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GUIDE TO MODEL PORT LEGISLATION

INTER-AMERICAN COMMITTEE ON PORTS (CIP)

Note by the Secretariat

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In the framework of the meetings of the Technical Advisory Group on Public Policy, Legislation and Regulation held during the 2012 and 2013 and in compliance with the Plan of Action of Cartagena (2014-2015); a thematic proposal was discussed aimed at achieving a minimum content of port legislation with the objective to put it forward to the wider membership of the CIP.

The tool promoted by the World Bank called model of General Law on Ports has been used as a basis for the establishment of this model. Also, other tools have been considered such as UNCITRAL - Rotterdam Rules.¹

The purpose of this guide is to establish the basic legal provisions, which currently requires the port sector and related services to ensure legal certainty and private investment, by means of concessions, permits, authorizations, transfer agreements, contracts or any other form of private participation in ports. In addition, provide a legal framework that enables a management and efficient and competitive operation, without obstructing environment measures, as well as port protection and security. It will also indicate the institutions, national authorities or agencies, which are necessary for the proper regulation, organization and management of the activities and port facilities, as well as determine their respective functions, powers and competences.

I. JUSTIFICATION

Maritime transport is the best tool to boost trade in goods for a nation, given that it is one of the more economical means of transportation. Also, marine terminals are the commercial window to the world, so there must be an adequate concurrence between the distribution of production from one country to international markets and the supply of its domestic market. In addition, the management and port operation should be more efficient and economical in order to build a faster, more reliable, economical and safe movement of goods, which in turn brings added value and increase the competitiveness of the port.

Aware that the maritime industry has been evolving toward the incorporation of ships that by far exceed the dimensions of those of the start of the last decade, and the consequent increase of larger volumes of cargo and containers. Increased spending on infrastructure is necessary but it is

¹ See presentation of Diego Sepúlveda during the First Course on Port Management organized by the CIP in Lima, Peru in June 2011:
http://www.oas.org/cip/docs/5Careas_tecnicas%5C15_leg_portuaria%5CANP%20Legislaci%C3%B3n%20Portuaria.ppt



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not enough. It is also vital to be more efficient in the management and operation of the port terminals. In order to achieve this it is essential to make modifications to the regulatory framework as a means to give continuity and viability to port development projects, where the port sector is designed as a modern, efficient and socially and economically useful.

The CIP has taken up this challenge and shares the idea that a better legal framework will make the ports more efficient, competitive and secure.

It requires the response of the institutions from the Member States responsible for ensuring the movement of cargo. In this sense there is a need for strong national legislation, covering issues concerning the movement of goods through ports in the Member States.

Some national port laws have not incorporated the necessary changes to meet the new realities. Hence the need to promote the reform or creation of a regulatory framework that allows port terminals to be more efficient and competitive. In addition, these changes should consider new consultation processes, involving the private sector in the procurement processes, development of new port regulations and granting of concessions, permits and authorizations. Also, must be included for this purpose all actors responsible for the management of ports at the national, local or at the community level, as well as incorporate appropriate mechanisms for monitoring and evaluation.

II. ELEMENTS OF THE MODEL LAW TO BE CONSIDERED

a. The regulatory function of the market

The maritime port market is imperfect and has many different interests. In addition, the ports are multi-service entities, which produce different services for numerous markets, such as the handling of the cargo, pilotage, the trailer and the mooring, among others. Equally, the ports must serve different markets, which are related to the types of incoming and outgoing vessels. The ports also produce public goods and require an indivisible investment. It is necessary to eliminate or reduce the distortions in fields such as natural monopolies, economic monopolies, the dominant operators of the market, mergers and the rules for the regulation or fixing of rates and prices.

The State must develop a regulatory framework that allows him to operate only when the market is not functioning correctly or where there is an exclusion of competitors in the market for services otherwise it will bring damages to the users of the port and benefits unlawfully a certain group of companies providing services. The role of the State is designed to restore the conditions of competition as regulator of the market, price and access regimes, but in no case as auditor of the market.

The State must designate or create a body or agency of economic competition, which is autonomous, decentralized, with regulatory authority with powers to create anti-trust policies and with the channels of communication open to allow public consultations. The body or agency must have highly skilled personnel with the expertise necessary for the exercise of its functions and powers.



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The agency or specialized body should encourage private participation in the respective industry, creating the conditions for greater efficiency and effectiveness, as well as generate an environment of legal security to protect the basic rights of users and providers of services.

b. Normative and regulatory function of the activity of the State

The State must exercise its rule of law to protect and regulate the common good; exercise its sole authority for issuing the general rules of the port system; and lay down the conditions or requirements that must meet the economic agents involved in the national port system.

The regulator, suggested to be a public drive specialized, inserted into the overall structure of the Central Government, such as a Secretary or Sub-Secretary of State, or General Management.

Basic objectives in these areas:

- To develop and lead the National Ports Policy
- To formulate technical, operational and economic mandatory rules.
- To determine the mechanisms of coordination between the government authorities, at the national, regional or local level.
- To develop and implement a national public register to register enterprises that provides port services in the terminals or facilities under its control.
- To establish the port system general conditions, operational and technical.
- To develop, adopt and implement port protection and security
- To conclude cooperation agreements with other port dependencies and national or foreign institutions, as well as with international organizations.

c. Role of Monitoring and Control of the economic operator

In the port sector the State must have the powers and responsibilities to perform the functions of monitoring and control. Therefore, the State should monitor the compliance of the rules, requirements and regulations that the regulator has generated.

The functions of regulation and oversight must be separated, for this reason, there should be a regulator that dictates the rules, and other supervisory body to oversee and monitor compliance with the standard. That is to say, the audit functions and control must be handed over to a different body. This principle of the separation prevents a single agency from being a judge and a party at the same time.

It is suggested that the features described are delivered to a different entity or entities of the level of a superintendent, or to an autonomous body, decentralized of central government power.



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The Supervisory Body must perform functions of inspection, verification, research and control on the following topics:

- Monitor compliance with regulatory, technical, operational and administrative legal standards
- Keep a register, exert control and issue permits to companies that provide services or related port activities.
- Exercise control over public or private companies that are concessionaires, administering or operators of ports and terminals.
- Coordinate the development of national plans for port development.
- Approve the master plans of public or private ports.
- Grant authorizations and concessions
- Port control operations of the entities that operate port infrastructure for public use, whether private concessionaires or state-owned operators.
- Keep the records of infrastructure port tariff and services for concessionaires and operators.
- Supervise the implementation of the contracts of the port operators, administrators of port infrastructure and concessionaires.
- Ensure compliance with the technical requirements relating to the works that were to be built in the grantees ports or handed over to the participation of the private sector
- Oversee and control the implementation of the comprehensive safety standards, which include physical security, maritime security and conservation of the environment.
- Have the dredging of channels of access to the ports
- Apply sanctions in case of breach of port laws, as well as other rules and regulations.

d. Administrator role of the State Port Infrastructure.

The legal framework should establish a special body in charge of the management of port infrastructure, which is under the direct direction of the State. This body may also hold the port authority. In any case, this body can have regulatory or supervisory powers.

The port legal framework can empower the port authority to perform the following functions:

- Management and physical development of the port zone.
- Maintenance, rehabilitation, renovation and construction of basic infrastructure and operation.



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- Accord concessions, permits and authorizations, that businesses require for provide port or related services.
- Coordinate the entry and exit of vessels
- Ensure public order in the port area.
- Protect the port areas.
- To promote industrial and commercial activities relate to shipping or port traffic.
- To coordinate port security
- To ensure maritime safety and environmental protection.
- Punish violations to port legislation, such as damages to common benefit, illegal operation of the port services, evasion of port fees, navigation or unsafe operation of ships and pollution of the environment.
- Integrate port statistics.

e. The city-port relationship

Maritime ports contribute to the economic, social and cultural growth and development of the port city. However, maritime ports attempt to become more competitive through the development of new port zones or the transformation of existing port areas. Growth, development or redesigning of ports must be harmonized with the urban planning of a city port in order to have an existing integration among the port areas, borders or accesses and the daily life of the city port.

Port master plans should contain measures to avoid negative issues related to the landscape, noise, pollution, safety and road traffic or excessive circulation of heavy vehicles, derived from port activities. That is, the elements of the port must be reconciled with the urban planning of the port city.

The regulatory framework must implement committees or decision-making mechanisms so that different private, public, local, and city actors can influence the planning of port accesses, the development of port areas or the port expansion that may affect the urban planning of a port city. Such mechanisms should not impede or delay the proper development of the port, as the competitiveness of the port may be affected.

In addition, the legislation should allow the reclassification or release of the inner harbor areas, which may be obsolete or may no longer be exploited due to a lack of draft or difficult maritime access, among other circumstances, with the purpose of completely or partially opening it to the municipal public or citizen. Generally, these obsolete areas correspond to the original core of the port or the most important seafront, which could generate waterfronts if released, for the public usage of citizens.

f. Alternative Dispute Resolution Mechanisms



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Port legislation may contemplate the possibility of granting port authorities the necessary powers to create and manage specialized mediation, conciliation or arbitration centers so that port sector enterprises and/or enterprises related to maritime transportation may submit their controversies or disputes, related to maritime, port, or commercial law.

Likewise, the regulatory framework can permit or authorize, as an alternative operation, for the port authority or/and the port sector companies to settle their disputes resulting from applying legislation, as well as those coming from port administration or operations, through an arbitration procedure.

Where appropriate, the regulatory framework can establish prejudicial mediation or conciliation, as budget admissibility of a lawsuit, as well as forced arbitration, in the aforementioned matters, taking into account the regulatory framework of the country.

g. Environment

The State Regulatory Agency should develop a series of legal requirements for ports to carry out their activities in a sustainable and environmental manner, seeking to minimize the environmental impact generated by port activities.

The State may harmonize port legislation with national energy plans or policies to promote energy conservation, energy efficiency and renewable energy usage. In particular, the State may establish or incentivize quotas for energy saving, energy employment with greater potential for CO₂ emissions, or usage of renewable energy in the activities performed by port authorities and operators.

The environmental management systems may cover the following topics:

- Evaluation of environmental aspects associated with the activities carried out by port authorities or operators, as well as subcontractors.
- The analysis of compliance with environmental regulations on their activities.
- The promotion of renewable energies.
- The management of terrestrial and marine wastes, as well as emissions of materials and acoustics.
- Water planning, which allows managing the collection and treatment of wastewater; improve and control the quality of water at ports, among others.
- The optimization of consumption of natural resources, such as electricity, consumption of drinking water, fuels, oils, greases and paints.
- The protection of biodiversity.
- The development of logbooks or indicators of environmental behavior.
- The preparedness and response Plan to environmental emergencies.



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- The Internal Contingency Plan for accidental and deliberate marine pollution.
- Training of employees on accidental marine pollution emergencies.

Furthermore, the State Regulatory Agency can create voluntary participation programs to promote and incentivize the planning, implementation, and operation of environmental management systems, by the port operators.

Additionally, the port legislation should include the obligation for providers of port services to have sufficient means to prevent accidental marine, atmospheric, and terrestrial contamination. The Port Authority should condition their authorizations or concessions in compliance with national or international standards in the field, by port service companies.

Likewise, the regulatory framework should include the possibility for the Port Authority to perform a waste reception plan in the port's facilities by ships and other port service companies, such as cargo residues, waste generated by ships, ballast water, among others.

The State Supervising Body must verify and certify the planning, implementation and operation of the environmental management system, through environmental audits. Similarly, the State Supervising Body may authorize private companies to verify port authorities or operators' compliance with the environmental management system. In addition, the Supervising Body may authorize certified accredited companies to certify those authorities and operators who comply with the proper implementation of the environmental management system, based on international standards.

Port legislation should include mechanisms to develop and approve projects aimed at expanding and modifying national ports. These mechanisms may include the following elements:

- The assessment of the environmental impact
- The authority responsible for developing the plan
- The bodies responsible of approving the plan
- A stage to hear opinions or address reports from local authorities in regards to urbanism, and other secretariats or linked addresses.

h. Gender Equality

The State must recognize the fundamental role of the full participation and representation of women in the civil, political, economic, social and cultural environments for the integral development of the Hemisphere, the CIP of the Organization of American States (OAS) reiterates the importance of integrating the gender approach in the formulation of public policy and encourages Member States to implement strategic actions aimed at the achievement of gender equality.

i. Definitions



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The legal framework should provide basic definitions of the regulation and specify the relevant authorities, to remove ambiguities or avoid misinterpretations.

Then we made an enumerative list of definitions that serves as an example for the development of port policy framework:

Terminal operation: the holder of (a concession, permit, authorization) for the management of port infrastructure.

Supervisory Body: (Superintendence, agency, or specialized body) is responsible for the inspection, verification, investigation and control of the port legislation, in terms of applicable law.

Regulator: (Secretariat, General Secretariat or port) is empowered to regulate the port system, based on the legal system.

Port: The place of the shore or bank enabled by (the port authority or central government) for the reception, shelter and care of boats, whose limits are set by (the port authority or central government) and activities are governed in accordance with (this port law or the relevant national legislation).

Service Provider Company: Any person or company that provides port services related to the operation of ports under the terms of the Port Law.

j. New role of the State

The State is the custodian of the common good and cannot delegate everything to the private sector. The system constitutes a border of the country located over goods of the public domain. It concession to a certain period and at the end it should back to the State.

III. MODEL

The methodological tool named the Port Reform Toolkit has been developed by the World Bank, which contains a special volume designated to the legal framework.

One law model should establish the legal and institutional basis of the management system of every country, considering the functions, organization, coordination and the programs of the different actors. It should have in mind the legal and institutional basis to design, implement, and monitor and evaluate the port public policies

This methodological tool of the World Bank aims:

- Make a diagnosis of the current legislation.



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- Identify the areas that are not regulated and the ones that should adequate to the new model.
- Ensure the legal basis of the port model.
- Establish specific definitions and clear guidance in an appropriate manner that is required to open the investment and management of port infrastructure at the national or foreign sector.

The tool identifies the areas and matters that are recommended to incorporate, such as basic elements in the general laws of ports, and which are mentioned bellow:

1. Scope of the law
2. Objectives of the law
3. Definition of the State's role and private sector
4. Objectives and functions of the port authority
5. Competency of Regulatory Bodies.
6. Coordination with other regional bodies
7. Principles of port decentralization
8. Definition of authority port property
9. Concessions, permits and authorizations
10. Customs treatment
11. Tariff treatment
12. Tax treatment
13. Operating infrastructure systems
14. Lease, corporations and concessions
15. Port service regulation
16. Requirements and obligations of the port operators
17. Territorial and port planning
18. Integral Port Security
19. Antitrust and competition port service
20. Port development plans
21. Labor regulations
22. Port-city relationship
23. Environmental aspects
24. Gender Equality
25. Alternative dispute resolution mechanisms;
26. Civil liability of port managers and operators
27. Regulations and bodies of State control
28. Infractions and Sanctions
29. Supplementary and transitional provisions
30. Final provisions

The information provided in section II and III of this note is useful for making a diagnosis of the current legislation, to identify areas that are not regulated and other that should be adequate to the



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new model, to ensure the legal basis of the port model and to establish specific definitions and clear guidance of the appropriate form required to open the investment and management of port infrastructure at the national or foreign private sector.