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DP World Erects Legal Firewall in the Face of a Political Firestorm ©

How U.S. Politics and Calls for Protectionism Have Dented The Level Playing Field of Global Trade ©

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During the past week, the media has been awash in reports concluding that DP World, a UAE operator and manager of international port facilities, had been forced by the U.S. Congress to surrender its legal right to capitalize on the strategic purchase of Peninsula & Oriental Steam Navigation, a former British competitor.

These reports describe how DP World encountered overwhelming opposition by 'national security-minded' U.S. congressman and senators, *especially* those 9/11-'sensitive' representatives in the greater *NY-NJ* metropolitan area. The reports also describe how the face-saving compromise DP World adopted to diffuse the political firestorm triggered by these representatives' inaccurate public statements had been brokered at the last minute by a rational and informed Senate Armed Services Committee Chairman, John Warner (R-Va). However, these reports do not discuss how the fanning of public fears incident to this debate was largely choreographed as political theatre by opportunists seeking free media attention and name recognition in a congressional election year. The media has also largely exaggerated whatever little it did know about the transaction and has neglected to mention how little change will likely follow from such surrender.

There are legitimate concerns about the details of the concession rights acquired, the nature of activities to be undertaken, the restrictions that have been placed on those activities by White House and U.S. agency officials, and their potential impact, after a valid risk assessment has been performed, on port and maritime security. And, an in-depth and transparent investigation of the overall national security implications of the acquisition is certainly warranted. However, most of the 'noise' emanating from Washington, New York and Los Angeles during the past two weeks, and from Miami-based Eller & Co., which is perhaps one of the last remaining U.S. companies that can competitively operate and manage terminals at U.S. ports, has been political rather substantive in nature. And, Eller's recent challenge of the P&O acquisition in British courts is likely nothing more than an attempt to seek government protection of its eroding U.S. market share against an aggressive and more efficient international competitor.

Indeed, most knowledgeable persons will admit that foreign companies such as Hutchison Port Holdings of Hong Kong, PSA Corp. of Singapore and DP World of the UAE are increasingly positioning themselves to dominate an industry long controlled by European and American companies. APM Terminals of the Netherlands (i.e., Maersk), Maher Terminals of New York and Eller & Co. of Miami appear to be among the last holdovers. This has occurred because deep-pocketed (and perhaps government-subsidized) developing country companies like DP World can more profitably manage and operate terminals at U.S. and other developed country ports due to their much lower cost of doing business. They are not subject to the same high labor and other regulatory costs that are imposed on their European and American competitors. In fact, even if they incur higher than usual costs in the U.S. and Europe, their much more profitable operations overseas will more than offset any U.S. or European operating losses. This simple fact of business economics is likely what motivated the P&O Steam Navigation sale to DP World in the first place – better to sell when the company stock still has a relatively high value than to wait until successive operating losses cause it to drop.

DP World's decision to divest itself of newly acquired P&O Steam Navigation's U.S. operations in the face of the recent U.S. political firestorm will likely be nothing more than a 'form over substance' transaction. Ultimate ownership of P&O will not likely be forfeited, but rather a legal firewall will be erected to cordon off DP World's ownership interest in its newly acquired British subsidiary. In other words, either DP World or P&O will likely create one or more new, and at least partially owned, U.S. operating subsidiaries whose business will be the management and operation of the terminal concession and stevedoring contracts acquired in the P&O purchase. These rights entitle P&O to service approximately twenty U.S. ports. And, in order to satisfy U.S. national security concerns, control over the day-to-day operations of the U.S. subsidiaries, which will be subject to U.S. legal jurisdiction and oversight, will likely be delegated to separate U.S.-based managements and boards of directors which, presumably, will consist of foreign *and* U.S. personnel possessing impeccable national security credentials. Yet, as is usually the case, the devil is in the details.

It must be remembered that DP World did not acquire physical assets (port terminals, etc.) of a sensitive national security nature here - it acquired merely contract rights to lease, manage, and operate terminals as a concessionaire and to on- and off-load cargo. Thus, DP World's assumption of P&O contract rights does not result in any shifting of legal ownership and control of U.S. ports and terminals. Such ownership and control is retained by the local port authorities, which are entities of state and local government. Furthermore, security of the ports is handled exclusively by the U.S. Coast Guard and the U.S. Customs and Border Protection, both under the auspices of the Department of Homeland Security.

Nevertheless, these and other facts have largely been ignored or obfuscated by a headline-craven media and a politically opportunistic Congress. The operatives behind the media storm had no other purpose than to politically grandstand – to either create an election-year issue for the Democratic Party where none otherwise existed or to distance already vulnerable Republican Congressmen from a weakening Republican presidency. This strategy, therefore, was arguably utilized to exploit public fears and generate public confusion for political gain. In the process, however, it has sacrificed public understanding of critically important port and maritime security and foreign investment issues. In addition, it has helped to undermine U.S. foreign relations and international trade policy without contributing much, if anything, to national security.

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Furthermore, such bipartisan cacophony has likely instilled *less* rather than more public trust and confidence in our elected officials.

The interagency Committee on Foreign Investment in the United States (CFIUS) is currently investigating this transaction, and Senators Collins (R-Me) and Lieberman (D-Ct) and other congressional representatives have recently proposed changes to the CFIUS review process itself that may ultimately improve national security. Perhaps if thoughtful CFIUS reforms had preceded the proposed 2005 purchase of U.S.-owned Unocal by Cnooc (China National Offshore Oil Corporation, Ltd.), a large Chinese state-owned oil company, the American public would have learned the truth about that transaction, as well.

Unfortunately, a politically motivated and hyperbolic Congress and media, supported by some in industry, then seized the opportunity, just as they have now, to scuttle an international business transaction under false pretenses. And, just as before, this was achieved at the expense of long-term U.S. international trade policy objectives, and possibly, even national security interests. The overall U.S. response to this transaction raises a very fundamental and troubling question that begs an honest answer: Do we in the U.S. really want a level global playing field based on free market competition in an era of rapid globalization and growing interdependence?

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