

# Current Alert

Legislative & Regulatory Issues of Contemporary Import to the U.S. Marine Transport Industry

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## PORT SECURITY IN THE US

### Globalism At It's Best And Worst

As we watch in the wake of a threat of US **President George Bush's** first veto ever, one can't help but scratch their head and wonder exactly how and why this nation got into to this seemingly ridiculous situation, and why it is that the \$6.8 Billion **Dubai Ports World (DPW)** purchase of **Peninsular and Oriental Steam Navigation Company (P&O)** has evoked the torrent of opposition being played out in the press and in the corridors on Capitol Hill. This edition of *Current Alert* will seek to explore these questions, and perhaps raise a little consciousness of its own while doing so.

Towards the middle of 2005, industry news reports began a respectable coverage of the then-emerging acquisition of **P&O** (an old firm organized under the rules of Great Britain in 1837). A number of corporate suitors appeared interested, but by the beginning of the New Year only two: the **Port of Singapore Authority (PSA)** and **Dubai Ports World**, appeared to be cash-rich enough to prevail. By the second week of February, it was clear that **DPW** had won out. The tender of **Thunder FZE** (a wholly-owned subsidiary of **Ports, Customs and Free Zone Corporation Dubai [DPW]**) was accepted by **P&O** shareholders assembled in London on February 13, 2006. **P&O's** news release of that date sets out the expected completion of this acquisition as March 2, 2006.

### Then, The Sky Begins To Fall

On February 20, 2006, reports in the US media started appearing which detailed the displeasure of certain key Democratic legislators. How, they reasoned, could the Bush administration possibly submit the security of our ports to a foreign government? Moreover, how could such a sacred domestic responsibility be put into the hands of an authoritarian Arab government? An Arab government that had officially recognized the rogue Taliban regime in Afghanistan! The authoritarian leadership of a nation that had tacitly permitted the financing of the September 11<sup>th</sup> operations; that was purportedly responsible for providing roadblocks in the FBI's tracing of those (and similar) Dubai-based financial transactions. Then, of course, pages 137/138 of **The 9/11 Commission Report** were passingly referred to.

For subscribers unfamiliar with the contents therein, those pages are provided here:

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attempt to gather intelligence and wait for an opportunity. One Special Operations commander said his view of actionable intelligence was that if you "give me the action, I will give you the intelligence."<sup>148</sup> But this course would still be risky, in light both of the difficulties already mentioned and of the danger that U.S. operations might fail disastrously. We have found no evidence that such a long-term political-military approach for using Special Operations Forces in the region was proposed to or analyzed by the Small Group, even though such capability had been honed for at least a decade within the Defense Department.

Therefore the debate looked to some like bold proposals from civilians meeting hypercaution from the military. Clarke saw it this way. Of the military, he said to us, "They were very, very, very reluctant."<sup>149</sup> But from another perspective, poorly informed proposals for bold action were pitted against experienced professional judgment. That was how Secretary of Defense Cohen viewed it. He said to us: "I would have to place my judgment call in terms of, do I believe that the chairman of the Joint Chiefs, former commander of Special Forces command, is in a better position to make a judgment on the feasibility of this than, perhaps, Mr. Clarke?"<sup>150</sup>

Beyond a large-scale political-military commitment to build up a covert or clandestine capability using American personnel on the ground, either military or CIA, there was a still larger option that could have been considered—invading Afghanistan itself. Every official we questioned about the possibility of an invasion of Afghanistan said that it was almost unthinkable, absent a provocation such as 9/11, because of poor prospects for cooperation from Pakistan and other nations and because they believed the public would not support it. Cruise missiles were and would remain the only military option on the table.

## The Desert Camp, February 1999

Early in 1999, the CIA received reporting that Bin Ladin was spending much of his time at one of several camps in the Afghan desert south of Kandahar. At the beginning of February, Bin Ladin was reportedly located in the vicinity of the Sheikh Ah camp, a desert hunting camp being used by visitors from a Gulf state. Public sources have stated that these visitors were from the United Arab Emirates.<sup>151</sup>

Reporting from the CIA's assets provided a detailed description of the hunting camp, including its size, location, resources, and security, as well as of Bin Ladin's smaller, adjacent camp.<sup>152</sup> Because this was not in an urban area, missiles launched against it would have less risk of causing collateral damage. On February 8, the military began to ready itself for a possible strike.<sup>153</sup> The next day, national technical intelligence confirmed the location and description of the larger camp and showed the nearby presence of an official aircraft of the United Arab Emirates. But the location of Bin Ladin's quarters could not be pinned down so precisely.<sup>154</sup> The CIA did its best to answer a host of questions

about the larger camp and its residents and about Bin Ladin's daily schedule and routines to support military contingency planning. According to reporting from the tribals, Bin Ladin regularly went from his adjacent camp to the larger camp where he visited the Emiratis; the tribals expected him to be at the hunting camp for such a visit at least until midmorning on February 11.<sup>155</sup> Clarke wrote to Berger's deputy on February 10 that the military was then doing targeting work to hit the main camp with cruise missiles and should be in position to strike the following morning.<sup>156</sup> Speaker of the House Dennis Hastert appears to have been briefed on the situation.<sup>157</sup>

➔ No strike was launched. By February 12 Bin Ladin had apparently moved on, and the immediate strike plans became moot.<sup>158</sup> According to CIA and Defense officials, policymakers were concerned about the danger that a strike would kill an Emirati prince or other senior officials who might be with Bin Ladin or close by. Clarke told us the strike was called off after consultations with Director Tenet because the intelligence was dubious, and it seemed to Clarke as if the CIA was presenting an option to attack America's best counterterrorism ally in the Gulf. The lead CIA official in the field, Gary Schroen, felt that the intelligence reporting in this case was very reliable; the Bin Ladin unit chief, "Mike," agreed. Schroen believes today that this was a lost opportunity to kill Bin Ladin before 9/11.<sup>159</sup>

➔ Even after Bin Ladin's departure from the area, CIA officers hoped he might return, seeing the camp as a magnet that could draw him for as long as it was still set up. The military maintained readiness for another strike opportunity.<sup>160</sup> On March 7, 1999, Clarke called a UAE official to express his concerns about possible associations between Emirati officials and Bin Ladin. Clarke later wrote in a memorandum of this conversation that the call had been approved at an interagency meeting and cleared with the CIA.<sup>161</sup> When the former Bin Ladin unit chief found out about Clarke's call, he questioned CIA officials, who denied having given such a clearance.<sup>162</sup> Imagery confirmed that less than a week after Clarke's phone call the camp was hurriedly dismantled, and the site was deserted.<sup>163</sup> CIA officers, including Deputy Director for Operations Pavitt, were irate. "Mike" thought the dismantling of the camp erased a possible site for targeting Bin Ladin.<sup>164</sup>

➔ The United Arab Emirates was becoming both a valued counterterrorism ally of the United States and a persistent counterterrorism problem. From 1999 through early 2001, the United States, and President Clinton personally, pressed the UAE, one of the Taliban's only travel and financial outlets to the outside world, to break off its ties and enforce sanctions, especially those relating to flights to and from Afghanistan.<sup>165</sup> These efforts achieved little before 9/11.

In July 1999, UAE Minister of State for Foreign Affairs Hassan bin Zayed threatened to break relations with the Taliban over Bin Ladin.<sup>166</sup> The Taliban did not take him seriously, however. Bin Zayed later told an American diplo-

Within a day or two, Republican legislators (including Senate Majority Leader Frist and Speaker of the House Hastert) started calling for explanations and actually floated the idea of introducing their own legislation to block the sale of US-based P&O assets should a good explanation not appear. One very respected neo-conservative Republican Senator (Lindsey Graham of South Carolina) called the administration's buy-in to this deal "...politically tone deaf..."

Not to be outdone, President Bush declared that the process of this deal's oversight had been fairly accomplished; that the government of Dubai had been a solid partner in the war against terror; that killing this deal would "...send a wrong message to the Arab world."; and that he would veto any legislation arriving at his desk aimed at barring the acquisition. For a chief executive who, after over five years in office, had never exercised his veto power, GW sounded awfully serious about seeing this deal through.

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Speaking of oversight, just what sort of up-front scrutiny is President Bush really talking about?

Well, over the years Congress has sought to perfect the level and focus of investigations extra-national purchases of U.S. assets receive. They've written laws to ensure that such assets (and the nation's domestic and economic security) will not be harmed by such foreign acquisition. One such law, Section 5021 of the **Omnibus Trade and Competitiveness Act of 1988**, amended a previous law, Section 721 of the **Defense Production Act of 1950**, in such a manner as to provide authority for the President to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten the national security of the United States. The President can exercise this authority under section 721 (also known as the "Exon-Florio provision") to block a foreign acquisition of a U.S. corporation only if he finds:

**(1) there is credible evidence that the foreign entity exercising control might take action that threatens national security, and**

**(2) the provisions of law, other than the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect the national security.**

The Exon-Florio provision is implemented by the Committee on Foreign Investment in the United States ("CFIUS"), an inter-agency committee chaired by the Secretary of Treasury.



*Above left*, P&O's coat of arms combines the Royal colors of Spain and Portugal (thereby its "Peninsular" origins), with an "Oriental" rising sun as a crest, and a lion, elephant, dragon and kangaroo - which signify Britain, India, China and Australia, the countries linked by its Imperial mail services until the Second World War. *Above right*, James Lyle Mackay: the Earl of Inchcape, Chairman of the British India Steam Navigation Company at the time of that firm's merger with P&O. Mr. Mackay succeeded to the Chairmanship of P&O shortly after the joining of the two firms (1914).

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Further, the relevant law provides for a regulatory framework within which **CFIUS** decisions are rendered. Those regulations are codified at **31 CFR Part 800**, and provide a well written template from which the Executive branch must operate in reaching any conclusions. In the **DPW/P&O** matter, it certainly appears that all mandatory application and operational timelines have been adhered to and that the committee, acting under its **§800.502 (a)** powers; within the provided-for 30 day review period, made a determination that the **DPW/P&O** application required no further investigation. They could have chosen to extend the investigatory period for another 15 days, but did not. Had they conducted such an extended investigation, they would have had a need to submit their findings to the President in the form of a report. Had the committee's report recommended a denial, the President would have had 15 days within which to take a section 721 adverse action affirming the committee's recommendation. Given that the committee's findings supported the transaction, there was no legal basis or necessity for bothering the President with the details. Politically, however, it would have made a lot of sense to plug the White House into the equation.

Subscribers wishing to review 31 CFR Part 800, may do so utilizing this hyperlink:

[http://www.access.gpo.gov/nara/cfr/waisidx\\_05/31cfr800\\_05.html](http://www.access.gpo.gov/nara/cfr/waisidx_05/31cfr800_05.html)



*Above left, United Arab Emirates coat of arms. Above right, Sultan Ahmed Bin Sulayem, Executive Chairman, Ports, Customs and Free Zone Corporation Dubai (Dubai Ports World). Sultan Bin Sulayem, a Temple University graduate, has a close relationship with UAE's ruling Maktoum family.*

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## The Threat: Real or Merely Perceived?

Within the context of international terrorism, the Publisher's ability to assess the UAE's propensity to engage in the support of terrorism certainly has its limits. The Publisher likes the next guy, and earnestly tries to engage all people in a polite and friendly manner. He can, however, think.... and he can read. When he reads a fully vetted US government report that speaks of "...*an official aircraft of the United Arab Emirates...*" being parked on a runway next to Usama Bin-Laden's Afghan hunting camp, he's got to think that there's some sort of connection. How close or how true a connection, is, to him, a matter of conjecture. When he reads, in that same report, that there is a very reasonable sense that a UAE official tipped off Usama Bin-Laden about the CIA's knowledge of his precise whereabouts at that hunting camp, and when that camp is shut down and abandoned immediately thereafter, it's only natural to surmise that there very well may be a connection. These few connections are, however, sometimes wholly and sometimes bordering-on circumstantial. There appears to be no smoking gun. There are other issues out there, as well. One such issue, the legal construction of the relevant statute, could take on a life of its own and may very well turn on the interpretation of the term "*could*".

When the merits of the resultant conjecture would allow a business deal of this magnitude to pass or fail, then it is fully appropriate for greater scrutiny to be invested in getting to the right conclusion. The codified process allows for that eventuality. Any resultant thumbs-down decision must be based on objective findings of an unequivocal nature; not merely circumstantial evidence and certainly not "Islamophobia". If the allegations that are being cast around cannot be sustained after that process, then this transaction must be allowed to fully conclude. As it stands, **DPW** will probably accept the political reality of this deal's present circumstance and hold off on the assumption of at least its US role. Finally, to those who would advocate for it, it's a little too late in the game to insist on a fully domestic maritime infrastructure. We, as a nation, had our opportunity to preserve the one we had. That time is now past, for better or for worse.

## The Observable Level of Port Security

Whatever the outcome of the **DPW/P&O** transaction, it is fitting to consider where we are in the way of port security infrastructure and port security follow-through. In the controversy presently being played-out, it's been alleged by some that it is not the marine terminal operator, but rather the **U.S. Coast Guard (CG)** and the **Customs and Border Protection Agency (CBP)** that are responsible for the security of our nation's ports. Consequently, those same people maintain, there is very little we have to fear about the politics and the allegiances of the individual marine terminal operator. That's not a fair, nor an entirely true, statement.

From the beginning of the post-9/11 era, those that are now "spinning" the exaggeration that the **CG** and **CBP** are solely and exclusively responsible for port security, were the very ones who embraced the principle that the security of our ports was rightly a "shared responsibility". Many port-savvy people are probably correct, when surmising that the financing of port security infrastructure was the great

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motivator in the government's insistence that such responsibilities be "shared". Financing of port security infrastructure is a weighty issue, and one worth exploring at least briefly.

U.S. ports, it is well known, have been legitimately viewed as being particularly vulnerable to potential terrorism activities. Ports represent very attractive targets of opportunity for terrorists. Ports are great economic engines that drive domestic prosperity, and eliminating or handicapping such prime movers must be a very alluring proposition for those so inclined. Every time I ponder that fact, I must confess that a chill comes over me that is fully indescribable. How, then, is it the case that government spending on port security is so grievously lacking, and that the government's financial contribution to airport security is so much more forthcoming? Is the answer simply that more voters pass through airports? Or could it be that a 9/11-type of event has not yet occurred at one of our ports? Must we, as a nation, wait until that eventuality actually happens, or can we more convincingly implore our elected representatives to better protect our national interests?

Whatever the reason, it's high time for our government to understand the value-added stature of our ocean gateways and to act in a manner that fully underscores the heretofore understated and unappreciated reliance each of our citizens actually has in making sure our ports stay safe, secure and fully serviceable. To amble along, blind to such facts, invites catastrophe, hardship and tears.

## Finally, Our Obligatory History Lesson

Besides being the incumbent top executive at the helm of the venerable **P&O** name, and apart from being depicted in these pages with their index fingers to their temples, The Earl of Inchcape and Sultan Ahmed Bin Sulayem share other notable commonalities. Both men put into motion and presided over the merger/acquisition of the prestigious P&O name (and assets), albeit ninety years apart. Both men also saw the value of expanding and coordinating the infrastructure it could afford to their organization's clients.

In the case of Inchcape, he presided over the integration and expansion of both the British India Steam Navigation Company's and Peninsular and Oriental Steam Navigation Company's logistics and general agency assets. His efforts accrued to monumental financial gains for the amalgamated firm's stockholders. The Earl of Inchcape was uniquely focused upon his business' core interests. Underscoring that principle, when offered the throne of the Balkan state of Albania in 1921 he turned it down, stating that "...*it's not in my line* [of work]".

In the case of Sultan Ahmed Bin Sulayem, he too has a propensity to devote extraordinary attention to the core interests of the businesses he administers for his country (there are several). Like The Earl of Inchcape, he has spent considerable time and talent assembling complimentary business acquisitions and integrating the activities of those firms in a manner that benefits each of them, respectively. One need only look to the UAE's investment firm, **Istithmar** (part of the **DPW** organization), recent (Jan '06) \$285 Million acquisition of the ship agency named after James Lyle Mackay (**Inchcape Shipping Services**) to appreciate the complimentary scope of services and abilities. **Inchcape Shipping** manages over 50,000 port calls annually, working in 210 ports in over 50 countries. .... Connect those dots.

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