

**AAPA 2007 PORT ADMINISTRATION AND  
LEGAL ISSUES SEMINAR**

**February 12-14, 2007**

**INTERNATIONAL OPERATIONS IN THE UNITED STATES:  
FUROR OVER THE SALE OF P&O PORTS TO DP WORLD**

*John E. Bradley  
Vedder, Price, Kaufman & Kammholz, P.C.  
805 Third Avenue  
New York, NY 10022  
Phone: (212) 407-6941  
Fax: (212) 407-7799  
Email: [jbradley@vedderprice.com](mailto:jbradley@vedderprice.com)*

Thank you very much for that introduction. And thank you very much for your kind invitation to participate in this year's Ports Administration and Legal Issues Seminar. I am very pleased to be here in Miami with all of you.

## I. INTRODUCTION

Super Bowl 41 in Miami has come and gone without major incident or national crisis. This compares favorably to Super Bowl 38 which was played in Houston in 2004. As you may recall, it was during the halftime show of Super Bowl 38 that Janet Jackson had her infamous wardrobe malfunction which exposed a piece of her anatomy to millions of viewers on national television. The national uproar and debate over this incident prompted the great comedian Louis Black to observe that the country had temporarily lost its mind over Janet Jackson.

One year ago our beloved country lost its mind once again – this time on news that an English marine terminal operator was being sold to another marine terminal operator owned by a very wealthy sheik. The reason for the uproar was that the English operator happened to own a U.S. marine terminal operator, which raised the frightening prospect that the sheik – instead of buying U.S. goods and services – would be unloading ships in Miami and other ports throughout the United States. This was not a good thing for America and so many of our political leaders and commentators formed an unusual posse which rode out and killed the deal in its tracks.

I am referring, of course, to the proposed acquisition of P&O Ports by Dubai Ports World in 2006. The temporary national insanity which consumed and eventually killed this deal in the United States was unprecedented and certainly unlike anything that I have seen in my 25 years of practicing law. As the event was happening in real time, I thought that it would have repercussions throughout the United States port industry for many years to come. As we look back on this event today, one year later, its effects would appear to be mixed.

On the one hand, it does appear that the DP World controversy will have lasting meaning for future foreign investment in U.S. port operators. If nothing else, the political defeat of the deal does call into question the relative safety and integrity of the legal system that allowed it to go forward. On the other hand, it seems unlikely that the events of last year will bring about any significant changes in the structure and operation of U.S. ports. Our decentralized system will continue to operate as it has in the past with a door open to responsible and efficient international operators. Perhaps the confluence of events which caused the DP World fiasco to occur was unique to the players involved and the time and setting in which they occurred. Only time will tell.

When I started practicing law in New York in the early 1980s, it seemed that most stevedores and marine terminal operators in the United States were local or regional firms. These companies were often family run operations. The management of these companies often rose through the ranks from the docks to the corporate office and learned business skills along the way. I did not see many Wharton School graduates clamoring to join these businesses at that time and certainly did not see many private equity or infrastructure funds chasing these businesses to invest capital.

It also seemed that most stevedores and marine terminal operators in the United States in the early 1980s were basically American owned and operated. I did not see many stevedores that were owned by foreign firms and, to my knowledge, there were none that were owned or controlled by foreign governments. By contrast, there were many international liner shipping companies and some of them actually operated their own marine terminals.

Then, as now, the economic health stability of the U.S. port industry was very closely tied with the state of global trade, as well as the health and stability of the liner shipping industry. In the 1980s, it seemed that the liner shipping industry was an economic basket case. Prominent companies of the time such as Hellenic Lines, Prudential Lines, U.S. Lines and Waterman Lines seemed to be failing one after another. Many of the government controlled carriers – such as Lloyd Brasileiro, CAVN, Black Sea Shipping, Baltic Shipping and Polish Ocean Lines – closed their doors as well when their government subsidies and trade protections ended. These companies left behind millions and millions of dollars of debt. From my perspective as an attorney representing their interests, the 1980s and early 1990s did not seem to be a particularly prosperous time to be a stevedore or a marine terminal operator in the United States.

As the 1990s progressed, however, the fortunes of stevedores and marine terminal operators in the United States did seem to improve. Throughout the 1990s, we witnessed more and more consolidations throughout the industry which culminated with the 1999 acquisition of International terminal Operating Co. Inc. – known throughout the industry as “ITO” – by The Peninsular & Oriental Steam Navigation Company – known throughout the industry as “P&O.” P&O was at the time an English company with a glorious maritime past whose shares were then traded on the London Stock Exchange. P&O had marine terminal operations throughout the world and its acquisition of ITO brought it into the United States for the very first time.

The name ITO was subsequently changed to P&O Ports North America, Inc. – or “POPNA” for short. In 2000, P&O further expanded its presence in the United States through the acquisition of Gulf Services, Inc., which operated along the U.S. Gulf Coast. In 2002, the U.S. market witnessed the acquisition by NYK of Ceres Terminals – a family-owned firm headed at the time by Chris Kritikos. In 2004, CSX World Terminals was acquired by DP World for a reported \$1.15 billion.<sup>1</sup> The following year, the marine terminal world awoke to a remarkable announcement: The venerable P&O was going to be sold to DP World.

In November 2005, the directors of P&O in London announced that they had received a \$5.7 billion bid from DP World to acquire all of the stock of P&O. At the time of the offer, DP World was the one of the largest marine terminal operators in the world, largely as a result of its acquisition of CSX World Terminals one year earlier.<sup>2</sup> P&O, meanwhile, had grown to become the fourth largest marine terminal operator in the world.<sup>3</sup> The trade press reported that the acquisition would catapult DP World into third place in the rankings of global operators.<sup>4</sup>

DP World is a commercial enterprise that is owned by the Government of Dubai. Since DP World’s acquisition of P&O would include all of P&O’s interests in the United States, and since POPNA conducted stevedore and marine terminal operations in 22 ports throughout the United States, DP World and POPNA voluntarily notified the Committee on Foreign Investment in the United States of the proposed deal on October 17, 2005, and sought national security clearance of the deal under applicable law. The Committee – widely known by its acronym,

CFIUS – is comprised of six executive departments and six executive offices and is chaired by the U.S. Department of the Treasury.<sup>5</sup>

DP World commenced the review process informally beginning in October 2005 through a series of meetings with CFIUS staff members and constituent agencies, including the Department of Homeland Security, Customs and Border Protection, the U.S. Coast Guard and the Departments of Justice and Commerce. DP World provided detailed information on the transaction to CFIUS and CFIUS began its own informal review and analysis of the transaction.<sup>6</sup> Further meetings and review continued through November.

DP World filed a formal notification of the acquisition with CFIUS on December 16, 2005. The formal filing was significant because it triggered a statutory review period in which CFIUS was required to act. CFIUS recognized during its review that, to the extent that national security issues were triggered by the proposed transaction, they involved the issue of U.S. port security.<sup>7</sup> To overcome the concerns of CFIUS, DP World and POPNA were asked to commit to certain security undertakings, which they agreed to do. Among other things, they agreed to continue their participation in all voluntary security programs both in the United States and overseas.<sup>8</sup> They also agreed to an “open book” policy by which all information relating to security policies and procedures would be subject to review by the Department of Homeland Security upon request and without the need for a subpoena or search warrant.<sup>9</sup> These undertakings were memorialized in a letter of assurances dated January 6, 2006 and signed by DP World and POPNA.<sup>10</sup>

On the basis of the letter of assurances and its own comprehensive review of the transaction,<sup>11</sup> CFIUS unanimously approved the deal and issued a formal letter of no objection on January 17, 2006. This notification effectively assured DP World that the President had no objection to the acquisition from a national security standpoint and that the transaction could proceed without further security clearances. It also meant that the transaction had found a “safe harbor” – meaning that it could not later be undone by the President.

In January 2006, the directors of P&O received a competing bid for the shares of the company, this one from PSA International (“PSA”) in the amount of \$6.33 billion.<sup>12</sup> Like DP World, PSA is a government-owned marine terminal operator, with the government of Singapore being its ultimate owner and shareholder. Within 24 hours, DP World upped its offer for P&O to a staggering \$6.8 billion, and PSA subsequently withdrew from all further bidding.<sup>13</sup> The directors of P&O recommended the revised DP World offer to the company’s shareholders and they voted to approve the takeover in February 2006.

Within a matter of days of the shareholder approval, a firestorm of opposition to the transaction erupted on Capitol Hill and in national and local media outlets. Within a matter of weeks, DP World’s plans to acquire P&O’s interests in the United States were crushed. Many who watched this deal develop asked: Where did the opposition come from and why was it so intense? And why did the opposition come so late in the day? After all, the acquisition did receive clearance from CFIUS a month before. And the deal was not put together in the dark of night. To the contrary, from November 2005, when the deal was first announced, until February 2006, when the deal received P&O shareholder approval, it received intense media scrutiny throughout Europe and the United States. The port industry and port directors in the United

States were well aware of the deal and, in at least one instance with which I am aware, a port director hosted a meeting with senior management of DP World.

It has been reported in the trade press that a joint venture partner of POPNA's in South Florida hired a Washington, D.C. lobbyist, to attract political opposition to the sale on Capitol Hill.<sup>14</sup> Although the deal had received security clearance from CFIUS, the lobbyist reportedly attacked the process by which the deal was cleared, and found a sympathetic ear and an outspoken critic of the Bush Administration in Senator Charles Schumer of New York.<sup>15</sup> Senator Schumer quickly joined forces with politicians from both sides of the political aisle, who were sharply divided with the Bush Administration on a number of issues, including immigration reform and the war in Iraq.

The deal was scheduled to close in London in the last week of February or the first week of March. With all conditions to closing being fulfilled, the shareholders of P&O were expecting to complete their deal and to sell their shares to DP World for the agreed price. DP World was expecting to acquire the shares of P&O and all of P&O's operations worldwide. However, in the United States, public awareness of the deal was increasing and political opposition was mounting. Day after day, and night after night, news of the DP World deal was topic number one in U.S. newspapers and radio and cable news talk shows. Much of the coverage appeared to be negative and most of it reflected a growing public consensus that the deal was not in the national interest.

In late February, in an effort to complete the deal amid mounting U.S. opposition, DP World publicly announced that it would not exercise control over or otherwise influence the management of POPNA for a period of time after the deal closed. DP World would hold POPNA separate from all of its other operations worldwide and would allow management and control of POPNA to remain with P&O management in London. DP World memorialized its hold-separate commitment in a written document. The purpose of the commitment was to "permit more time for consultation between DP World and the Bush Administration, Congressional leadership and representatives of various port authorities."

DP World simultaneously requested CFIUS "on a non-precedential basis" to conduct another review, including a full 45-day investigation of the acquisition. The DP World request stated the following:

"Upon prompt agreement by CFIUS to conduct such review, DP World and POPNA will submit a notification to CFIUS, ..., to initiate the requested review. DP World and POPNA will abide by the outcome of the review, but nothing herein shall constitute a waiver of any rights of DP World or POPNA that have arisen from the Original Notification [of no objection from CFIUS]."

This announcement was as puzzling as it was remarkable. DP World effectively agreed to not interfere in the affairs of a company that it was about to acquire while CFIUS undertook a further review and more detailed investigation of the deal. DP World further agreed to abide by the outcome of the review without waiving whatever rights it had obtained by reason of the original notification of no objection. I was not sure what this meant at the time and am not sure

what it means today. However, the hold separate commitment did not quell the mounting opposition to the deal.

Congressional hearings were convened to review the deal and its possible effects on port security. A number of bills and resolutions were quickly introduced in Congress to kill the deal or at least delay its closing. Meanwhile, The Port Authority of New York and New Jersey commenced litigation against an affiliate of POPNA, alleging that the acquisition of the stock of P&O by DP World in London constituted an impermissible change of control under the affiliate's 30 year lease with the Port Authority. Organized labor even got into the act by staging impromptu rallies in Port Newark in opposition to the deal.

The end came on March 8, 2006, when the House Appropriations Committee attached an amendment to an appropriations bill earmarked for Iraq military efforts and Hurricane Katrina recovery efforts. The amendment, which passed by a 62-2 vote, effectively undid prior CFIUS approval in two bold strokes. The amendment withheld the use of any funds "to approve or otherwise allow the acquisition of leases, contracts, rights, or other obligations" of P&O by DP World<sup>16</sup> and, in addition, prohibited DP World from "acquiring any leases, contracts, rights or other obligations in the United States" of P&O.<sup>17</sup> One day later, under apparent pressure from the Bush Administration, DP World reluctantly announced that it would sell POPNA to a "United States entity."<sup>18</sup> DP World agreed not to interfere in the day-to-day operations of POPNA during the sales process, but reserved the right to "participate" in the process – suggesting that it had no intention of suffering any "economic loss" as a result of its decision to sell.

DP World hired Deutsche Bank to sell POPNA to the highest American bidder. Interested parties included private equity funds, infrastructure funds and one or two U.S. marine terminal operators. In December 2006, DP World announced that it would sell POPNA to AIG Global Investment Group, a unit of the American insurance giant, AIG, for an undisclosed price.<sup>19</sup>

The deal is scheduled to be completed upon the fulfillment of customary conditions, including the obtaining of government approvals and third party consents.

The DP World controversy brought our industry into the national spotlight in a way that many of us had never seen before. It also opened a number of national issues regarding the ownership and operation of the many stevedores and marine terminal operators doing business in ports across the United States. I would like to touch upon two of those issues today. The first is whether foreign ownership of U.S. stevedores and marine terminal operatives should be banned or restricted by the U.S. government. The second issue concerns the process by which foreign acquisitions of U.S. companies involved in port operations are reviewed based upon possible national security concerns.

Another issue raised by the DP World deal is a local issue rather than a national one. It involves the means by which local port authorities seek to control their contracts and the identity of the stevedores and marine terminal operators with whom they choose to do business. I will spend a little time on this topic as well.

## II. FOREIGN OWNERSHIP OF U.S. MARINE TERMINAL OPERATORS

One of the first issues that surfaced in the DP World debate involved the foreign ownership of stevedores and marine terminal operators in the United States. It is no surprise to anyone here today that many, if not most, stevedores and marine terminal operators currently working in the United States are owned by foreign firms, some of which are owned or controlled by foreign governments. A recent survey conducted by the U.S. Maritime Administration found “that at the seventeen largest U.S. container ports, 45 terminals (66%) were operated by a foreign based company, 5 terminals (7%) were operated by a joint venture between a domestic and foreign based company, and 18 terminals (26%) were operated by a purely domestic terminal operating company.”<sup>20</sup> The Marad survey also found that several U.S. ports have no U.S. based container terminal operators, including Baltimore, Jacksonville, New Orleans, Houston, Los Angeles and Tacoma.<sup>21</sup> In New York, four of our six container terminals are operated by local companies which are foreign-owned.

The prevalence of foreign ownership of the U.S. marine terminal industry seemed to take many politicians and political commentators by surprise and led to loud protestations over the “outsourcing” of U.S. ports and port security.<sup>22</sup>

As a matter of national security or industrial policy, some U.S. economic sectors are indeed off-limits to foreign investors in whole or in part. For example, in the aviation sector, foreign-owned air carriers cannot operate along U.S. domestic routes.<sup>23</sup> As a general rule, only carriers owned by U.S. citizens may operate such routes. To qualify as a U.S. citizen, a domestic corporation must be under the actual control of U.S. citizens and at least 75% of the voting interest must be owned or controlled by U.S. citizens. In addition, the president and at least two-thirds of the board of directors and other managing officers must be U.S. citizens.<sup>24</sup>

In the maritime sector, all ships required to be registered with the U.S. Coast Guard must be owned by U.S. citizens, although the citizenship requirements vary depending upon the intended use and operation of the vessel, and the form of documentation sought. A vessel for which a registry endorsement is sought, i.e., one which allows the vessel to be employed in the foreign trade, must be owned by a documentation citizen. A corporation meets the requirements of a documentation citizen if:

- (1) It is incorporated under the laws of the United States or a State;
- (2) Its chief executive officer and chairman of the Board of directors are U.S. citizens; and
- (3) No more of its directors are non-citizens than a minority of the number necessary to constitute a quorum.<sup>25</sup>

A vessel operating under a registry endorsement may be wholly owned by non-U.S. citizens so long as these tests are met.

A vessel which operates in the coastwise trades of the United States must possess a coastwise endorsement and must be owned by a coastwise citizen.<sup>26</sup> In the case of a corporation, this typically means that each of the above tests must be met and, in addition, at least 75% of the

stock of the corporation must be owned by U.S. citizens.<sup>27</sup> Where the vessel-owning corporation is owned by one or more upstream entities, each entity must be a coastwise citizen in its own right.<sup>28</sup> Similar “super-citizenship” requirements apply to vessels which operate in the U.S. fisheries<sup>29</sup> and dredging vessels which operate in U.S. navigable waters.<sup>30</sup>

By contrast, there are no citizenship restrictions on the ownership or operation of commercial shipyards and ship repair facilities in the United States.<sup>31</sup> Although the U.S. Maritime Administration must approve the transfer of any interest in a shipyard to a non-citizen, this restriction only applies during times of war or national emergency.<sup>32</sup>

When DP World and P&O first announced their deal in November 2005, there were no federal restrictions on the foreign ownership of marine terminal companies and stevedores operating in the United States. When they closed their deal in March 2006, there were no such restrictions. Nonetheless, when DP World decided to throw in the towel, it announced that it would sell P&O’s holdings in the United States *only* to an American buyer – thereby precluding from the auction process the major international shipping lines and marine terminal operators and all foreign investors. No guidelines were established as to whom or what would qualify as an American buyer and none were imposed.

DP World’s decision to “sell American” was unprecedented and no doubt compelled by the political and commercial pressures of the moment. DP World could not take the chance that a different foreign buyer would be equally unsuitable to Congress and the American public. Nor could it take the chance that foreign ownership would be banned by U.S. lawmakers by the time that a new foreign owner could be found. In fact, a number of bills were hastily introduced in Congress, beginning in late February of last year, which sought to stop the perceived “outsourcing” of U.S. ports and port security operations to foreign firms. These bills reflected an attitude that foreign firms should not be trusted or permitted to own, lease, manage or operate U.S. port facilities, either directly or indirectly through U.S. subsidiaries. Here’s a sampling:

- Representative J.D. Hayworth introduced a bill in the House of Representative on February 28, 2006<sup>33</sup> which would prevent an entity that is owned or controlled by a foreign government from conducting operations at any U.S. seaport in the United States or entering into any agreement to conduct such operations. Although the result was probably unintended, Representative Hayworth’s measure would effectively prevent government controlled carriers, such as American President Lines, COSCO Container Lines and China Shipping Lines – three of the largest liner operators in the world – from conducting operations at U.S. seaports.

- Representative John Doolittle introduced a bill on March 1, 2006<sup>34</sup> which would only allow U.S. persons to control security operations at a U.S. seaport or to enter into agreements to conduct such operations. Under this measure, a legal entity would qualify as a U.S. person only if U.S. citizens owned or controlled at least 51% of the stock or equity interests in such entity. Think about the irony of this one for a moment. If only U.S. persons were permitted to control security operations at U.S. seaports, the hundreds of foreign-owned operators of waterfront facilities currently in the United States would be unable to comply with their obligations under the Maritime Transportation Security Act.



■ Senator Bob Menendez<sup>35</sup> introduced a bill in the Senate on March 1, 2006, which would require the President to prohibit any merger, acquisition or takeover that would result in any entity owned or controlled by a foreign government leasing, operating, managing or owning a U.S. port facility. An identical bill was introduced in the House on the same day by Representative Wasserman Schultz.<sup>36</sup> Such measures would have prevented the Ontario Teachers Pension Fund – which is owned by the Canadian government – from acquiring the U.S. marine terminal assets of OOIL.

■ Senator Frank Lautenberg introduced a bill on March 3, 2006,<sup>37</sup> which would create a federal cause of action allowing any port authority to file a lawsuit to nullify any contractual obligation with any terminal operator within the port “if a merger, acquisition or takeover transaction would result in a change in the ownership of the terminal operator, and the new owner would be a foreign controlled entity” – that is, any entity in which a foreign entity owns a majority interest, or otherwise controls or manages the entity. Such relief could be granted upon the showing of a “demonstrated increase in the security risk to the port or the port community as a result in such change in ownership.”

■ Representative Duncan Hunter introduced a bill on March 7, 2006,<sup>38</sup> which would require the Secretary of Defense, in consultation with the Secretary of Homeland Security, to establish a “National Defense Critical Infrastructure List.” Under the proposed bill, only citizens of the United States under Section 2 of the Shipping Act, 1916, would be allowed to own, manage or operate critical infrastructure.

■ Representative Mike Turner introduced a bill on March 14, 2006<sup>39</sup> which would allow a foreign person to manage, operate or hold a property interest in a U.S. port facility only to the extent that a U.S. person can manage, control or hold a property interest in a port facility in the foreign country.

None of these bills has been enacted into law and, to my knowledge, none has made it out of the committee or committees to which it was referred. Nonetheless, as each of them demonstrates, the DP World controversy clearly raised Congressional concerns over “the degree to which ownership [of marine terminal facilities] is relevant to [port] security.”<sup>40</sup> In a report to Congress in April 2006, the Congressional Research Service addressed the question, as follows:

“If one believes that stevedore ownership is relevant to security, then a subsequent question is whether foreign ownership poses more of a security risk than domestic ownership. In evaluating whether foreign terminal operators should be excluded from U.S. ports, more information as to how many U.S. marine facilities are actually operated would be useful. ...[M]ost container terminals in the United States are operated by foreign companies but container terminals account for only one type of marine facility. It is probably that in some cases, other types of marine terminals are not only operated but also owned by foreign interests....

“It is important to pinpoint exactly what advantage a terrorist group would have if it had some kind of connection with a terminal

operator. Foreign terminal operators would gain intimate knowledge of the day-to-day security procedures at the U.S. terminals they operate and could theoretically pass this knowledge on to a terrorist group. However, U.S.-based terminal operators would have the same knowledge and a terrorist group could infiltrate them also. Because foreign terminal operators hire mostly Americans to work in their terminals, they may pose no more security risk than a U.S.-based company. One could view foreign companies like DP World as mostly the financiers behind the terminal operation with little or no involvement in the day-to-day running of the terminals.”<sup>41</sup>

The CRS report stressed the importance of “[d]efining the potential threat posed by foreign terminal operators.”<sup>42</sup> Unfortunately, none of the bills introduced in the heat of the controversy defined the threat or made any thoughtful attempt to enhance security at U.S. ports through restrictions on foreign investment. Even if you could magically transform every stevedore and marine terminal operator into a coastwise citizen, that fact would not solve our security issues. They would still have to get up every morning, go to work, and handle millions of unmarked, look-alike containers arriving from every corner of the globe. Enhanced citizenship requirements are not the answer. The unfortunate truth is that the terrorist attacks on 9/11, and the terrorist attacks against Pan Am Flight 103, the U.S.S. Cole and the Alfred Murrah Building in Oklahoma City, all occurred despite the fact that the airlines, airplanes, airports, buildings and ship involved were under U.S. ownership and control.

We should not forget that foreign terminal operators are a fixture in U.S. ports because many U.S. operators simply moved out. By filling the void, foreign operators have reshaped the U.S. port industry and have contributed billions of dollars to the U.S. economy.<sup>43</sup> As everyone who is here today knows, and as the Congressional Research Service recognized, any outright ban on their continued participation in the market would have inevitable “drawbacks” for the industry and the economy.<sup>44</sup>

Foreign terminal operators are critical to the U.S. port industry because they provide a much needed source of capital for infrastructure improvements. In addition, they have historically provided good jobs, high operating standards and a global perspective at the local level. Foreign terminal operators have created efficient and competitive local organizations that have enhanced intra-port and inter-port competition throughout the United States. One need look no farther than the U.S. coastwise trades to see what can happen to competition when market entry is restricted. Lastly, a very good argument can be made that global operators – most of which are foreign-owned – actually enhance security at the local port level by linking security personnel and programs, as well as risk management systems, through worldwide networks.

One year after DP World reluctantly agreed to sell POPNA to an American buyer, there are no federal restrictions against foreign ownership of U.S. stevedores and marine terminal operators. We do not need to tamper with a system that is not broken.

### III. FOREIGN DIRECT INVESTMENT IN THE UNITED STATES – EXON-FLORIO

The single largest issue in the DP World saga involved the role of CFIUS in reviewing foreign acquisitions of U.S. firms where potential national security concerns are involved. In order to put this issue in context, we need to travel back in time about 30 years.

CFIUS was formed by Executive Order of the President in 1975 for the primary purpose of “monitoring the impact of foreign investment in the United States.”<sup>45</sup> Ironically, it was public “alarm over petrodollar investments [in the United States] from oil-producing nations” that led to the creation of CFIUS.<sup>46</sup> If you do not recall just how alarmed our nation was over petrodollar investments in the mid 1970s, rent Paddy Chayefsky’s classic 1976 movie, *Network*, starring Peter Finch. Mr. Finch played the role of Howard Beale, a deranged network anchor whose nightly tirades brought success and ratings to his failing network. “*I’m mad as hell and I’m not going to take it anymore*,” Beale would shout to his viewers. Beale’s personal undoing came at the height of his popularity when he exposed on the air a planned takeover of the network by Saudi Arabian interests. His tirade against the deal expressed the fears and resentments of many Americans toward petrodollar investments at the time. He pleaded with his viewers to flood the White House with telegrams opposing the takeover. They did and the fictional deal was stopped dead.

By the late 1980s, public concern about growing levels of foreign investment in the United States began to mount once again.<sup>47</sup> Many of us in New York still recall the startling announcement that the Mitsubishi group acquired a majority interest in Rockefeller Center. In 1988, in response to these concerns, Congress enacted the Omnibus Trade and Competitiveness Act, which included the so-called “Exon-Florio” amendment to the Defense Production Act of 1950.

Prior to the enactment of Exon-Florio, CFIUS “had no authority to [investigate or] take action with respect to specific foreign investments.”<sup>48</sup> It could only monitor the impact of foreign investments. And the President had no ability to prevent a foreign investment from occurring in the absence of a declared national emergency or actual violations of federal antitrust, environmental or securities laws.<sup>49</sup> Exon-Florio gave the President new and expanded tools to investigate and block foreign investments in the name of national security. These tools were meant to “strengthen the President’s hand in conducting foreign investment policy.”<sup>50</sup> While increasing the role of the Executive branch, Congress limited its own role to one of general oversight. By keeping itself away from the day-to-day review and investigation of specific deals, Congress emphasized that “the commercial nature of investment transactions should be free from political considerations.”<sup>51</sup>

The Exon-Florio amendment strengthened the President’s hand in several ways. First, it authorized the President of the United States to conduct investigations to determine the effects on national security of mergers, acquisitions and takeovers by foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.<sup>52</sup> Second, Exon-Florio authorized the President to take action to suspend, prohibit or rescind any foreign investment transaction so that foreign control “will not threaten to impair the national security.”<sup>53</sup> Under Exon-Florio, the President is permitted to take such action where he finds that (1) there is “credible evidence” that a foreign interest exercising control might take action that threatens to

impair the national security, and (2) the threat to national security cannot be effectively addressed through other laws.<sup>54</sup>

There are several things to bear in mind with respect to Presidential authority under Exon-Florio. First, his findings on national security are not subject to judicial review. Second, if an acquisition which threatens the national security is **not** voluntarily submitted for review, the President may take action to undo the transaction at any time – meaning that there is no statute of limitations.<sup>55</sup> On the other hand, if a transaction is voluntarily submitted for review under Exon-Florio, and it is approved (as was the case with DP World), the transaction “benefits from a regulatory ‘safe harbor’ ... [which immunizes] it against subsequent reviews or action by the President.”<sup>56</sup> Finally, shortly after the enactment of Exon-Florio, the President delegated his authority to receive notices of transactions, and to review and investigate their effects on national security to CFIUS,<sup>57</sup> while retaining his authority to suspend, prohibit or rescind a transaction.<sup>58</sup>

Exon-Florio reviews are subject to formal timetables and procedures with a number of informal practices built into the system. Once a formal notice is received, CFIUS has 30 days to review the transaction to determine its effect on national security. If all members of CFIUS determine that there is no effect on national security within 30 days, the review will be terminated. If any member of CFIUS has national security concerns that cannot be satisfactorily resolved within 30 days, then CFIUS must undertake a broader investigation of the transaction. This “second-stage” investigation must be completed within 45 days of the date that it begins. At the end of the investigation, CFIUS must make a recommendation to the President, who then has 15 days to make a decision, and inform Congress of his determination. If all steps are followed, the formal process must be completed within 90 days.

As a matter of practice, if an acquiring company believes that its deal may have national security implications, it may (and often does) notify CFIUS of the transaction informally long before it files a formal notice. This practice allows the company and its advisors to determine whether any CFIUS member has national security concerns, and what can be done to overcome those concerns.<sup>59</sup> DP World followed this time-honored practice when it contacted CFIUS about its deal in October 2005. In many cases where national security issues are identified, they can be addressed and successfully overcome through a negotiated security agreement between CFIUS and the parties to the transaction. This is what the letter of assurances given by DP World and POPNA to CFIUS was all about.

One of the many criticisms leveled at CFIUS in its handling of the DP World filing is that its formal review only took 30 days. While it is true that the formal review process only took 30 days, remember that CFIUS had started a review of the transaction beginning in late October 2005. If you include the pre-filing review period, the entire process took just about 90 days. Nonetheless, Congress charged CFIUS with disregard of the law when it chose not to undertake a formal 45-day investigation of the transaction. When you read the statute, the criticism is not entirely without merit.

Exon-Florio was amended in 1992 to deal specifically with acquisitions by an *entity controlled by or acting on behalf of a foreign government*. The amendment provided that, where such an acquisition could result in control<sup>60</sup> of a U.S. entity, and such control *could affect the*

*national security of the United States*, a 45-day investigation is mandatory, not discretionary.<sup>61</sup> Senator Paul Sarbanes made the following observation:

“How could one reasonably question the fact that the Government of Dubai’s control of the corporation ... [that operates] major terminals in some of the largest ports in the United States ‘could affect national security’? Port security is a major component of our defenses against terrorism. Our ports are critical to the national economy and to our conduct of international trade. And our ports employ tens of thousands of our citizens. Still, despite ownership of DPW by the Government of Dubai, no 45-day investigation occurred.”<sup>62</sup>

You can certainly understand why certain members of Congress were upset that CFIUS did not conduct a mandatory 45-day investigation. If it did conduct such an investigation, then CFIUS would have had to make a recommendation to the President who would have had to make a decision, yes or no, and simultaneously inform Congress of his decision. As it turned out, Congress did not learn of the transaction from the President, but from Washington lobbyists and cable talk show hosts. In fact, it was later learned that the President knew nothing about the deal as it was moving through CFIUS.

CFIUS obviously viewed the statute differently. Under its interpretation, Exon-Florio did not mandate a 45-day investigation just because DP World was controlled by a foreign government. CFIUS clearly read the statute to mean that a 45-day investigation is mandated only when: (1) the acquirer is controlled by a foreign government, which was obviously true in the DP World case; (2) the takeover would result in the control of the acquired company, which was also true; (3) the acquired company was engaged in interstate commerce in the United States, which was true; and (4) the control of the acquired company “could affect the national security of the United States.” On this last point, CFIUS obviously felt that the DP World deal would not affect national security because of the letter of assurances delivered by DP World and POPNA mitigated national security concerns.

It seems evident in retrospect that Congress and the Bush Administration were on a collision course concerning the process by which the national security implications of foreign investments should be reviewed and handled.<sup>63</sup> It just so happened that DP World and P&O were crossing the street when the collision occurred.

Another contentious political issue which ran down the DP World deal was the meaning of the term “national security” for purposes of Exon-Florio review.<sup>64</sup> Exon-Florio does not define the term. However, the preamble to the Exon-Florio regulations states that the term “national security” should be interpreted “broadly and without limitation to particular industries.”<sup>65</sup> The preamble also states that “judgment as to whether a transaction threatens the national security rests within the President’s discretion.”<sup>66</sup> The preamble advises that “transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security.”<sup>67</sup> Although the Exon-Florio amendment does not provide a working definition of “national

security,” it does list five factors which the President *may* consider when taking into account the requirements of national security. These factors are as follows:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
- (4) the potential effects of the proposed transaction or pending transaction on sales of military goods, equipment or technology to a country that supports terrorism or proliferates missile technology or chemical or biological weapons; and
- (5) the potential effects of the proposed or pending transaction on U.S. international technological leadership in areas affecting U.S. national security.<sup>68</sup>

Just months before the DP World deal was announced, Congress demonstrated that it could stop foreign takeovers having perceived national security implications. In June 2005, China National Offshore Oil Corp. (“China National”) made a \$18.5 billion bid to acquire Unocal Corporation (“Unocal”). China National was a state-owned Chinese petroleum company while Unocal was a California-based oil and gas company. The China National offer topped a prior offer made for Unocal by Chevron by \$2 billion.<sup>69</sup>

The bid by China National reportedly triggered Congressional concerns “regarding national security issues arising from the possibility of a foreign company taking control of a U.S. [energy] company in the already tight energy market.”<sup>70</sup> A House Resolution was introduced which called on the President “to conduct a thorough review of the proposed transaction.”<sup>71</sup> As a sign of things to come for DP World eight months later, the House effectively killed the deal by passing “an amendment to an appropriations bill, which prohibited the use of Treasury funds for the purpose of gaining approval for the proposed transaction.”<sup>72</sup>

To meet the political opposition, China National volunteered to undergo review by CFIUS and, in a letter sent to Congress, made assurances regarding job retention and the availability of oil and gas produced by Unocal in the United States. The chief executive of China National even pledged to divest Unocal’s U.S. assets should a sale be approved and completed. These moves did not quell Congressional opponents of the deal, who apparently began to question the wisdom of the deal from the standpoint of national economic security.<sup>73</sup> As opposition to the deal mounted, China National was unable to predict the outcome of a formal review by CFIUS, and withdrew its bid for Unocal before formal notice was ever filed with CFIUS. With China National out of the picture, Chevron wound up buying Unocal.

In September 2005, less than one month before DP World met with CFIUS for the first time, the U.S. Government Accountability Office (“GAO”) issued a comprehensive report on Exon-Florio.<sup>74</sup> Among other things, GAO sharply criticized what it perceived to be a narrow interpretation of “national security” taken by certain members of CFIUS. The report noted a split of opinion within CFIUS regarding the meaning of national security, with the Departments of Justice, Defense and Homeland Security favoring a broader interpretation which recognizes that “vulnerabilities can result from foreign control of critical infrastructure.”<sup>75</sup> GAO made the observations regarding the importance of critical infrastructure which would resurface during the DP World debate five months later. GAO stated:

“In the aftermath of the September 11, 2001, terror attacks on the United States and the subsequent war on terrorism, the nature of threats facing this country has changed. In addition to traditional threats to national security, vulnerabilities in areas such as the nation’s critical infrastructure have emerged as potential threats. Exon-Florio provides the latitude for ... [CFIUS] to address these threats. But the effectiveness of Exon-Florio as a safety net depends on the manner in which the broad scope of its authority is implemented. The narrow, more traditional interpretation of what constitutes a threat to national security fails to fully consider the factors currently embodied in the law.”<sup>76</sup>

In its September 2005 report, GAO also observed that CFIUS had been historically “reluctant” to initiate 45-day investigations “to avoid both the negative connotations of an investigation and the need for a presidential decision.”<sup>77</sup> This observation seems to be supported by the Treasury Department’s own statistics which indicate that CFIUS initiated very few investigations from 1997 to 2004. During this period, CFIUS received 470 notices and initiated only eight investigations.<sup>78</sup> From 1988 to 2005, CFIUS reportedly received over 1,500 notices and initiated only 25 investigations. Of the 25 investigations, 13 notices were withdrawn by the filing parties and 12 cases were sent to the President for determination – with only one transaction blocked by the President.<sup>79</sup> Critics have charged CFIUS as being nothing more than a “rubber stamp” for foreign acquisitions.<sup>80</sup>

Although some Exon-Florio experts have questioned the fairness of these criticisms, even they acknowledge that the review process had a number of serious flaws prior to the DP World review.<sup>81</sup> According to a report by the Council on Foreign Relations, CFIUS’s “failure to respond to congressional inquiries about the nature of the review process fostered an atmosphere of distrust and uncertainty in Congress concerning the adequacy of the process.”<sup>82</sup> Its apparent reluctance “to brief Congress on particular transactions [in order] to preserve the confidentiality of the process”<sup>83</sup> created serious transparency issues since no one in Congress could see into CFIUS deliberations. The White House’s “hands-off” approach toward security reviews contributed to the perception in Congress “that the CFIUS process failed to seriously consider real security concerns raised by specific transactions.”<sup>84</sup> As stated by the Council of Foreign Relations in its report:

“The White House’s arms length approach to CFIUS has had the positive effect of contributing to an apolitical review process, one

that has usually enabled complex issues to be assessed technically. At the same time, its approach has created a situation in which the president appears to be out of the loop on what are increasingly regarded as important national security questions. This issue came to the fore in the DPW case, when the administration publicly acknowledged that the president, vice president, secretary of treasury, secretary of homeland security, and secretary of defense were not briefed on the regulatory review process. It is not surprising that such decisions are made at the subcabinet-level since subcabinet-level officials handle consequential issues daily. However, in the DPW case, the lack of White House ownership of the issue, combined with the lack of support or understanding of CFIUS within Congress, enabled opponents of the DPW transaction to question not only the merits of CFIUS's decision to approve the acquisition, but more importantly, to cast doubt on the integrity of the CFIUS process itself."<sup>85</sup>

In the wake of DP World, a number of bills were introduced in the 109th Congress to reform Exon-Florio and the CFIUS review process. One bill passed the House of Representatives<sup>86</sup> and one bill passed the Senate,<sup>87</sup> both on the same date, but no agreement was ever reached on a final bill and no conference committee was convened. Among other things, the Senate bill would have required CFIUS to investigate any transaction where the acquirer is a foreign government or a person acting on behalf of a foreign government, or any transaction that could result in control of "critical infrastructure" if CFIUS determined that there would be "any possible impairment to national security."<sup>88</sup> In addition, the Senate bill would have expanded the President's list of national security to include a transaction's "potential effects on critical infrastructure."<sup>89</sup>

The 110th Congress has begun with the introduction of an Exon-Florio reform bill<sup>90</sup> by Representative Carolyn Maloney, which is identical to the measure that passed the full House last term. The bill has been referred to the House Financial Services Committee, which held hearings last week.

In the meantime, it would appear that the DP World controversy taught us several important lessons about the Exon-Florio process. First, it clearly illustrated that CFIUS review and approval of an inbound deal does not create a complete safe harbor for the deal. Although the President cannot undo a transaction approved by CFIUS, it appears that Congress can do so, or believes it can do so by turning off the flow of funds to CFIUS. Furthermore, when Exon-Florio was first enacted in 1988, the intention was to limit the role of Congress and the influence of local politics in foreign investment reviews. However, DP World did show us that the CFIUS process does have a political back door. A disgruntled constituent with a dedicated lobbyist can presumably walk through that door at any time of the day or night. These lessons must be very hard to understand for foreign investors who actually believe in the relative integrity and safety of the U.S. legal system.

Second, it showed that process and transparency of process are of paramount importance. If CFIUS had conducted a formal 45-day investigation of the DP World deal from the outset,



would that have affected the outcome? Perhaps not. Perhaps DP World was just in the wrong place at the wrong time, and even the observance of unassailable process by CFIUS would not have saved the deal from the powerful political forces that aligned to kill it. But process and transparency of process certainly would have stripped the deal's opponents of their principal objection – that CFIUS failed and refused to follow Exon-Florio to the letter of the law.

A number of changes involving the CFIUS review process have been observed since the DP World controversy last year. First, as reported by the National Foundation on American Policy (“NFAP”), the number of formal filings in 2006 (113) increased by 73% over 2005, with the number of second-stage investigations conducted by CFIUS (7) increasing by 250%.<sup>91</sup> Of the seven second-stage investigations conducted by CFIUS in 2006, five filings were withdrawn, and two wound up on the President’s desk for decision.<sup>92</sup> According to NFAP:

“The data demonstrate two unassailable facts: (i) companies and their counsel are filing cases that would not have been filed the previous year; and (ii) transactions are being scrutinized like never before. All of this is evidence of CFIUS’s caution and extraordinary scrutiny in reviewing transactions post-Dubai Ports World.”<sup>93</sup>

It is further reported that CFIUS entered into more security agreements in 2006 (15) than in the prior three years combined (13).<sup>94</sup> These agreements reportedly imposed “tougher conditions” than had been seen in the past, including, in at least one case, the imposition of a so-called “evergreen” condition that would “allow CFIUS to reopen and potentially order divestment for non-compliance with an agreement.”<sup>95</sup> Other reported changes include higher level reviews within CFIUS agencies as well as the level and frequency of reporting by CFIUS to Congress.<sup>96</sup>

What guidance does DP World provide for future foreign investments in U.S. marine terminal operators and stevedores? From the standpoint of someone who lives and works outside of CFIUS, there is no precise answer. Unlike our court system, which operates in public and publishes opinions upon which legal precedent is clearly established, CFIUS operates in private. Materials filed with CFIUS are protected from public disclosure<sup>97</sup> and, as matters currently stand, CFIUS does not publish its decisions and is not required to report its activities to Congress, except on a quadrennial basis.<sup>98</sup> There is no clear body of established precedent which guides foreign investors and their advisors. To the extent that precedent exists, it seems to be based informally upon events as they anecdotally occurred, rather than reasoned decision-making. Here, then, is what I see based upon all that happened last year:

- Although all U.S. ports and all marine terminals within ports do not necessarily qualify as “critical infrastructure” under the USA PATRIOT Act,<sup>99</sup> all ports are on the national security radar screen as critical infrastructure for purposes of Exon-Florio. Finer distinctions regarding the relative importance of individual ports and terminals will be left for another day.

- Any foreign acquirer from a country in the Middle East – or from any non-OECD country which is burdened with Islamic extremism – will face intense national security scrutiny

from CFIUS in a transaction which involves the acquisition of operating rights in terminals and marine facilities in U.S. ports.

- Any foreign acquirer that is owned by a foreign government – other than one associated with an OECD country – will face intense national security scrutiny from CFIUS in a transaction which involves the acquisition of operating rights in terminals and marine facilities in U.S. ports.

- Proponents of future marine terminal deals will remember that CFIUS has a political back door and will attempt to close that door as tightly as possible by enlisting key political support and the support of organized labor as part of the approval process.

#### IV. LOCAL CONTROLS ON STEVEDORES AND MARINE TERMINAL OPERATORS

In addition to the Exon-Florio issues that were played out on a national stage, a number of important issues triggered by the DP World deal played out in local venues across the country.

When DP World acquired the stock of P&O, POPNA was a *fifth* tier subsidiary of P&O, meaning that POPNA was owned by a company, which was owned by another company, which was owned by another company, which was owned by yet another company, which was owned by P&O. P&O was separated from its parent by four distinct operating companies – two in the United States and two in England. In the United States, POPNA owned the stock and held interests in various other companies and joint ventures in 22 ports from Maine to Texas.

POPNA and its operating companies were licensed as stevedores and parties to literally hundreds of agreements and contracts – both big and small. These included a number of concession agreements, terminal leases, operating agreements, management agreements and licenses with various port authorities. When the political firestorm swept across the country last February, I am willing to bet that most port directors were asked the following two questions by their commissioners and local political delegations: (1) Does P&O operate in our port? (2) Can we throw P&O out of our port if necessary?

These questions forced port directors and their attorneys to dig through their licenses, permits, leases, operating agreements and other contracts with POPNA to determine their options and possible points of leverage. As indicated earlier, The Port Authority of New York and New Jersey actually commenced a lawsuit last February to terminate a 30-year lease that it had with a POPNA affiliate. As an interesting aside, it was reported last week that three Indian port operators “are [now] taking legal advice on whether the acquisition of P&O Ports-operated terminals by DP World constitutes a change of management without prior port trust consent.”<sup>100</sup>

On a local level, the DP World controversy spotlighted the means and methods by which port authorities control their markets and the persons with whom they do business in the port.

The first method by which control is exercised is through control of market entry – typically through licensing. For example, in New York, no company can enter the market as a stevedore unless it is first licensed by the Waterfront Commission of New York Harbor.<sup>101</sup> The licensing process involves a formal application followed by interviews, fingerprinting and background checks. In Miami, no company can work as a stevedore unless it first obtains a

stevedore permit from the Seaport Director.<sup>102</sup> Application and background investigation requirements also apply in Miami. Stevedore licenses obtained in New York and stevedore permits obtained in Miami are not freely transferable in either jurisdiction.<sup>103</sup> On the other hand, a change in the ownership and control of a corporate licensee (in the case of New York stevedores) or a corporate permittee (in the case of Miami stevedores) is not disallowed, but notice of the change must be promptly given.<sup>104</sup> A change of control in these locales does not automatically trigger the cancellation, suspension or reconsideration of the short-term license or permit. I suspect that this is generally true throughout the United States.

The second method by which port authorities – particularly landlord port authorities – control their markets is through the contract selection process. In the absence of public bid requirements, and other contracting restrictions imposed by contract or charter, port authorities often have broad discretion to select which private operators will lease or operate their facilities.

The third method by which port authorities control their markets is through the imposition of contract controls. These controls are usually in the form of anti-assignment and change of control clauses contained in the leases and contracts which they award. These clauses have different purposes, and not every contract will have both. Generally speaking, an anti-assignment clause looks to control a person's ability to assign or transfer the contract, or his rights or obligations under the contract. A change of control clause ordinarily seeks to control the identity of persons who own or control a party to the contract, to the extent that such persons are vital to the award or performance of the contract.

In the case of assignments, it is important for counsel to remember a few things. First, in most jurisdictions, leases and contracts are freely assignable unless the substitution of the assignee for the assignor materially changes the duties, risks, burdens or performance expectations of the non-assigning party, or unless the assignment is contrary to law or public policy.<sup>105</sup> Most attorneys do not rely on these rules of law to prevent an assignment from occurring. This is because the rules cover a narrow band of circumstances and are often unpredictable in their application. Therefore, most contract parties who are concerned about assignment will typically include an anti-assignment clause in their contract.

Second, most jurisdictions will enforce a freely-negotiated anti-assignment provision,<sup>106</sup> although the scope of the provision will be shaped by the words chosen by the parties. For example, a simple anti-assignment clause may not necessarily prohibit assignments by operation of law<sup>107</sup> or assignments resulting from the statutory merger or consolidation of two companies.<sup>108</sup> Similarly, a simple anti-assignment provision may not necessarily preclude the sale and transfer of the stock of the company bound by the provision, or the stock of its upstream corporate owners.<sup>109</sup> In addition, since many contracts permit an assignment only with the consent of the other party, it is important to understand whether such consent is absolute or subject to explicit or implicit standards which govern the party's consent rights, and thereby limit the party's discretion to refuse consent.<sup>110</sup>

In the case of change of control clauses, there are usually three issues which should be carefully considered by counsel. First, and perhaps most importantly, counsel must decide whether change of control restrictions actually belong in the contract given the nature and length of the contract, and the relative risks and expectations of the parties. In my view, most operating

agreements and marine terminal leases involve the performance of commoditized services, such that the ultimate economic interest in the operator or lessee should be of no overriding concern to the port authority, unless a parental guaranty is involved. This is particularly true where the contract has a relatively short term or may be terminated on short notice. Where long term contracts are involved, and the ownership and control of a particular party is of critical importance to the award or performance of the contract, the need for control restrictions may be more apparent.

Second, counsel must decide what outcomes will flow from a change of control, once the change has occurred. For example, in executive compensation agreements, a change of control may entitle the executive to a buyout of his contract. In joint venture agreements, such as partnership agreements and the like, a change of control which burdens a partner may result in the forced sale of that partner's interest in the joint venture. In real estate leases, a change of control affecting the ownership of the property may give a substantial tenant the option to acquire the property. In many other commercial contexts, a change of control clause may give the unburdened party one or more of the following rights and options:

- (1) the option to cancel the contract without penalty;
- (2) the right to receive additional or different security or performance guarantees;
- (3) the right to terminate the contract based upon an event of default; and/or
- (4) the right to sue for damages based upon a breach of contract.

The key to the second drafting issue is reaching agreement on which set of outcomes is appropriate in the circumstances.

Third, counsel must define *control* and *change of control* such that the parties will clearly understand what event or series of events will trigger the application of the clause. In the context of U.S. securities laws, the term has an expansive meaning, as the following excerpt from the legislative history illustrates:

“[W]hen reference is made to ‘control,’ the term is intended to include actual control as well as what has been called legally enforceable control .... It was thought undesirable to attempt to define the term. It would be difficult if not impossible to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, lease, contract, and agency. It is well known that actual control sometimes may be exerted through ownership of much less than a majority of the stock of a corporation either by the ownership of such stock alone or through such ownership in combination with other factors.”<sup>111</sup>

The Securities and Exchange Commission (“SEC”) has since defined “*control*” in SEC Rule 405 to mean the following:

“The term control (including the terms *controlling*, *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.”<sup>112</sup>

The business corporation laws of many states have similar definitions of *control*.<sup>113</sup>

In deciding how best to address control issues, counsel must understand the ownership and control structure of its contract party. Among other things, counsel should consider the type of business entity involved, whether the entity is closely or publicly held and, in today’s marketplace, whether legally enforceable control is held by a financial or strategic owner. Counsel must consider the potential impact of various percentage changes in direct and beneficial ownership, and whether changes in legally enforceable control should be considered as a trigger event. All of these issues should be considered upfront to avoid misunderstandings later on.

Although it enjoys considerable latitude, a port authority does not have an unlimited ability to control its market. For example, a port authority cannot deny market entry to or refuse to do business with a local stevedore or marine terminal operator that is foreign-owned merely because it is foreign-owned. There are several reasons for this. First and foremost, the Equal Protection clause of the U.S. Constitution<sup>114</sup> protects corporations as well as individuals.<sup>115</sup> Second, “the United States has treaties with most major investing nations that have been interpreted by the Supreme Court to afford United States corporations formed by foreign nationals all the rights and obligations of United States corporations formed by United States citizens.”<sup>116</sup> Third, under the Shipping Act of 1984, a port authority in its role as marine terminal operator may not “unreasonably refuse to deal or negotiate with any person.”<sup>117</sup> Nor may it “impose any undue or unreasonable prejudice or disadvantage with respect to any person.”<sup>118</sup> Lastly, a port authority should not attempt to control its market by regulating areas already occupied by the U.S. government. I realize that many port authorities thought that the Bush Administration dropped the ball in its handling of DP World. Many might even feel that the U.S. government cannot be relied upon to protect local ports from national security risks attendant to foreign investment in U.S. port operators. However, federal preemption issues abound in this area,<sup>119</sup> and those issues should be carefully considered before any port authority endeavors to become a “mini-CFIUS.”

## V. CONCLUSIONS

As we wave goodbye to the DP World controversy, we might ask ourselves the following: What practical lessons did DP World provide for our beloved industry? There are no doubt many lessons, but I will leave you with two. The first practical lesson is a warning to all of us not to leave the highway at the wrong exit!

In the late 1980s Tom Wolfe published a brilliant novel entitled *The Bonfire of the Vanities*. The story was set in New York City and focused on a character by the name of Sherman McCoy – a wealthy financier who lived on Park Avenue in Manhattan and was a self-described “Master of the Universe.” One night, while returning from the airport with his

mistress in his Mercedes Benz, he mistakenly took the wrong exit off the highway, wound up in the South Bronx, and entered a world that was completely foreign to him – a world shaped by tabloid journalists and political hacks. In the world that he entered, Sherman McCoy's wealth, social position and pedigree meant nothing.

In many respects, DP World and P&O – masters of the universe in their own right – drove off the wrong exit in February of last year. After months of deal-making and negotiation, they were driving down the highway, heading for the consummation of their \$6.8 billion transaction. With just a few miles left to go, they drove down an exit ramp that was dimly lit. At the bottom of the ramp, they entered a world of cutthroat partisan politics and cable news talk shows. Like Sherman McCoy in *The Bonfire of the Vanities*, they entered a world that seemingly knew very little about their world and showed little interest in learning – a world where the facts would not get in the way of a good story or political fight.

Although everyone knows that stevedores and individual marine terminals do not run U.S. ports, the politicians and cable talk show hosts were appalled that DP World would be running U.S. ports. Although foreign operators have been in the U.S. for years, our political leaders seemed shocked that the free market could allow any marine terminal operator in the United States to be owned by a foreign firm or by a foreign firm controlled by a foreign government. They expressed concerns about DP World's corporate nationality, but conveniently ignored the fact that three members of DP World's senior management, including its chief operating officer, were Americans,<sup>120</sup> and that its general counsel was a New York lawyer. In blasting DP World as being anti-Israel, they ignored a letter in support of the company written by an official of Zim Lines, which praised the security of terminals operated by DP World. In questioning DP World's ability to secure U.S. ports, they disregarded the fact that DP World facilities in Dubai had hosted the U.S. Navy "on a continual basis for nearly 2 decades"<sup>121</sup> and the fact that DP World had voluntarily participated in U.S. Government sponsored security initiatives for years.<sup>122</sup>

The rough and unfair treatment received by DP World from politicians and political commentators, whose real beef was with the Bush Administration, was difficult to watch.

If anyone needed proof that DP World had driven down the wrong exit, the hearing conducted by the Senate Committee on Commerce, Science and Transportation on February 28, 2006, provided it in spades. During the hearing, the following exchanged occurred between the then-Chief Operating Officer of DP World, Ted Bilkey, and Senator Barbara Boxer:

Q. [Senator Boxer]: Who owns you? Who owns DP World?

A. [Mr. Bilkey]: The Government of Dubai.

Q. And what about them? Is it their policy to respect the boycott, the Israeli boycott?

A. I do not have influence on the Government of Dubai.

Q. I didn't ask you if you have influence. I wish you did. But I asked you if they respect the boycott, yes or no.

A. I would imagine they would.

Q. Do they support and respect the boycott? Say it again?

A. I imagine they would.<sup>123</sup>

Senator Boxer then demanded the following:

Q. ... Now, I looked through all of your company's chief, top positions. I don't see any women in there. Who is the – do you have any women in top positions here in your company?<sup>124</sup>

The questioning of Ted Bilkey by Senator Boxer vividly illustrated that DP World had driven right into the wrong neighborhood. And perhaps the most practical lesson of the DP World controversy is the lesson of *The Bonfire of the Vanities*. Always try to stay on highway. And if you happen to drive off at the wrong exit, find your way back to the highway as quickly as possible!

The second lesson of DP World comes straight from Oscar Wilde, who is quoted as saying that “life imitates art more than art imitates life.” Or perhaps the second lesson really comes from Woody Allen, who said that “life doesn't imitate art, it imitates bad television!” Regardless of point of view, all of us in the ports business should always keep our professional lives in perspective. We should maintain our collective sense of humor, even when the rest of the country is losing its collective mind. And that brings me back to the mid-1970s, when public concerns over petrodollar investments in the United States led to the creation of CFIUS.

Last February, as I was watching the DP World deal attacked in the broadcast media day after day, night after night, I kept thinking that I had seen this irrational hysteria before. One night after work, I came home, had dinner and flipped on the television. One of the movie channels was airing *Network* – the Paddy Chayefsky film released in 1976, which I mentioned earlier.

*Network* told the story of a fictional television network, UBS, whose news division was losing money and whose nightly ratings were terrible – until one night when its anchor person, Howard Beale played by Peter Finch, lost his mind on the air. The ratings skyrocketed overnight and UBS realized that it finally had a winning formula on its hand. Just put the deranged Mr. Beale on the air every night and let him rant about anything he wanted!

In the movie, the network UBS was owned by a fictional company by the name of CCA. Beale learns one day that CCA is being sold to Saudi Arabian interests. That evening he goes on the air and begins a long tirade against the sale. Beale pleads with his viewers to bombard the White House with telegrams opposing the takeover of CCA. They do and, as mentioned earlier, the fictional deal is stopped. When I watched *Network* last February, it seemed as though I was watching the events of that very day, with only the names and clothing styles changed.

If technology allows, I would like to close today with a brief clip from *Network*. In the clip, you will see Beale ranting against the sale on a television screen. The person watching

Beale and talking on the telephone is Frank Hackett, Beale's boss, played by a young Robert Duvall.

Thank you for your time today. I enjoyed being here.

---

<sup>1</sup> Peter T. Leach, *Friend or Foe?*, The Journal of Commerce, Feb. 27, 2006, at 14 [hereinafter *Friend or Foe*].

<sup>2</sup> Peter T. Leach, *Scaling New Heights-Acquisition of P&O Puts Dubai Ports World in the Top Echelon of Global Terminal Operations*, The Journal of Commerce, Dec. 5, 2005, at 32.

<sup>3</sup> Simon Heaney, *DP World Aims High*, American Shipper, January 2006, at 89.

<sup>4</sup> *Id.* at 88.

<sup>5</sup> See <http://www.ustreas.gov/offices/international-affairs/exon-florio>.

<sup>6</sup> *Security of Terminal Operations at U.S. Ports: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 109<sup>th</sup> Cong. 66-67 (2006) [hereinafter *Commerce Committee Hearings*] (Statement of H. Edward Bilkey).

<sup>7</sup> *Dubai Purchase of U.S. Port Facilities: Hearings Before the Senate Comm. On Banking, Housing and Urban Affairs*, 109<sup>th</sup> Cong. (2006) [hereinafter *Banking Committee Hearings*] (Statement of Robert M. Kimmitt, Deputy Secretary of the U.S. Department of the Treasury).

<sup>8</sup> *Banking Committee Hearings*, note 7 *supra* (Statement of Stewart Baker, Assistant Secretary, Department of Homeland Security).

<sup>9</sup> *Id.*

<sup>10</sup> *Commerce Committee Hearings*, note 6 *supra*, at 67 (Statement of H. Edward Bilkey).

<sup>11</sup> In testimony given to Congress, the Hon. Michael P. Jackson, Deputy Secretary of the Department of Homeland Security ("DHS"), suggested that, as a result of the CFIUS review, DHS had "more visibility into the operations of DP World" than any other marine terminal company operating in the United States. *Commerce Committee Hearings*, note 6 *supra*, at 96 (Statement of Hon. Michael P. Jackson).

<sup>12</sup> Eric Kulish, *What's Next for Port Security-Dubai Ports World Deal Hits Political Landmine*, American Shipper, April 2006, at 78 [hereinafter *Kulish*].

<sup>13</sup> *Id.*

<sup>14</sup> Peter Tirschwell, *Like a Skunk at a Picnic*, The Journal of Commerce, June 26, 2006, at 54.

<sup>15</sup> *Id.*

<sup>16</sup> The Library of Congress Research Service, *CRS Report for Congress: The Exon-Florio National Security Test for Foreign Investment*, Updated March 15, 2006, at 5 [hereinafter *CRS Exon-Florio Report*].

<sup>17</sup> *Id.*

<sup>18</sup> Jonathan Weisman, *Dubai Firm to sell U.S. Port Operations*, washingtonpost.com (March 10, 2006).

<sup>19</sup> JoC Online, *AIG Buys DP World's U.S. Container Terminals* (December 11, 2006).

<sup>20</sup> The Library of Congress Research Service, *CRS Report for Congress: Terminal Operators and Their Role in U.S. Port and Maritime Security*, April 20, 2006, at 3 [hereinafter *CRS Terminal Operator Report*].

<sup>21</sup> *Id.*

<sup>22</sup> *Commerce Committee Hearings*, note 6 *supra*, at 18 (Statement of Senator Ben Nelson).

<sup>23</sup> 2 J. Marans *et al.*, *Manual of Foreign Investment in the United States* §13:3 (3d ed. 2004) [hereinafter *Manual of Foreign Investment*].

<sup>24</sup> *Id.* at §13:5; see also *In re Virgin America, Inc.*, U.S. Dept. of Transp., Docket OST-2005-23307 (Order to Show Cause Dec. 27, 2006).

<sup>25</sup> 46 U.S.C.A. §12102(a)(4); 46 C.F.R. §67.39(a).

<sup>26</sup> 46 U.S.C.A. §883 (2006 Pamphlet)

<sup>27</sup> 46 U.S.C.A. §802 (2006 Pamphlet); 46 C.F.R. §67.39(c).

<sup>28</sup> 46 C.F.R. §67.31(d).

<sup>29</sup> 46 U.S.C.A. §12102(c); 46 C.F.R. §67.39(b).

<sup>30</sup> 46 U.S.C.A. §292(a) (2006 Pamphlet).

<sup>31</sup> 2 *Manual of Foreign Investment*, note 23 *supra*, at §18:30.

<sup>32</sup> *Id.*; see 46 U.S.C.A. §835(b)(3) (1975).

<sup>33</sup> H.R. 4817, 109<sup>th</sup> Cong. (2006).

<sup>34</sup> H.R. 4833, 109<sup>th</sup> Cong. (2006).

<sup>35</sup> S. 2334, 109<sup>th</sup> Cong. (2006).



- 
- <sup>36</sup> H.R. 4842, 109<sup>th</sup> Cong. (2006).
- <sup>37</sup> S. 2367, 109<sup>th</sup> Cong. (2006).
- <sup>38</sup> H.R. 4881, 109<sup>th</sup> Cong. (2006).
- <sup>39</sup> H.R. 4959, 109<sup>th</sup> Cong. (2006).
- <sup>40</sup> *CRS Terminal Operator Report*, note 20 *supra*, at 12.
- <sup>41</sup> *Id.*, at 12-13.
- <sup>42</sup> *Id.* at 13.
- <sup>43</sup> *Commerce Committee Hearings*, note 6 *supra*, at 80-1 (Statement of Christopher Koch).
- <sup>44</sup> *CRS Terminal Operator Report*, note 20 *supra*, at 13.
- <sup>45</sup> Exec. Order No. 11858, 3 C.F.R. 1971-1975 Comp. 990 (1975).
- <sup>46</sup> A. Larson & D. Marchick, Council on Foreign Relations, *Foreign Investment and National Security – Getting the Balance Right*, at 4 (July 2006) [hereinafter *Council Report*].
- <sup>47</sup> *Id.*
- <sup>48</sup> *Banking Committee Hearings*, note 7 *supra* (Statement of Robert M. Kimmitt).
- <sup>49</sup> Library of Congress Research Service, *CRS Report for Congress: The Committee on Foreign Investment in the United States, Updated July 28, 2006*, at 5 [hereinafter *CRS CFIUS Report*].
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.*
- <sup>52</sup> 50 U.S.C. A. §2170(a) (2006 Pamphlet).
- <sup>53</sup> 50 U.S.C. A. §2170(d) (2006 Pamphlet).
- <sup>54</sup> 50 U.S.C.A. §2170(e) (2006 Pamphlet).
- <sup>55</sup> *Council Report*, note 46 *supra*, at 11.
- <sup>56</sup> *Id.*
- <sup>57</sup> Exec. Order No. 12661, 3 C.F.R. 1988 Comp. 618 (1988).
- <sup>58</sup> *Banking Committee Hearings*, note 7 *supra* (Statement of Robert M. Kimmitt).
- <sup>59</sup> *CRS CFIUS Report*, note 49 *supra*, at 11.
- <sup>60</sup> The term “control” is very broadly defined. 31 C.F.R. §800.204 (2006).
- <sup>61</sup> 50 U.S.C.A. §2170(b) (2006 Pamphlet).
- <sup>62</sup> *Banking Committee Hearings*, note 7 *supra* (Statement of Senator Paul S. Sarbanes).
- <sup>63</sup> *CRS CFIUS Report*, note 49 *supra*, at 25.
- <sup>64</sup> *Id.*
- <sup>65</sup> 31 C.F.R. Part 800, Appendix A, at 1006 (2006)
- <sup>66</sup> *Id.*
- <sup>67</sup> *Id.*
- <sup>68</sup> 50 U.S.C.A. §2170(f) (2006 Pamphlet).
- <sup>69</sup> G. Sud, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 Vand. J. Transnat’l L. 1303, 1304 (2006).
- <sup>70</sup> *Id.* at 1305.
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.*
- <sup>73</sup> M. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 Ohio St. L. J. 849, 852 (2006).
- <sup>74</sup> U.S. General Accountability Office, *Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law’s Effectiveness* (2005) [hereinafter *GAO Report*].
- <sup>75</sup> *Id.* at 12.
- <sup>76</sup> *Id.* at 20.
- <sup>77</sup> *Id.* at 13.
- <sup>78</sup> *Id.*
- <sup>79</sup> *CRS CFIUS Report*, note 49 *supra*, at 11.
- <sup>80</sup> *Council Report*, note 46 *supra*, at 13.
- <sup>81</sup> *Id.* at 15.
- <sup>82</sup> *Id.*
- <sup>83</sup> *Id.*
- <sup>84</sup> *Id.*
- <sup>85</sup> *Id.* at 17.

<sup>86</sup> H.R. 5337, 109th Cong. (2006).

<sup>87</sup> S. 3549, 109th Cong. (2006).

<sup>88</sup> *CRS CFIUS Report*, note 49 *supra*, at 22.

<sup>89</sup> *Id.* at 23.

<sup>90</sup> H.R. 556, 110th Cong. (2007).

<sup>91</sup> D. Marchick, National Foundation for American Policy – Policy Brief, *Swinging the Pendulum too Far: An Analysis of the CFIUS Process Post Dubai Ports World*, at 5 (2007) [hereinafter *NFAP Policy Brief*].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 7.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 8-9.

<sup>97</sup> 50 U.S.C.A. §2170(c) (2006 Pamphlet).

<sup>98</sup> 50 U.S.C.A. §2170(k) (2006 Pamphlet).

<sup>99</sup> The term “critical infrastructure” means “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” 42 U.S.C.A. §5195c(e)(2003).

<sup>100</sup> See *Fairplay Daily News Service* (Feb. 5, 2007).

<sup>101</sup> N.Y. Unconsolidated Laws §9819 (McKinney’s 2002)

<sup>102</sup> Code of Metropolitan Dade County, *Seaport and Security Operations*, §28A-6 [hereinafter *Miami-Dade Code*].

<sup>103</sup> Waterfront Comm. of New York Harbor, *Rules and Regulations*, §1.13 [hereinafter *WC Regulations*]; *Miami-Dade Code* §28A-6.7.

<sup>104</sup> *WC Regulations* §3.8; *Miami-Dade Code* §28A-6.3.

<sup>105</sup> RESTATEMENT (SECOND) OF CONTRACTS §317(2)(a)-(b) (1981); see also New York U.C.C. §2-210(2) (McKinney 2002); RESTATEMENT (SECOND) ON PROPERTY, LANDLORD & TENANT §15.1(2) (1977).

<sup>106</sup> RESTATEMENT (SECOND) OF CONTRACTS §317(2)(c) (1981); New York U.C.C. §2-210(2) (McKinney 2002); RESTATEMENT (SECOND) ON PROPERTY, LANDLORD & TENANT §15.1(3) (1977). It should be pointed out, however, that the courts typically interpret anti-assignment clauses in real estate leases based upon principles of real property law which disfavor restraints on alienation. See *ESPN, Inc. v. Office of the Commissioner of Baseball*, 76 F.Supp. 2d 383, 397 (S.D.N.Y. 1999); *PPG Industries, Inc. v. Guardian Industries*, 597 F.2d 1090, 1095 (6th Cir. 1979). Therefore, anti-assignment clauses in real estate leases are often interpreted differently from similar clauses in other commercial contracts.

<sup>107</sup> 49 Am. Jur.2d, *Landlord and Tenant* §1096, at 862 (2d Ed. 1995); see also, *John Lindgren v. Those Guys, Inc.*, 2005 Cal. App. Unpub. LEXIS 11339 (2d App. Dist. 2005); *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 344-45, 182 P.2d 182, 188 (1947).

<sup>108</sup> See *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, 1993 Del. Ch. LEXIS 158 (Del. Chan. 1993) (“[W]here an antitransfer clause in a contract does not explicitly prohibit a transfer of property rights to a new entity by a merger, and where performance by the original contracting party is not a material condition, and the transfer itself creates no unreasonable risks for the other contracting parties, the court should not presume that the parties intended to prohibit the merger.”); but see *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090 (6th Cir. 1979); *Salgo Associates v. Continental Illinois Properties*, 532 F.Supp 279 (D.D.C. 1981).

<sup>109</sup> *Torrey Delivery, Inc. v. Chautauqua Truck Sales and Service, Inc.*, 47 A.D.2d 279, 366 N.Y.S. 2d 506 (4th Dep’t 1975); *New Paradigm Software Corp. v. New Era of Networks, Inc.*, 2002 U.S. Dist. LEXIS 23753 (S.D.N.Y. 2002); see also *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 1996 Tex. LEXIS 91 (Tex. Sup. 1996); *Engel v. Teleprompter Corp.*, 703 F.3d 127 (5<sup>th</sup> Cir. 1983); *United States Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929 (9<sup>th</sup> Cir. 2002); *Maryville Hotel Associates I, LLC v. IHC/Maryville Hotel Corp.*, 2006 U.S. Dist. LEXIS 28235 (E.D. Mo. May 5, 2006).

<sup>110</sup> For a general discussion of the various rules governing consent clauses, see the following cases: *Ring v. MPATH Interactive, Inc.*, 302 F.2d 301 (S.D.N.Y. 2004); *Mayfair Supermarkets, Inc. v. Acme Markets, Inc.*, 1989 U.S. Dist. LEXIS 3466 (D.N.J. 1989); *Sayed v. Rapp*, 10 A.D.3d 717, 782 N.Y.S. 2d 278 (2d Dep’t 2004); *Krieger v. Helmsley Spear, Inc.*, 62 N.J. 423 (1973); *East Penn Sanitation, Inc. v. Grinnell Haulers, Inc.*, 294 N.J. Super. 158 (App. Div. 1996).

<sup>111</sup> HR Rep. No. 1383, 73d Cong., 2d Sess. 26 (1934).

<sup>112</sup> 17 C.F.R. §230.405 (2005); see also SEC Rule 12b-2(f), 17 C.F.R. §240.12b-2(f) (2005).

---

<sup>113</sup> See e.g. N.Y. Bus. Corp. L. §912(a)(8) (McKinney's 2003); 8 Del. Gen. Corp. L §203(c)(4); see also New York Stock Exchange Rule 2(f) (2006) ("The term 'control' means the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A person shall be presumed to control another person if such person, directly or indirectly, (i) has the right to vote 25 percent or more of the voting securities, (ii) is entitled to receive 25 percent or more of the net profits, or (iii) is a director, general partner or principal executive officer (or person accompanying a similar status or performing similar functions) of the other person.").

<sup>114</sup> U.S. Const. Amend. XIV, §1.

<sup>115</sup> *I Manual of Foreign Investment*, note 23 *supra*, at §1:10.

<sup>116</sup> *Id.*

<sup>117</sup> 46 U.S.C.A. §1709(d)(3) (2006 Pamphlet).

<sup>118</sup> 46 U.S.C.A. §1709(d)(4) (2006 Pamphlet).

<sup>119</sup> See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

<sup>120</sup> *Commerce Committee Hearings*, note 6 *supra*, at 63 (Statement of H. Edward Bilkey).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 65.

<sup>123</sup> *Id.* at 118-119.

<sup>124</sup> *Id.*