analyze the HMT and its tumultuous legal journey to its current iteration and will also explain the circumstances behind Davisville’s exemption from the charge.⁷ Although some of

2. *Id.* at 10.

3. The Port of Davisville is located in North Kingstown, Rhode Island (Latitude: 41° 36’ 43” N Longitude: 71° 24’ 17” W). “The Port of Davisville offers 4,500 linear feet of berthing space, consisting of two piers (each 1,200 feet in length), a bulkhead, 32 ft. controlling depth - mean low water (MLW), on-dock rail, and a 14 acre lay down area.” Quonset Business Park, *Quonset Development Corporation: Port Facilities*, <http://www.quonset.com/transportation/port-facilities/> (last visited Nov. 2, 2012).

4. See I.R.C. § 4462(e) (2012) (“No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.”); Water Resources Development Act of 1986, Pub. L. No. 99-662 §1401-02. The Harbor Maintenance Tax is a .125 percent *ad valorem tax* on imports or domestic shipments within specific U.S. ports. 26 U.S.C. § 4461(b) (2006).

5. *Rhode Island’s Port’s: Opportunities for Growth*, Slide 83 (Apr. 28, 2011), <http://www.makingbusinesseasyri.com/resources/RI-Ports-Opports-fr-Grwth-050311-Report.pdf> (last visited Sept. 22, 2012) [hereinafter Martin Associates Report].

6. See U.S. CONST. art. I, § 9, cl. 6.

7. See *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998); see also *Carnival Cruise Lines, Inc. v. United States*, 404 F.3d 1312 (Fed. Cir.

the analysis will draw from domestic and international criticism of the HMT, the primary focus of the analysis will center on its legal evolution and attempted rehabilitation⁸ after part of the tax was declared unconstitutional in *United States v. United States Shoe Corp.*⁹ The exemption from the charge provides Davisville with unique opportunities, but also precludes the facility from getting federal funds for dredging, which may pose challenges if the Port is to be a staging ground for future projects.¹⁰ In addition to the HMT, this section will briefly explore whether the exemption from the HMT would raise a Port Preference Clause challenge.¹¹

Part II of the analysis will explore Davisville's transport infrastructure and its proposed integration into the M-95 Marine Highway Corridor as developed by the Maritime Administration ("MARAD").¹² Part III will evaluate the port's potential role in offshore wind projects.¹³ Using a case study from the author's dissertation discussing the Port of Hull and its potential use as a staging ground for a wind farm in the North Sea, this article will propose that Davisville is in a unique position to join a small number of facilities that change the port from being a node¹⁴ along the supply chain into a dynamic facility offering sustainable solutions.¹⁵

2005).

8. H.R. 1947, 106th Cong. (1999).

9. *Shoe*, 523 U.S. at 370.

10. Martin Associates Report, *supra* note 5, at Slide 87.

11. U.S. CONST. art. 1, § 9, cl. 6 states: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

12. The Maritime Administration (MARAD) is an agency within the U.S. Department of Transportation. The agency deals with waterborne transportation within the United States as well as integrating maritime transport with other land based transport operations within the U.S. Maritime Administration, *About Us: Maritime Administration*, http://www.marad.dot.gov/about_us_landing_page/about_us_landing_page.htm 1 (Last visited Nov. 2, 2012).

13. Department of Transportation: Maritime Administration, *M-95 Marine Highway Corridor*, available at http://www.marad.dot.gov/documents/Marine_Highway_Corridors13_Sep_10.pdf (last visited Sept. 22, 2012).

14. A node is "a point at which subsidiary parts originate or center." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 840 (11th ed. 2003). In the context of supply chains, node denotes a stop along any given supply chain.

15. See Fialkoff, Port Centric Logistics, *supra* note 1, at 79.

Ultimately, this paper first proposes that, while the HMT is a controversial charge in the international and domestic freight field, its impact has been internalized and is, at best, minimal. While challenges from the WTO and the international community loom, domestically, the charge has weathered the constitutional storm and does not pose a significant impact on ports. Second, ports can play a driving force in creating mode shift opportunities to water-borne transport via the inclusion of value added activities and infrastructure development which will entice maritime transport over traditional land based operations. Third, and probably most importantly, the port can play a critical role in developing renewable energy, be it on port grounds or through staging grounds for off-shore wind projects. The U.S. is behind our European counterparts and can glean valuable insight from the administrative and logistical solutions European states such as England and Germany have used with respect to port operation and renewable energy production.

I. LEGAL ASPECTS OF THE PORT OF DAVISVILLE

A. The Harbor Maintenance Tax

The Davisville facility is unique in that it is exempt from the Harbor Maintenance tax, but why does that make Davisville an interesting case to study with respect to maritime transportation and other proposed activities centered on the facility? This section will unpack the HMT and its development from a proposed tax on cargo to a larger policy debate on domestic infrastructure, international trade policy, and concerns on national freight transportation policy.

1. *Brief History and Canadian Frustration*

Prior to the HMT, the federal government paid for dredging of navigational channels while ports and other stakeholders paid for dredging of individual berths and other projects within port facilities.¹⁶ As part of the Water Resources Development Act of 1986 (WRDA), Congress passed the Harbor Maintenance Tax to

16. Lawrence Juda & Richard Burroughs, *Dredging Navigational Channels in a Changing Scientific and Regulatory Environment*, 35 J. MAR. L. & COM. 171, 197-98 (2004).

facilitate a cost sharing system between the federal government and stakeholders in dredging navigable channels.¹⁷ The tax, originally set at 0.04 percent (later changed to 0.125 percent) is an *ad valorem* tax on all goods imported or exported using U.S. ports.¹⁸ Chapter Nineteen of the Code of Federal Regulations¹⁹ sets out which ports are covered by the act. The HMT is described as an “opt-in” arrangement where federal approval of a channel is necessary, with such channel or system of waterway being maintained by the Army Corps of Engineers.²⁰

From the outset, the HMT was perceived to be an economic detriment, rather than a benefit that could help maintain the nation’s waterways.²¹ For example, in 1988, MARAD calculated that approximately 4.8 million tons of cargo was diverted from U.S. ports to Canadian ports because of the HMT.²² Ports such as Montreal and Vancouver were benefiting from the cargo diversion while northern ports such as Boston, Seattle, and Tacoma were losing freight volume as a result of the tax.²³ In addition to the transport impacts, it has been argued that the revenues collected from the tax were being held in the Harbor Maintenance Trust Fund, which was established by WRDA, and that the funds were being placed into what could be considered the general budget and not being completely dispersed to harbor projects.²⁴

One concern raised was that the HMT was contrary to the principles of the North American Free Trade Agreement (“NAFTA”); specifically, a potential challenge under Chapter

17. *Id.* at 198; Water Resources Development Act, Pub. L. No. 99-662 §1401-02, 100 Stat. 4082 (1986); *see also* I.R.C. § 4461-62 (2012).

18. Howard Schragin, Comment, *U.S. Shoe Corp v. United States: A Victory for U.S.-Canada Maritime Trade*, 19 FORDHAM INT’L L.J. 1764, 1801-02 (1996) [hereinafter Schragin, *A Victory for U.S.-Canada Maritime Trade*]. *Ad valorem* means “proportional to the value of the thing taxed” as defined by BLACK’S LAW DICTIONARY 60 (9th ed. 2011); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

19. Customs Duties, 19 C.F.R. § 24.24 (2012).

20. Email from Evan Matthews, Port Director, Quonset Development Corporation, to Marc Fialkoff, J.D. Candidate, Roger Williams School of Law (Jan. 30, 2013, 03:03 EST) (on file with author) [hereinafter Matthews Email].

21. Schragin, *A Victory for U.S.-Canada Maritime Trade*, *supra* note 18, at 1803-04.

22. *Id.* at 1804-05.

23. *Id.* at 1805.

24. *Id.* at 1806-07 & n.426.

Twenty of the agreement activating a dispute resolution mechanism that could force the removal of the HMT if it was found to be in violation of the agreement.²⁵ Article 2001 of Section A in Chapter Twenty lays out a dispute resolution mechanism calling for the establishment of a Commission to hear both parties and determine which party, if any, is in violation of the agreement.²⁶ If a violation has been determined, remedial action such as removal of the offensive tax or financial compensation can be imposed.²⁷ While no action was brought against the HMT internationally, a constitutional challenge was brewing within the United States.

2. *Attempts to Sink the HMT: The Export Clause*

While *Shoe* provided the opening salvo as to the attack on the HMT, the Court has maintained a strict standard protecting the right to export and transport goods.²⁸ In the *Shoe* opinion, Justice Ginsburg relied primarily on *U.S. v. International Business Machines* (“*IBM*”), which unequivocally staked out the Court’s position that any challenge to the Export Clause will be met with what could be called a strict scrutiny type analysis.²⁹ Such strict analysis stems from the concern of the framers that the Northern states would unfairly impose taxes on Southern states that relied on commerce and the prohibition on such a charge would protect Southern interests.³⁰ In *Shoe*, Justice Ginsburg focused on whether the HMT was actually a tax or if the harbor services provided for justified the imposition of the charge.³¹ Using the test set forth in *Pace v. Burgess*, Justice Ginsburg articulated the fact that the HMT charge does not adequately charge the proper

25. North America Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

26. *Id.*

27. *Id.* (See Chapter 20, Part 2, Article 2018 of NAFTA)

28. U.S. CONST. art. I, § 9, cl. 5 mandates that: “No Tax or Duty shall be laid on Articles exported from any State.” See *United States v. Int’l Bus. Machines Corp.*, 517 U.S. 843, 863 (1996) (concluding that the Export Clause does not allow for the application of any tax, however general in application or nondiscriminatory on the export transit of goods).

29. *United States v. United States Shoe Corp.*, 523 U.S. 360, 368-70 (1998) (Court required that user fees “fairly match the exporters’ use of port services and facilities”).

30. *Id.* at 368 (citing *IBM*, 517 U.S. at 852).

31. *Id.* at 367.

amount for the harbor services rendered in proportion to the freight being loaded or unloaded at the port.³² In her calculation, the HMT, as configured, was charging too much on the value of the freight and not enough on the services rendered by the port.³³ This position was consistent with Justice Kennedy's dissent in *IBM*, an opinion which Justice Ginsburg joined.³⁴ From this analysis, the Court determined that the export portion of the HMT did conflict with the Export Clause and was found to be unconstitutional.³⁵

One question the *Shoe* opinion explored was whether the HMT was a tax or a user fee. In her analysis, Justice Ginsburg cited *Massachusetts v. United States*, but did not apply its three pronged test to the *Shoe* analysis.³⁶ While *Shoe* declared that charging exports under the HMT was unconstitutional, imports and other domestic freight movement was still covered by the HMT.³⁷ In *Thomson Multimedia Inc. v. United States*, Judge Michel of the Federal Circuit applied the *Massachusetts* test to the HMT to determine that it is a user fee, and not a tax with respect to imported goods.³⁸ In the *Thomson* case, the scrutiny was different because, unlike in *Shoe*, the Court was faced with a

32. *Id.* at 369 (citing *Pace v. Burgess*, 92 U.S. 372, 375 (1872) (determining that a charge is not a tax when it the charge does not bear any proportion to the value of the freight and that charge is not excessive in taking into account the costs of exporting the goods as a way to preserve the benefit to the exporter while preventing against fraud)).

33. *Id.* at 369.

34. *IBM*, 517 U.S. at 865 (Kennedy, J., dissenting) (determining that a tax would survive Export Clause scrutiny if the services rendered was being charged and not the cargo itself).

35. *Shoe*, 523 U.S. at 370.

36. *Id.* at 367-68; see *Massachusetts v. United States*, 435 U.S. 444, 465 (1978) (devising a test to be applied against charges as to whether they are a tax or user fee. The test had three prongs: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred (hereinafter the *Massachusetts* test)).

37. *Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1360 (Fed. Cir. 2003) (holding that import and domestic charges were severable from the unconstitutional export provision and that congressional intent was clear and that previous precedent allows for severability of the unconstitutional provision).

38. *Id.*

Uniformity Clause and Port Preference Clause challenge and not an Export Clause challenge.³⁹ As Judge Michel noted, while the Export Clause allows for no tax to interfere with exportation of goods, review of the HMT under the other two clauses does not follow such a strict review.⁴⁰ Under the *Massachusetts* test, Judge Michel determined that (1) the charge does not discriminate and is applied uniformly sans the exemptions delineated within the WRDA, (2) the tax was a fair approximation, although an imperfect correlation between the freight and the services rendered, and (3) the charge was not excessive in relation to government expenditure.⁴¹

3. *A Battle on Two Fronts*

While the domestic challenges to the HMT were proceeding, the underlying concerns expressed by Howard Schragin in his *Fordham International Law Journal* article relating to the HMT and international trade law continued to brew; specifically, the reduction of cross border marine interactions between Canada and the U.S.⁴² For example a Canadian study by Professor Mary R. Brooks of Dalhousie University and James D. Frost of MariNova Consulting Ltd. noted that development of a marine connection between Ontario and Michigan was abandoned and ferry service between Rochester and Toronto was suspended as a result of the imposition of the HMT.⁴³ Further work conducted by Brooks,

39. *Id.* at 1360. U.S. CONST. art I, § 8, cl. 1 mandates that all Duties, Imposts and Excises shall be uniform throughout the United States, while U.S. CONST. art I, § 9, cl. 6 states that no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. For this portion of the analysis, only a brief discussion of the Port Preference Clause is done; however, a more thorough analysis will be conducted when discussing the Davisville exemption from the HMT and whether this sort of exemption maybe considered a Port Preference Clause violation.

40. *Thomson*, 340 F.3d at 1360-61.

41. *Id.* at 1360-64 (noting that while the third prong might not have been met because HMT is used to fund prospective projects and not current projects, this is not a fatal failure because the congressional intent of maintaining these channels could be viewed as long term projects).

42. Schragin, *A Victory for U.S.-Canada Maritime Trade*, *supra* note 18, at 1804-05.

43. Mary R. Brooks & James D. Frost, *Short sea shipping: a Canadian perspective*, 31 MAR. POL'Y & MGMT. 393, 402 (2004).

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Richard Hodgson, and Frost in *Short Sea Shipping on the East Coast of North America: An analysis of opportunities and issues*, seemed to indicate that Canadian shippers are against cross-border operations because of the HMT, citing shippers' mixed responses to questions relating to the HMT, or showing a minimal impact of the HMT.⁴⁴ In their estimation, the continued imposition of the HMT militates against short sea shipping operations between the U.S. and Canada and continued modal selection of truck transportation to avoid the charge.⁴⁵

The Canadian frustration with the HMT has spread to other countries and has caused consternation with the European Union (then European Community, hereinafter EU). Prior to the *Shoe* decision, the European Union requested consultation with the World Trade Organization ("WTO"), claiming that the HMT violated Articles I, II, III, and IV of the General Agreement on Tariffs and Trade and, further, that the HMT was costing European exporters \$86 million annually.⁴⁶ Because the consultation was running simultaneous to the *Shoe* decision, the U.S. at that time refused to comment on the outcome or WTO impacts of the decision.⁴⁷ After *Shoe* was decided, the EU requested a second round of consultation to clarify the U.S. position and indicated that if remedial legislation was not implemented by the U.S. by January 2000, the EU would ask for a WTO panel to review U.S. consistency with international trade law.⁴⁸

44. Mary R. Brooks, J. Richard Hodgson, & James D. Frost, *Short Sea Shipping on the East Coast of North America: An analysis of opportunities and issues*, CANADA-DALHOUSIE UNIVERSITY TRANSPORTATION PLANNING/MODAL INTEGRATION INITIATIVE, Project ACG-TPMI-AH08, 28-29 (Mar. 31, 2006).

45. *Id.* at Part II.

46. Pat Mutschler, *The Harbor Maintenance Trust Fund: Collecting funds necessary to maintain our waterways*, at 48, http://uscg.mil/proceedings/Summer2011/articles/46_Mutschler%20HMTFi.pdf (last visited Sept. 23, 2012) [hereinafter Mutschler, *The Harbor Maintenance Trust Fund*]; OFFICE FOR TRADE POLY REV., REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES (CHAPTER 1: THE UNITED STATES) 4-5 (2002), available at <http://www.meti.go.jp/english/report/downloadfiles/gCT0201e.pdf> [hereinafter WTO CONSISTENCY REVIEW].

47. Mutschler, *The Harbor Maintenance Trust Fund*, *supra* note 46, at 48.

48. *Id.* Attempts to repeal the HMT manifested in the form of HR 2737, Support for Harbor Investment Program (SHIP) was introduced in the

Anticipating a future challenge of the HMT under WTO review, Clay Baldwin of Taggart, Rimes & Usry, PLLC, has analogized the HMT to the Merchandising Processing Fee (“MPF”)⁴⁹ that was passed as part of the Omnibus Budget and Reconciliation Act of 1986 and was also an *ad valorem* tax.⁵⁰ In his analysis, Baldwin suggests that given the similarities in charging regime between the MPF and the HMT, a WTO panel would be inclined to find that the HMT violates the GATT provisions that the EU was claiming around the time of *Shoe*.⁵¹ While the Baldwin analysis seems to suggest that if the EU or Canada were to challenge the HMT using a WTO panel, their claim would be successful, the HMT differs from the MPF given that the cost of the HMT seems to be shared by the exporter and the importer in the sense that any charge taxed on the import would be spread to both parties and can be offset. Consistent with this thought, the Baldwin article notes that when the WTO panel heard arguments on the MPF, the complainants (EU and Canada) failed to demonstrate that the charge had created a trade distortion.⁵² Potentially, this argument could militate towards the WTO finding the HMT to violate international trade laws given the work done by Pat Mutschler and the complaint by the EU that, as a result of the HMT, European exporters “lose” \$86 million.⁵³

While the arguments put forward by Mutschler and Baldwin

House, but was subsequently referred to the House subcommittee on Water Resources and Environment as well as the subcommittee on the Coast Guard Patrol and Maritime Transportation and has been deemed “dead.” See WTO CONSISTENCY REVIEW, *supra* note 46, at 5 (citing H.R. 2737, 107th Cong. (2001)).

49. 19 U.S.C. § 1401 (2006). U.S. Customs and Border Protection, *User fee-Merchandise Processing Fee*, https://help.cbp.gov/app/answers/detail/a_id/334/~/_user-fee---merchandise-processing-fees (last visited Nov. 2, 2012).

50. Clay B. Baldwin, *The Harbor Maintenance Tax: Awaiting the Next Challenge*, Int’l Trade Committee Newsletter Vol. IV(1), at 7 (2009), available at <http://meetings.abanet.org/webupload/commupload/IC776000/newsletterpubs/ITC2009newsletter.pdf>.

51. *Id.* at 8. In his analysis, Baldwin outlines the WTO’s decision related to the MPF and how its charging structure violates certain provisions within GATT; specifically Articles VIII (Fees related to importation and exportation of goods). *Id.* at 7-8.

52. *Id.* at 8.

53. *Id.*; see also Mutschler, *The Harbor Maintenance Trust Fund*, *supra* note 46, at 48.

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would suggest that the HMT is under international pressures, the last consultation by the WTO was subsequent to the *Shoe* decision and no action has been taken by the EU, Canada, or the WTO. Given that almost a decade has passed since the last WTO consultation, it would seem that the international community has begrudgingly internalized the HMT; however, this acceptance has come at a cost for the U.S.: an avoidance of maritime transport to move freight.⁵⁴

4. *A Turbulent History in Perspective*

As this section has discussed, the Harbor Maintenance Tax has gone through some growing pains, both domestically and internationally. As recently as January 2012, the Federal Maritime Commission has begun an inquiry into whether the HMT significantly diverts cargo from U.S. ports to Canadian and Mexican ports.⁵⁵ It seems that Schragin's original examples of Seattle and Tacoma are still suffering from cargo diversions to ports in Vancouver and Prince Rupert. The inquiry is tasked to look at how the HMT is impacting U.S. ports and whether the structural issues related to fund disbursement from the revenue of the HMT can be used more effectively for national freight transportation issues.⁵⁶ Alternatives to the charge range from removal of the charge and have the U.S. Treasury to pay for dredging,⁵⁷ or force the ports to raise their own funds for navigational dredging, which has the potential to cause unneeded competition amongst the ports.⁵⁸ Through all this, the Davisville

54. The HMT cannot be entirely "blamed" for freight choice to use surface transportation. It is only one perceived barrier, with larger barriers being presented to maritime transport. See William H. Yost III, *Jonesing for a Taste of Competition: Why an Antiquated Maritime Law Needs Reform*, 18 ROGER WILLIAMS U. L. REV. 52 (Apr. 2013).

55. Toby Gooley, *The brewing battle over the HMT*, DC VELOCITY (Jan. 23, 2012) <http://www.dcvelocity.com/articles/20120123-the-brewing-battle-over-the-hmt/> (last visited Sept. 29, 2012).

56. *Id.*

57. AMERICAN ASSOC. OF PORT AUTHORITIES, THE HISTORY OF THE HARBOR MAINTENANCE TAX, <http://www.aapa-ports.org/Issues/content.cfm?ItemNumber=1006>, (last visited Sept. 29, 2012).

58. Compare Jean C. Godwin, A speech at the 31st Transportation Law Institute Panel: Infrastructure Financing: Who Pays, Who Doesn't. Who Should and How Much? (October 27, 1998), available at <http://www.aapa-ports.org/Issues/content.cfm?ItemNumber=1016> (last visited Sept. 29, 2012),

Facility is able to stay above the chaos given its exemption. However, does the exemption from the HMT create a challenge to the Port Preference Clause of the Constitution?

B. The Port Preference Clause Challenge

Article I, § 9 of the U.S. Constitution mandates that “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”⁵⁹ Alan L. Blume, Lieutenant in the U.S. Coast Guard, examined the Port Preference Clause; his analysis established a framework for understanding the Constitutional boundaries for federal funding of dredging and other water improvement projects.⁶⁰ Blume’s analysis did not look at the interplay between the HMT and the Port Preference Clause or assess the impact of what happens when a port opts in to the HMT regime.⁶¹

In *Milwaukee v. Yeutter*, Judge Easterbrook of the Seventh Circuit explained that the rationale for the Port Preference Clause emanated from Luther Martin, the delegate from the Maryland Delegation at the Constitutional Convention in 1787, who argued that such a clause was needed because of concern that Congress would require vessels to stop in Virginia and clear customs before proceeding into the Chesapeake Bay and the port of Baltimore.⁶² While the Clause on its face protects ports from unfair preferences, Luther was unconvinced that the Clause was strong enough to prevent unfair preferences from occurring anyway.⁶³

The Court of International Trade has held that the HMT does not violate the Port Preference Clause because the HMT does not explicitly give preference to one port over another.⁶⁴ In the case of

with Gooley, *supra* note 55 (suggesting the review of the Canadian model of port operation and the use of revenue for dredging projects).

59. U.C. CONST. art. I, § 9, cl. 6.

60. Alan L. Blume, *A Proposal for Funding Port Dredging to Improve the Efficiency of the Nation’s Marine Transportation System*, 33 J. MAR. L. & COM. 37, 39 (2002).

61. See *Amoco Oil Co. v. United States*, 63 F. Supp. 2d 1332, 1341 (Ct. Int’l Trade 1999) (determining that the HMT creates a preference for ports as opposed to states and, therefore, does not violate the Port Preference Clause).

62. *Milwaukee v. Yeutter*, 877 F.2d 540, 546 (7th. Cir. 1989) (citing Max Farrand, *2 Records of the Federal Convention* 417 (Madison: Aug. 25, 1787)).

63. *Id.* (citing MARTIN LUTHER, GENUINE INFORMATION (1788))

64. *Amoco*, 63 F. Supp. 2d at 1341.

Amoco Oil Co. v. United States, Judge Restani determined that the analysis of Port Preference Clause cases is based on whether Congressional action explicitly discriminated against a particular port, not the actual result of the act.⁶⁵ Acknowledging that Congress passes laws that benefit some ports, but also incidentally result in a disadvantage to other ports, such a disadvantage was not what the Port Preference Clause was meant to protect against.⁶⁶

C. The Legal Aspects of Davisville in Perspective

Even though Davisville is considered “exempt” from the HMT, it has the opportunity to elect to accept funding from the Army Corp of Engineers if it adopts the HMT, but in its current iteration, it would be unfair to charge vessels entering the facility the HMT if the facility does not receive Army Corp. funding for dredging projects.⁶⁷ While the HMT had a rough constitutional growing phase, the maritime community has begrudgingly accepted the charge. In addition to the legal challenges directly associated with the HMT, there was a question as to whether the HMT created a preference for ports not affected by the charge. As demonstrated in *Amoco*, because the HMT affects ports in general and does not explicitly discriminate against a particular state, the Port Preference Clause is not violated.⁶⁸

While the HMT has gone through some growing pains, its legal effects are minimal with respect to the Davisville. Given that ports can opt into the program, it’s a choice made by the port; however, that leads to ask whether Davisville has made the right choice? Although the HMT is still under siege from international opponents, the domestic issues with it have been sorted and the HMT has been determined not to pose significant impacts on port operation or the movement of freight through the facility. At most, it is an inconvenience which has been internalized, at least domestically, into supply chain operating costs.

Having analyzed the legal aspects of the HMT, the analysis

65. *Id.* at 621.

66. *Id.* (citing *Louisiana Public Service Comm’n v. Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931)); *see also* *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908).

67. *See* Matthews Email, *supra* note 20.

68. *Amoco*, 63 F. Supp. 2d at 1341.

will shift gears and explore the transport infrastructure of the port and analyze whether the HMT truly makes the Port of Davisville stand out from its competitors. The analysis will focus on Davisville's history and its current operations as well as examine its relationship with the Deepwater Wind Program and compare this relationship with that ongoing between the Port of Hull and Siemens in the United Kingdom.⁶⁹

II. SHIPPING LANES AND POWER LINES: TRANSPORT PLANNING, AND MARITIME MODE SHIFT

The previous section established one of the unique aspects of the Davisville facility. The exemption from the Harbor Maintenance Tax provides an opportunity for transportation operations at the Port and along the East Coast Corridor of the proposed Marine Highways program under the auspices of MARAD. This section will examine the uniqueness of Davisville, from its start as a naval air station during the Second World War up to now in its current utilization by the Quonset Development Corporation ("QDC"). This section will also provide a framework through which to look at Quonset as a stand-alone piece of infrastructure with unique opportunities as well as an integrated part of U.S. maritime transport operations.

A. From Military Installation to Economic Engine

Originally, the area that is now considered the Quonset Business Park began as various military installations used as part of the Lend-Lease Agreement during the Second World War.⁷⁰ At its peak during the war, the Quonset Naval Air Station and the Davisville Construction Battalion had the largest workforce in Rhode Island.⁷¹ The Naval Air Station was eventually decommissioned in 1974,⁷² while the structures related to the Construction Battalion were closed and slowly demolished

69. See Fialkoff, *Port Centric Logistics*, *supra* note 1, at 51.

70. *Davisville Naval Construction Battalion Center*, BASE, http://quonsetpoint.artinruins.com/davisville_main.htm (2000) (last visited Sept 29, 2012) [hereinafter *Davisville NCBC*]; *Quonset Naval Air Station*, BASE, http://quonsetpoint.artinruins.com/quonset_main.htm (2000) (last visited Sept. 29, 2012) [hereinafter *Quonset NAS*].

71. See *Quonset NAS*, *supra* note 70.

72. *Id.*

starting in 1994.⁷³ At the time of the decommissioning in 1974, the air station was transferred to the Rhode Island Port Authority, which was later renamed the Rhode Island Economic Development Corporation (RIEDC).⁷⁴ Formed in 2005, the Quonset Development Corporation (“QDC”) was created as a quasi-public subsidiary of the Rhode Island Economic Development Corporation (“RIEDC”) intended to rehabilitate the Naval Air Station and the area of the Construction Battalion, consisting of 3,207 acres of land which today is known as the Quonset Business Park (“QBP”).⁷⁵

The Port facilities have 4,500 linear feet of berthing space, consisting of two piers, a bulkhead, and on-dock rail access.⁷⁶ The facility has rail access and is four miles from Interstate Ninety-Five.⁷⁷ The port has sheltered facilities as well as a lay down area for cargo and capacity for automobiles moved through the port.⁷⁸ Pier One is built with a load capacity of 500 lbs./sq. ft. while Pier Two is built to hold a load capacity 1,000 lbs./sq. ft.⁷⁹ As of the publication of this paper, the draft has been dredged to minus thirty-two feet.⁸⁰ To date, the Port of Davisville has two tenants; the first is North Atlantic Distribution (NORAD), which is an automobile distribution company that currently has a fifty year lease for 125 acres of land in the facility.⁸¹ Davisville is the third largest auto port in the Northeast, eighth in North America, with New York and Baltimore being the two ports ahead of Davisville with respect to automobile imports in the Northeast.⁸² The other organization, Seafreeze is a cold storage/seafood company which

73. See Davisville NCBC, *supra* note 70.

74. See Matthews Email, *supra* note 20.

75. Quonset Business Park, *Quonset Development Corporation: About Us*, <http://www.quonset.com/about-us/about-us-overview/> (2010) (last visited Sept. 29, 2012).

76. Quonset Business Park, *Quonset Development Corporation: Transportation Overview*, <http://www.quonset.com/transportation/transportation-overview/> (2010) (last visited Sept. 29, 2012) [hereinafter Davisville Transportation Abilities].

77. *Id.*

78. Quonset Business Park, *Quonset Development Corporation: Port Facilities*, <http://www.quonset.com/transportation/port-facilities/> (2010) (last visited Sept. 29, 2012) [hereinafter Davisville Port Facilities].

79. Martin Associates Report, *supra* note 5, at Slide 79.

80. See Matthews Email, *supra* note 20.

81. *Id.*

82. Martin Associates Report, *supra* note 5, at Slide 83.

leases three acres of land, upon which lies a 15,000 ton freezer.⁸³

While the Port is currently owned and operated by the QDC, it was considered part of a military installation because the Davisville Facility was once part of the old Davisville Construction Battalion site.⁸⁴ When the WRDA was enacted, § 4462(e) exempted any facility that was an agent of the United States from the HMT; ergo because of Davisville's location on the old naval base, it is exempt from the HMT.⁸⁵ On its official website, the QDC acknowledges this exemption and also emphasizes that in comparison to other ports, it is one day closer to Europe, making it more appealing for companies to utilize.⁸⁶

B. Encouraging Maritime Mode Shift.

1. U.S. Desires for Maritime Mode Shift

In the last decade or so, there has been a global recognition of the importance of water-borne freight movement as a tool for sustainable transport solutions.⁸⁷ The United Nations has reported that "[i]nternational maritime transport carries over 80 per cent of the volume of world trade and is vital to globalized trade."⁸⁸ With this in mind, MARAD has recently reported that while the inland waterway systems of the U.S. transportation system carries more than one billion tons of freight, water-borne transportation accounts for roughly thirteen percent of the nation's domestic freight movement.⁸⁹ Within the same report, MARAD concedes that by 2035, U.S. freight transport will

83. *Id.* at Slide 79.

84. ABSOLUTE ASTRONOMER, *Quonset Point: Facts, Discussion, and Encyclopedia Article*, http://www.absoluteastronomy.com/topics/Quonset_Point.htm (Last visited Sept. 29, 2012).

85. I.R.C. § 4462 (e) (2006).

86. Davisville Port Facilities, *supra* note 74.

87. See United Nations Conference on Trade and Development, Multi-Year Expert Meeting on Transport and Trade Facilitation, Geneva, Switz., Feb. 16-18, 2009, *Maritime Transport and the Climate Change Challenge*, iii, UNCTAD/DTL/TLB/2009/1 (Dec. 1, 2009), available at http://unctad.org/en/Docs/dtltlb20091_en.pdf [hereinafter UNCTAD Report].

88. *Id.*

89. U.S. DEP'T OF TRANSP., MAR. ADMIN., *America's Marine Highway Report to Congress*, at 4 (Apr. 2011), available at http://www.marad.dot.gov/documents/MARAD_AMH_Report_to_Congress.pdf [hereinafter *Marine Highway Report*].

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increase by seventy-three percent, an increase which our land based transport system is inadequate to support.⁹⁰

In October 2008, a report prepared for MARAD outlined a set of reasons and objectives related to encouraging maritime mode shift.⁹¹ The report seemingly was in response to the sharp increase in oil prices in 2008 and the concern that the increased oil prices would impact land based transport operations.⁹² As acknowledged in the MARAD report, the transport system which supports “economic globalism” is very dependent on oil and alternative modes need to be considered if the oil prices remain high.⁹³ In comparing road, rail, and water-borne modes, the report concedes that while water based transport may be slow in terms of transit time, the cost for bunker fuel is far less than that of truck operations.⁹⁴ Likewise, the report notes that both rail and road transport are encountering capacity challenges that water-based transport is able to overcome given the utilization of larger, post-panamax vessels.⁹⁵

In a subsequent report about the Marine Highway’s program, MARAD added more explanation to the economic objective, but also added two more objectives to the analysis: environmentally sustainable transport and national defense/safety.⁹⁶ With respect to the economic efficiency of water borne transport MARAD found that, citing the Bureau of Labor Statistics, the water-borne transport industry accounts for approximately 65,200 direct jobs, 97,000 jobs in port activities, and a further 104,500 jobs in shipbuilding, repair, and maintenance.⁹⁷ In terms of gross output, the maritime industry generated \$36.1 billion with \$10.7 billion being generated in value added activities.⁹⁸

In addition to the economic benefits of a maritime mode shift,

90. *Id.*

91. TRANSP. ECON. & MGMT. SYS, INC., *Impact of High Oil Prices on Freight Transportation: Modal Shift Potential in Five Corridors Technical Report*, at 1 (Oct. 2008), available at http://www.marad.dot.gov/documents/Modal_Shift_Study_-_Technical_Report.pdf [hereinafter *Five Corridors Report*].

92. *Id.*

93. *Id.* at 4.

94. *Id.* at 7.

95. *Id.*

96. *Marine Highways Report*, *supra* note 89, at 1.

97. *Id.* at 12-13.

98. *Id.* at 13.

one major inducement to move freight off surface-based modes is reduced congestion on land-based routes.⁹⁹ The report acknowledges that reduced congestion has “potential payoffs to society, allowing greater national productivity through improved reliability of deliveries and trip times, lower transportation costs, cleaner air, and a much higher quality of life for commuters. . . .”¹⁰⁰ According to the Texas Transportation Institute, approximately 2.8 billion gallons of fuel were consumed and 4.2 billion hours of commuter hours were exhausted as a result of traffic and gridlock along land based routes over time.¹⁰¹ The report goes on to note that even rail service has seen congestion, slowing down operational efficiency, further encouraging the need for maritime mode shift.¹⁰²

While the economic objective focuses on job creation, time efficiencies or inefficiencies and the use of oil, the environmental objective proposed by MARAD focuses on transport operations and the vehicle emissions of each mode.¹⁰³ While the National Highway Traffic Safety Administration (NHTSA) has made strides towards improving fuel economy and Green House Gas (GHG) emissions, the report suggests a maritime mode shift to offset environmental impacts of surface transportation operations.¹⁰⁴ In a comparison of modal effects on the general public, it was calculated that truck traffic can carry 155 ton-miles of freight per gallon, rail can carry 413 ton-miles, and tug-and-barge operations can carry 576 ton-miles.¹⁰⁵ Furthermore, maritime transport emits between ten and eighty-eight grams of carbon dioxide in comparison to trucks which emit between 117 and 264 grams of carbon dioxide per ton-mile.¹⁰⁶

Additionally, the Environmental Protection Agency has promulgated a final rule relating to maritime based sulfur emissions, reducing sulfur emissions ninety-nine percent as well

99. *Id.* at 15.

100. *Id.*

101. *Id.* at 16 & n.38.

102. *Id.* at 16-17.

103. *Id.* at 21.

104. *Id.* at 21-22.

105. *Id.* at 22. A ton-mile is defined as how many miles one ton of freight can be moved on a gallon of fuel. MERRIAM WEBSTER'S THIRD NEW INT'L DICT. 2408 (3d. ed. 2002).

106. *Maritime Highway Report*, *supra* note 89, at 24.

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bringing U.S. vessels into compliance with the International Convention for the Prevention of Pollution from Ships.¹⁰⁷ Although most of the environmental concerns relate to sulfur, carbon dioxide, and nitrogen oxides, the report explains that mode shift to water based transport will reduce noise and vibration issues that arise when dealing with surface transportation, particularly in residential areas.¹⁰⁸

Although the Marine Highways report acknowledges other objectives with respect to encouraging maritime mode shift (such as national defense) and the institutional development to encourage maritime mode shift within the Marine Highways Initiative, the above mentioned objectives show the desire from the U.S. Department of Transportation for maritime mode shift. Taking these objectives into account and using the Marine Highways model, the next section explores how Davisville can help facilitate maritime operations along the East Coast (M-95) corridor.

2. *Davisville within the Marine Highways Program*

The Marine Highways Program, established by the Energy Independence and Security Act of 2007,¹⁰⁹ is a program under the auspices of MARAD which seeks to heighten the use of maritime waterways to offset surface transportation congestion on America's highways and motorways.¹¹⁰ The program utilizes 29,000 nautical miles and creates designated corridors to facilitate increased maritime transport of freight throughout the system.¹¹¹

The Davisville Facility is located along the M-95 Marine Highway which (as described by MARAD) includes the "Atlantic Ocean coastal waters, Atlantic Intracoastal Waterway, and connecting commercial navigation channels, ports, and harbors."¹¹² The corridor spans fifteen states, from Portland,

107. *Id.* at 25-26 & n.67

108. *Id.* at 26.

109. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified at 46 U.S.C. § 55601 (Supp. 2012)).

110. U.S. DEP'T OF TRANSP., MARITIME ADMIN., *America's Marine Highway Program: Program Description*, http://www.marad.dot.gov/ships_shipping_landing_page/mhi_home/mhi_home.htm (Last visited Nov. 2, 2012).

111. *Id.*

112. U.S. DEP'T OF TRANSP., MARITIME ADMIN., *M-95 Corridor Description*,

Maine to Miami, Florida, with connections to other Marine Corridors further westward.¹¹³ MARAD notes that the M-95 corridor parallels approximately 1,900 miles of the I-95 corridor.¹¹⁴ Finally, the M-95 corridor connects to fifteen of the largest ports in the United States with these ports handling 582 million short tons of cargo per year, or twenty-six percent of the national short tons of freight moved throughout the United States.¹¹⁵

The main goals of the M-95 route are to reduce landside congestion of the I-95 corridor of freight vehicles, while also reducing greenhouse gases, conserving energy, and maintaining cost of the highway infrastructure affected by truck traffic.¹¹⁶ These objectives are consistent with MARAD's report to Congress in April 2011, outlining the goals and prospects of achieving maritime modal shift.¹¹⁷ One of the unique aspects of the Marine Highways program is the multi-state and regional collaboration by the states, ports, and transportation agencies in coordinating on development of their individual corridors, or at least in emphasizing the importance of their corridor.¹¹⁸ In the case of the M-95 Corridor, the Port of Davisville joined other port authorities supporting the utilization of the corridor.¹¹⁹

In terms of its own strategic contribution to the M-95 Corridor, Davisville applied for and received a \$22.3 million Transportation Investment Generating Economic Recovery (TIGER) Grant in 2010.¹²⁰ Under the discretion of the U.S. Department of Transportation, a TIGER Grant "provides a unique opportunity for the U.S. Department of Transportation to invest in road, rail, transit and port projects that promise to achieve critical

available at http://www.marad.dot.gov/documents/2012_Marine_Highway_Corridors_PRINTER_FRIENDLY_V_10.pdf (last visited Nov. 2, 2012) [hereinafter *M-95 Corridor Description*].

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Marine Highway Report*, *supra* note 89, at 42.

118. *Id.*

119. *M-95 Corridor Description*, *supra* note 112.

120. Quonset Business Park, *Quonset Development Corporation: TIGER Grant Funded Projects*, <http://www.quonset.com/projects/tiger-grant-funded-projects/> (last visited Nov. 2, 2012).

national objectives.”¹²¹ With the TIGER Grant for the Davisville facility, the QDC set out many construction projects to make the Port more versatile for freight operations, while preserving its customer base, primarily the auto industry. Specifically, the Port will be purchasing a port crane as well as further developing operations along Pier Two and making improvements to Terminals Four and Five within the facility.¹²² Outside the TIGER grant, the Port began a \$7.5 million dredging project in October of 2012, which entailed removing 260,000 cubic yards of material from the channel floor.¹²³ In terms of intermodal development, the Port is undertaking rail rehabilitation along Pier Two, which includes placing concrete crossties and creating turnout space for carriages along the pier.¹²⁴

The improvements to the Port facility, aided by TIGER money, will help develop the Port’s capabilities when the Marine Highways Program becomes viable and more marine traffic begins to utilize the corridor. The beauty of the port is that it can respond to its customers’ needs by building requisite infrastructure. According to the Port Director, while the exemption from the HMT does help in the decision making process for tenants of the Port, it’s a small aspect of the decision-making process.¹²⁵ This type of model is similar to what ABP Hull does with respect to its British clients.¹²⁶ ABP has an amount of land sufficient to develop warehouses, or space, according to a customer’s specific requirements and ABP works with clients to develop the needed space to accommodate their needs.¹²⁷ This relationship allows for dynamic changes and the Port is able to

121. U.S. DEP’T OF TRANSP., *TIGER Grants*, <http://www.dot.gov/tiger>, (last visited Nov. 2, 2012).

122. Quonset Business Park, *Quonset Development Corporation: TIGER Grant Funded Projects*, <http://www.quonset.com/projects/tiger-grant-funded-projects/> (last visited Nov. 2, 2012).

123. WPRI, *Dredging project kicks off at Quonset*, WPRI.com, (Oct. 25, 2012, 6:48 PM), http://www.wpri.com/dpp/news/local_news/south_county/north-kingstown-dredging-project-kicks-off-at-quonset, (last visited Nov. 2, 2012).

124. Quonset Business Park, *Quonset Development Corporation: TIGER Grant Funded Projects*, <http://www.quonset.com/projects/tiger-grant-funded-projects/> (last visited Nov. 2, 2012).

125. *Id.*

126. See Fialkoff, *Port Centric Logistics*, *supra* note 1, at 50-51.

127. See *id.*

cater directly to its tenants needs while customizing its services to the client's supply chain requirements.¹²⁸ As described in the author's earlier work, this flexibility lends itself to a stronger development of a port-centric operation.¹²⁹ While this article does not focus on port-centric operations at the Davisville Facility, future work comparing the Port of Hull to the Port of Davisville would reveal whether U.S. ports are embracing a port-centric type model or whether the Davisville case is an aberration within U.S. port governance. Likewise, the dynamic utilization of ports within the supply chain can contribute to a desire by freight movers to shift their operations from land based modes to water borne options. Although statute may prevent such shift from a transport perspective, the notion that ports can be the driving force for a mode shift should not be downplayed.

One curious connection between the Port of Hull and the Davisville Facility is their individual relationships with wind energy and the seemingly different approaches and paths taken by these ports with respect to their interaction with renewable energy. In Hull, there is a trade-off of priorities between energy lay down space and containerization operations with a seemingly positive push for energy development on port grounds.¹³⁰ The next section will further explore port concepts which were started during my fieldwork in the United Kingdom and evaluate them in a Rhode Island context.

III. TILTING AT WINDMILLS: PORTS AS STAGING GROUNDS FOR RENEWABLE ENERGY PROJECTS

So far in this analysis, the focus has been a "unique" legal aspect of the Port of Davisville with respect to the Harbor Maintenance Tax as well as evaluating the desire for maritime mode shift and U.S. efforts in this area, using the port as a reference marker along the M-95 corridor. The final section of this comment will explore the ever-growing utilization of port space for development of wind energy projects. The U.S. has certainly had some "fits and starts" with wind energy, primarily the

128. *See id.* at 29-31.

129. *See id.* at 78.

130. *Id.*

development of the Cape Wind project in Massachusetts¹³¹ and the ongoing development of the Deepwater Wind project in Rhode Island. However, the U.S. is behind its European counterparts, such as the UK, Germany, and Denmark, in developing wind energy and the utilization of ports as staging grounds for such projects.¹³² This section will build on work conducted by the author during his time at the Institute for Transport Studies as well as work done by Thomsen, the author of *Offshore Wind*, in comparing wind energy permitting and installation procedures in the U.S. with those in the EU.¹³³ Using the ongoing Deepwater Wind project and the Port of Davisville, a contrast will be drawn as to how the U.S. has taken a more cumbersome approach to wind development versus the holistic integrated approach espoused by EU countries.

A. “Getting your Decade In Court.”¹³⁴ Permitting Regimes in the United States and the EU

Kurt Thomsen, the author of *Offshore Wind: A Comprehensive Guide to Successful Offshore Wind Farm Installation* compares the various regimes for permitting in the U.S., UK, and Germany with respect to the siting and development of offshore wind farms.¹³⁵ When reviewing the permitting structures for each of these countries, three things should be kept in mind: 1) who is holding the land/seabed in title upon which the project will be

131. The Cape Wind Project “will be America’s first offshore wind farm, on Horseshoe Shoal in Nantucket Sound. Miles from the nearest shore, 130 wind turbines will gracefully harness the wind to produce up to 420 megawatts of clean, renewable energy.” CAPE WIND, Project at a Glance, <http://www.capewind.org/article24.htm> (last visited Nov. 12, 2012). The process for completion of the permitting process however took nine years to complete and Cape Wind is the only company who has made it through the process as of today. F.B. VAN CLEVE & A.E. COPPING, OFFSHORE WIND ENERGY PERMITTING: A SURVEY OF U.S. PROJECT DEVELOPERS, DEPARTMENT OF ENERGY 4.8 (Nov. 2010), available at http://www.pnl.gov/main/publications/external/technical_reports/pnnl-20024.pdf.

132. KURT E. THOMSEN, OFFSHORE WIND: A COMPREHENSIVE GUIDE TO SUCCESSFUL OFFSHORE WIND FARM INSTALLATION 9, 17, 21, 23 (2012) [hereinafter THOMSEN, OFFSHORE WIND].

133. *Id.* at 9.

134. I would like to thank Professor Dennis Esposito for the use of this quote, aptly describing the potentially long process it may take to get a permit in the context of U.S. environmental projects

135. THOMSEN, OFFSHORE WIND, *supra* note 132, at vii.

built, 2) what are the administrative structures/agencies that oversee the application process, and (3) who do these administrative agencies answer to?¹³⁶

1. *The United States*

Of the three regimes being analyzed, the United States has the most cumbersome and entangled system of permitting regulations for an offshore wind project.¹³⁷ First, in comparison to the British and German regimes, the United States holds land submerged in a public trust.¹³⁸ The Public Trust Doctrine¹³⁹ makes such lands open to all, and therefore activities conducted in these areas have to conform to the desire/needs of society as a whole.¹⁴⁰ On top of this abstract protection, a wind farm project must navigate regulations and issues of multi-level governance as well as multiple agencies involved in the process.¹⁴¹ For example, the federal permitting regime requires compliance with the National Environmental Policy Act (“NEPA”)¹⁴², Coastal Zone Management Act (“CZMA”)¹⁴³, Clean Water Act (“CWA”)¹⁴⁴, Rivers and Harbors Act (“RHA”)¹⁴⁵, and species-protecting statutes such as the Endangered Species Act (“ESA”)¹⁴⁶ and the Marine Mammal Protection Act (“MMPA”)¹⁴⁷

Within each of these statutes are various applications, permitting requirements and impact analyses to ensure the project is in compliance with each of the regimes.¹⁴⁸ The U.S. has

136. *Id.*

137. *Id.* at 13-16.

138. Christine Santora, Nicole Hade, & Jackie Odell, *Managing offshore wind developments in the United States: Legal, environmental and social considerations using a case study in Nantucket Sound*, 47 OCEAN & COASTAL MGMT. 141, 153 (2004) [hereinafter Santora, *Managing offshore wind*].

139. As explained by Santora, Hade, and Odell, “The Public Trust Doctrine can be traced back to Roman law and applies to tidelands and lands below navigable waters, which were claimed to be of value for commerce, navigation, and fishery resources.” *Id.*

140. *See id.*

141. THOMSEN, OFFSHORE WINDS, *supra* note 132, at 15.

142. 42 U.S.C. §§ 4321-4370f (2006).

143. 16 U.S.C. §§ 1451-1466 (2006).

144. 33 U.S.C. §§ 1251-1387 (2006).

145. 33 U.S.C. §§ 401-467 (2006).

146. 7 U.S.C. §§ 136-136y (2006).

147. 16 U.S.C. §§ 1361-1423h (2006).

148. THOMSEN, OFFSHORE WINDS, *supra* note 132, at 15.

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a pseudo-centralized agency, the Bureau of Ocean Energy Management Regulation and Enforcement (“BOEMRE”) that focuses on the development of wind farms on the outer continental shelf.¹⁴⁹ However, final approval requires multi-level governmental cooperation and communication as well as support from the communities potentially impacted by the project.¹⁵⁰

2. *The United Kingdom*

In contrast, the United Kingdom has what some consider a more streamlined approach to offshore wind farms.¹⁵¹ The biggest and probably most important difference between the British and American approaches is that in the U.S. submerged lands are held in public trust, whereas submerged lands in the United Kingdom are managed by the Crown Estate, a corporate body that answers to Parliament, which represents the monarch’s hereditary possessions.¹⁵² In accordance with British and EU goals of wind energy development, the Crown Estate solicits and manages offshore leases in the UK.¹⁵³

While the Crown Estate is the main lease-holder, wind farm projects must undergo a Strategic Environmental Assessment (SEA) which, similar to the Environmental Impact Statement (EIS)¹⁵⁴ required by NEPA, assesses the environmental and the social impacts of the project.¹⁵⁵ Unlike the EIS process however, the SEA takes a more public access approach during which the community is involved in designing the strategy to be implemented, as opposed to the perceived adversarial system under the NEPA process.¹⁵⁶ Likewise, the administrative agencies

149. *Id.* at 10-11.

150. *Id.* at 10-11.

151. *See id.* at 17-21.

152. *Id.* at 19.

153. *Id.*

154. Under NEPA, if a project affects the natural or built environment, the project must undertake analyzing the impacts of the project as well as providing alternatives to mitigate any potential impacts as a result of the project. COUNCIL ON ENVIRONMENTAL QUALITY EXECUTIVE OFFICE OF THE PRESIDENT, A CITIZEN’S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 18 (Dec. 2007) available at http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf

155. THOMSEN, OFFSHORE WINDS, *supra* note 132, at 18.

156. However it should be noted that it is the author’s opinion that the NEPA process relating to public participation with respect to an EIS can devolve into what one could consider a “healthy” adversarial process given

in the UK are more centralized, specifically, applications and associated work in the lease process answer to the Marine Management Organization (“MMO”) and the Infrastructure Planning Commission (“IPC”).¹⁵⁷ These two agencies, in contrast to the myriad of agencies involved the U.S. process allow more direct communication and a more centralized approach to administrative management from the perspective of the government, as well as the contractor and project developer.¹⁵⁸

3. Germany

The British approach and administrative system is more streamlined because the barrier of the public is removed from the process in contrast to the oversight required by Public Trust Doctrine in the U.S.¹⁵⁹ With that said, Germany mirrors the United States from a structural perspective in the sense that there is a federal government and individual states (Länders) which have distinct sovereign responsibilities, including the management of ocean resources. This begs the question, why a similar administrative state in Germany allows for a smoother permitting process than in the U.S.?

Similar to the British, the German push for Wind Energy comes from the EU¹⁶⁰ and its directive-setting renewable energy targets.¹⁶¹ However, in contrast to both the British and American regulatory frameworks, the German leasing and permitting system is driven by statute and the administrative state, not a public trust or a single entity representing monarchical interests.¹⁶² In Germany, the Federal Maritime and Hydrographic Agency (“BSH”) is authorized under the Federal Maritime Responsibilities Act¹⁶³ while the Marine Facilities

the way in which the public is allowed to comment and attend public meetings to essentially protest projects.

157. See THOMSEN, OFFSHORE WINDS, *supra* note 132, at 20.

158. See *id.*

159. Essentially, because the Crown Estate manages the crown’s property, the public is not involved in discussing whether the land should be leased for the potential project. See *id.* at 19.

160. 2009 O.J. (L 140) 16.

161. See THOMSEN, OFFSHORE WINDS, *supra* note 132, at 22.

162. *Id.* at 22.

163. *Id.*

Ordinance¹⁶⁴ controls wind farm project development.¹⁶⁵ Unlike the U.S., the relationship between federal government and the individual coastal states creates interlocking and overlapping lines of communication to facilitate project development and reduce the amount of administrative and regulatory overlap.¹⁶⁶ Whereas the federal government manages the lease of land within the State's Economic Exclusive Zone ("EEZ"), the coastal states are kept informed via an Offshore Wind Standing Committee ("StAOWind").¹⁶⁷ The coastal states are also involved in approving transmission lines that emanate from their shores, thus giving them rights to participate in the process.¹⁶⁸ The issue of transmission lines and the ability to convert the wind energy into actual electric power is the main barrier for the German case, in particular, the use of High Voltage Direct Converters ("HVDC") to integrate the wind energy into the national grid.¹⁶⁹ This problem illustrates, in addition to transport issues with unstable geotechnical data, the practical problems that occur when implementing wind projects offshore.¹⁷⁰

4. *Who is in the Driver's Seat?*

Thomsen's comparison of these three systems provides some basic insight into the different drivers, forces, and barriers to developing wind energy projects from a U.S. and broad EU perspective.¹⁷¹ In the case of the U.S., while the Public Trust Doctrine provides the right for individuals to use public lands, this creates an initial hurdle that slows down the project given the high level of protection afforded to these lands by both the state and federal government.¹⁷² In addition to the Public Trust Doctrine, a project in the U.S. must contend with the ever-

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 23.

168. *Id.*

169. Matthias Schulz, *Germany's Offshore Fiasco: North Sea Wind Offensive Plagued by Problems*, SPIEGELONLINE (Sept. 4, 2012), <http://www.spiegel.de/international/germany/german-offshore-wind-offensive-plagued-by-problems-a-852728-2.html> (last visited Nov. 12, 2012).

170. *Id.*

171. See THOMSEN, OFFSHORE WIND, *supra* note 132, at 9-23.

172. See Santora, *Managing offshore wind*, *supra* note 138, at 153.

confusing administrative state which includes multiple agency involvement, over-lapping and time consuming procedural requirements, as well as assessment criteria to ensure project viability.¹⁷³ Moreover, a need for state, local, and federal harmony in approving the project for siting and future construction further encumbers the process.¹⁷⁴ In contrast, the European model is driven by high level directives from a supra-national organization, the internalization of such directives and varied approaches to implementation.¹⁷⁵ While the British probably have the most stream-lined approach, such an approach is only possible because of the monarchical lands and the Crown Estate's ability to lease land if it conforms to the Queen's economic desires.¹⁷⁶

Germany may provide a model that the U.S. can attempt to adapt or modify to fit with the Public Trust Doctrine. In Germany, a federal statute essentially creates an enabling agency for centralized stewardship with mandates from auxiliary statutes and communication with coastal states via committees.¹⁷⁷ These states create a cooperative framework that streamlines the process and actively includes all stakeholders in the process to ensure a well-developed project with all concerns addressed.¹⁷⁸ A caveat to this approach is that while the German case only involves two statutes in contrast to the myriad of U.S. statutes,¹⁷⁹ the EU provides directives which further develop parameters.¹⁸⁰ Given the structural similarities in both vertical federalism and the administrative state, further investigation should be done to determine what lessons the U.S. can glean from Germany with respect to offshore wind project development.

Having broadly defined the regulatory framework in the U.S. and the UK with respect to wind energy projects, the focus will now turn to how ports can contribute to wind farm projects. Finally this article compares the respective relationships of the Port of Hull in the United Kingdom and the Port of Davisville

173. *Id.*

174. *Id.* at 15-16.

175. *See id.* at 17-23.

176. *Id.* at 19.

177. *Id.*

178. *Id.* at 23.

179. *Compare id.* at 23, *with id.* at 15.

180. 2009 O.J. (L 140) 16.

with wind energy and the lessons or challenges each port exemplifies.

B. “Where Rubber Meets the Road,” or more aptly, where monopolies meet the seabed: the Port as the Staging Ground for Wind Projects

One of the critical aspects of developing the logistics for wind farm projects is the land/water interface for transporting equipment and wind turbines to the offshore site for construction.¹⁸¹ As part of the “supply chain,” the port becomes a critical hub of activity as both a staging ground and a transport site.¹⁸² When choosing a port to act as a staging ground, Thomsen lists various factors to consider in determining whether the port can support the equipment and modal impacts of the project.¹⁸³ These factors include:

(1) Ground Preparation: The port must have a ground-bearing capacity which can support the weight of ground traffic loaded with equipment, the numerous movements on-site, as well as the standing weight of the blades, nacelles, foundations, and monopolies.¹⁸⁴

(2) Piers and Waterfronts: This factor looks at the hardware within the port; specifically the cranes the port has in addition to the berthing space and pier capacity for holding the massive size of the transport vessels between the port and the off-site area.¹⁸⁵

(3) Seabed considerations: As one of the most important considerations in port selection, the seabed must be able to hold and maintain the weight of jacking vessels when they rise up to collect the equipment for transport.¹⁸⁶

(4) Security and On-site management: In addition to the geo-technical and infrastructure requirements, the port needs to be able to contain and monitor movement of employees, technicians, and other personnel to ensure safety of crew, equipment, and material. Using International Standards for Port Security (“ISPS”), ports can protect assets and personnel and monitor

181. See THOMSEN, OFFSHORE WIND, *supra* note 132, at 85.

182. See *id.* at 85-86.

183. *Id.* at 86.

184. *Id.* at 86-87.

185. *Id.* at 87-88.

186. *Id.* at 85-86.

movement within the facility.¹⁸⁷

With these considerations in mind, this article will now look at the Port of Hull and its relationship with Siemens in providing a staging ground for the North Sea Wind Farm Project and the ongoing Deepwater Wind project at Davisville. While the following discussion does not mention the above factors *per se*, it is important to acknowledge that, in the initial phase of project conceptualization, such factors play a critical role in developing the supply chain for wind turbine construction.

1. *Green-Port Hull*

The Port of Hull is located on the East Coast of England, along the Humber Estuary.¹⁸⁸ While the Port dates back to the Middle Ages, its peak usage was during the Industrial Revolution and continued to grow steadily until the growth of containerization and the rise of larger draft vessels.¹⁸⁹ Much of Hull's infrastructure, particularly its rail infrastructure, was demolished as a result of the Beeching report,¹⁹⁰ which effectively gutted the rail on Port grounds.¹⁹¹

Today, the Port is re-developing its focus with an emphasis on industrial and manufacturing production, particularly in the areas of paper, chemicals, and renewable energy. As described by Phillip Coombes, the Port operator, Associated British Ports (ABP) have entered into a Memorandum of Understanding (MoU) with Siemens to provide its port space to be the staging ground for the North Sea wind farm. In February of 2011, ABP stated that:

Green Port Hull will involve the regeneration of

187. *Id.*

188. See Fialkoff, PORT CENTRIC LOGISTICS, *supra* note 1, at 87 (citation omitted).

189. *Id.* at 44 (citation omitted).

190. The Reshaping of British Railways (more commonly known as the Beeching Report) was published with the desire to remove rail infrastructure in favor of new roads. This report led to a number of track and station closures from 1963 onwards. Marc Fialkoff & Angela Carpenter, Developments in Port Centric Logistics in EU Seaports with respect to Transport, Containerisation and Security 9 (Sept. 30, 2012) (unpublished manuscript) (on file with author) [hereinafter Fialkoff, Developments in Port Centric Logistics].

191. *Id.* The port still utilizes rail to move coal imported from Russia and has recently updated this infrastructure to increase capacity. *Id.*

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Alexandra Dock, an existing port complex that is directly adjacent to a natural deep-water channel. It is therefore perfectly positioned for the receipt of important cargo, component manufacture and the dispatch of the turbines for installation at the wind farms out at sea. . . . The development will comprise of a factory for the production of wind turbine equipment, together with component storage areas, offices and car parking, in addition, a new 600m riverside berth will be constructed for the export of wind turbine components around the site.¹⁹²

In addition to helping regenerate the City of Hull, the increased use of the Port will create approximately 10,000 jobs for the local community as well help encourage other supply operations to use the Port of Hull.¹⁹³

In the case of the Port of Hull and Siemens, a synergistic relationship exists in which the Port and the wind farm benefit in such a way that the wind farm increases the Port's versatility as well as helps it develop and revive its infrastructure in the face of future demand for space and renewable energy production either on site or as a staging ground for such projects. This shows the Port's ability to adapt and thrive in the age where renewables and creative solutions demand innovative approaches to infrastructure management.

2. *The Port of Davisville*

In contrast to my observations with the Hull-Siemens project, the relationship between Deepwater Wind and the Port of Davisville seems more part and parcel of the process that U.S. companies undertake when determining whether to use a port for a potential offshore wind installation. As described in the Joint Development Agreement (JDA) between Deepwater Wind and the RIEDC, the RIWINDS study concluded "that 95% of Rhode Island's wind energy potential was located in areas offshore of Rhode Island," and, therefore, it would be opportune for the

192. See GREENPORTHULL, *What is Green Port*, <http://www.greenporthull.co.uk/what-is-green-port/> (Feb. 4, 2011).

193. ABP CORPORATE, *Hull & Goole*, http://www.abports.co.uk/Our_Locations/Hull_Goole/ (last visited Mar. 6, 2013). It is important to note that the 10,000 jobs estimate was not given by the Port operator at Hull, but was a number extrapolated by Hull City Council.

development of an offshore wind farm in this area.¹⁹⁴ As part of the JDA, the QDC would lease land to Deepwater Wind at the Davisville location to be used as staging ground for the development of the offshore wind farm.¹⁹⁵ The JDA also lays out the contractual terms and staging of the lease at the Davisville facility. As acknowledged in the Martin Associates report, it was confirmed that ports in Rhode Island, such as Davisville, could serve as laydown sites for assembly as well as manufacturing on port grounds to support operations at the offshore construction sites.¹⁹⁶

The Martin report describes Deepwater Wind's desire to develop 200 five-to-six megawatt turbines twenty miles off Rhode Island as well as a smaller wind farm (an approximately 30 megawatt farm off Block Island).¹⁹⁷ Within the Port facility at Davisville, approximately eighty acres of land have been designated for manufacturing and assembly operations with utilization of Pier Two as the dock to handle inbound traffic.¹⁹⁸ As described in the report, Pier Two will receive upgrades as a result of the TIGER grant mentioned earlier and will begin to use the crane which was also purchased with TIGER grant funds.¹⁹⁹ Moreover, the report describes usage of Terminal Five within the Port as an area to store steel coils and subsequent barging of equipment.²⁰⁰

Port administrators have differing opinions on wind energy using port grounds. At Hull, the relationship seems to be welcomed and encouraged because of the mutual benefit for the Port and for Siemens. In contrast, while Davisville and the Rhode Island economy will benefit from the increased use of the Port as well as the increase in employment as a result of the project, the Port is concerned with ensuring its ability to continue to serve those tenants that are the primary users of the port. Specifically, the Port wants to ensure space and facility for the auto imports

194. *Joint Development Agreement Between the State of Rhode Island and Deepwater Wind Rhode Island, LLC 2* (2009), http://www.cfcri.com/Joint_Development_Agreement_1-2-2009_1.pdf.

195. *Id.* at 14.

196. Martin Associates Report, *supra* note 5, at Slide 133.

197. *Id.* at Slide 137.

198. *Id.* at Slide 141.

199. *Id.*

200. *Id.* at Slide 144.

from Europe which make Davisville a continued presence with respect to international auto shipment. The synergistic relationship at Hull is contrasted with Davisville's struggle to strike a balance between seeking new projects while also respecting current tenants and operational fluidity.²⁰¹ From comparing both the Hull and Davisville facility, one gets the impression that how the port's operational ability is viewed places the port in different lights. In a European context, the port has greater abilities, while in the U.S. the port is still viewed as a piece of infrastructure, to carry out basic purposes without an eye to breaking out of this traditional mold.

C. A Match Made in Heaven?

As we observe the contrasting experiences of both the Port of Hull and the Port of Davisville, the reaction is mixed. How synergistic or common-place does the port feel when being the land point of contact for offshore projects? In a sense, we have to look past the port at the national context to understand this relationship. In England and Europe in general, the port is viewed as a piece of regional development that is allowed to grow via organic means of demand, both from a business and a regional and international context. In the U.S. however, this organic growth is tempered by various legal, economic, and business barriers which view ports as pieces of infrastructure merely a system of cranes, vessels, and warehouses on its grounds.

While the author praises the European model as being more organic, the ever evolving nature of the economic climate in Europe is changing this.²⁰² For example, while regional

201. During the writing of this comment, Cape Wind, the offshore project that was and is still intending to use the Port of New Bedford as its lay-down site for the land-side component of its offshore wind project has met with Governor Lincoln Chafee to discuss the use of the Davisville facility as the primary lay-down site for the project. While Cape Wind and Massachusetts claim the Port of New Bedford will be ready to handle the project needs of Cape Wind, the project development team is keeping its options open. Michelle R. Smith, *Cape Wind meets with RI Gov. Chafee on port*, BOSTON.COM, (Nov. 9, 2012), <http://www.boston.com/news/local/massachusetts/2012/11/09/cape-wind-meets-with-rhode-island-governor/gn7DEHye1JYB2s1SKeCudP/story.html>.

202. Fialkoff, *Developments in Port Centric Logistics*, *supra* note 189, at 10.

organizations viewed ports as important to local development in the United Kingdom, the Comprehensive Spending Review by the Conservative Government caused regional organizations to consolidate or be eliminated in place of stronger local-enterprise partnerships, which cannot handle the ports economic impacts. As observed while conducting fieldwork at Immingham, the local economic partnerships are not equipped to handle the transport and economic impact that the Port [Immingham] has on that area.

To this extent, further analysis from a regional development perspective would reveal more information and give the Port of Davisville a case study, like the Port of Hull, to help guide future development and discussions with other wind companies, such as Cape Wind. From what has been observed thus far, the administrative barriers, market drivers, and the way the U.S. views ports seems to prove to be the biggest challenge for operations to move forward. While the EU and European states view ports more holistically as contributing to not just the supply chain, but to multiple sectors of a country's economic development, this is only slowly taking shape in the U.S. The Davisville facility seems to be trying to become a practical example, but is slow and is working through the growing pains of balancing port space for traditional operations and creating space for renewable energy production offshore.

One area in particular that the U.S. needs to improve or at least speed up its development is the use of port space for renewable energy production. Here, the European ports have figured out that a multi-use port allows for both economic development as well as centralization of activity from a transport, supply chain, and energy production perspective. While this paper focused mostly on transport and used wind energy as a case study to analyze the different approaches taken by the U.S., UK, and Germany, the U.S. can learn a lot from our European counterparts with utilization of port space.

IV. CONCLUDING THOUGHTS: PUTTING THE PIECES OF THE PUZZLE TOGETHER

From the outset, the port can be considered a dynamic piece of infrastructure in the context of transport and supply chain logistics. It serves as a platform for intermodal operations, a vehicle to deliver sustainable transport solutions, as well as a safe

harbor in some cases from economic costs. The Port of Davisville stands at a crossroads with the chance to break the mold for U.S. ports. The HMT, while not a market driver for reasons to use the Port, can help the Port stand out in the Atlantic Corridor as well as assist in developing the M-95 corridor of the Marine Highways program.²⁰³ The bigger question is the ability of the Port to adapt and become a dynamic exchange place for the traditional imports of autos and other goods as well as become part of a select group of ports that are at the frontier of using port space for renewable energy production offshore.

While this paper sought to explore the issues and intricacies of the Port of Davisville, this is only a broad swipe at the issues and accordingly has new questions and avenues for study. Some of those avenues include 1) using the Port of Hull as a comparator or, in some cases, as a guide to understand and explore how to maximize new relationships with the renewable energy industry, 2) comparing the German administrative and legal approaches to wind energy project development and determining whether any of Germany's approaches can be modified to fit the U.S. administrative structure including the Public Trust Doctrine, and 3) exploring the relationship between the HMT and its economic impact on wind energy projects given the increased traffic between the offshore operation and the port.

All the pieces are there to enable ports in general to have the unique opportunity to be dynamic pieces of infrastructure in delivering sustainable solutions, both in a transport and energy context. They have the opportunity to utilize their unique capabilities and surpass traditional notions to elevate themselves to be bastions of energy production or expand into non-traditional uses in developing sustainable solutions.

203. See *M-95 Corridor Description*, *supra* note at 112.