Ports Regulation: Global Experience and its Applicability to South Africa

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19 November 2013
• Overview of regulation
• South Africa
• Other countries
  - India
  - Australia
  - Peru
• South Africa - what next?
Overview of regulation
Why do we have regulation?

- Because the industry, left to itself, will not produce the desired outcomes
  - output is not large enough
  - prices are too high
  - output is not being fairly distributed between different categories of consumer
  - there is insufficient investment
  - costs are higher than necessary
  - technology is outdated

- Why does this happen?
  - because there is insufficient competition

- Why is there insufficient competition?

**Natural monopolies**
- small markets
- high fixed costs
- differentiated products

**Imperfect markets**
- collusion
- anti-competitive practices
- transition arrangements

**Institutional monopolies**
- SOEs in strategic industries
- planned economies
- national champions

Competition is normally preferable to regulation as it produces better outcomes more easily.
What are the objectives of regulation?

The objectives of regulation depend on the policy environment

**Government wants more competition**

- To remove barriers to competition
- To create enabling conditions for competition
- To facilitate transition to competitive markets

**Government does not want competition**

- To generate outcomes similar to those which would be achieved by competition in situations where competition is impossible
- To monitor industry performance & enforce accountability
- To protect consumers & ensure fair prices

**Primary objective**

Industrial restructuring

Performance auditing & improvement

**Nature of regulation**

Dynamic & proactive

Static & reactive

Port regulation often involves a bit of both approaches
Where in Government are the regulatory functions located?

Most of these countries have overlapping responsibilities for regulation.

Many countries regulate their ports very lightly or not at all.
<table>
<thead>
<tr>
<th>How do these different bodies regulate?</th>
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<tr>
<td><strong>Sector ministry</strong></td>
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<td>Performance contracts</td>
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<td>Directives</td>
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<td>Policy statements</td>
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<td>Informal day-to-day contacts</td>
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<td><strong>Shareholder ministry</strong></td>
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<td>Statement of corporate intent</td>
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<td>Shareholder compact</td>
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<td>Budget approval</td>
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<td><strong>Competition Commission</strong></td>
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<td>Ex-post investigations</td>
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<td>Ex-ante approvals</td>
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<td><strong>National Audit Office</strong></td>
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<td>Expenditure reviews</td>
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<td>One-off investigations</td>
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South Africa now
How is ports regulation organised in South Africa?

DOT

DPE

Ports Regulator

Other Ministries

Transnet

TNPA

Private operators

TPT

SAMSA

PCCs

Local govt

Port users

Advisory

Directives

Shareholder compact

Ownership

Regulation

Mergers & anti-trust

Competition Commission
How did we arrive at where we are now?

Changing policy environment

- White Paper 2002
- Ports Act 2005
- DOT Port Regulations 2007
- Ports Regulator
- Regulatory Principles 2009
- National Ports Authority
- Transnet
- Guidelines for Agreements, Licenses & Permits 2008
| **Policy** | National ports *SYSTEM developed* exclusively by central govt.  
| More competitive ports environment with greater user choice  
| Financially autonomous ports with globally competitive costs |
| **Institutions** | Separation of port authority from port operations within Transnet  
| Corporatisation of NPA and separation from Transnet at a date to be determined by DPE  
| DOT to establish Ports Regulator on a *temporary* basis whilst NPA remains in Transnet  
| Private sector participation to be increased through competitively tendered leases & concessions (DPE to issue guidelines) |
| **Ports Regulator** | Prevent rent-seeking by NPA  
| Ensure equity in access to port services  
| Rule on complaints against monopoly pricing by NPA |

Light regulation of services by NPA, fading away as competition increases

Competition Commission available for anti-trust cases
What do these key statements of regulatory intent actually say?

2005 Ports Act

**Ports Regulator objectives**

- **Exercise economic regulation** of the ports system in line with the government's strategic objectives
- **Promote equity of access** to port facilities and services
- **Monitor NPA** to ensure that it complies with the Act

**Ports Regulator tasks**

- Consider NPA's proposed tariffs
- Promote regulated competition
- Regulate the provision of adequate, affordable and efficient port services and facilities.
- Hear & investigate complaints
- Work with Competition Commission on anti-trust issues
- Support other regulatory authorities

NPA remains the main regulator of port services via Section 56 (concessions), Section 57 (licenses) and Section 58 (leases) of the Act.
What do these key statements of regulatory intent actually say?

2007 DOT Regulations

• **Economic participation**
  - Regulator to review public & private sector participation, with recommendations within 12 months
  
  - Interim regulation to be by means of
    - NPA tariff approval
    - hearing of complaints
    - regulation of prices of service providers other than NPA

• **BBEEE rules**

• **Port Consultative Committees**

• **Access to confidential information**

• **Port limits**
What do these key statements of regulatory intent actually say?

### 2008 TNPA Guidelines

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Application</th>
<th>Characteristics</th>
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</table>
| Section 56 agreements | • New passenger & cargo terminals  
• New ship repair facilities  
• Offshore cargo handling | • Competitively tendered concessions                                     |
| Section 57 licenses | • Stevedoring  
• Cargo storage  
• Waste disposal  
• Private floating cranes | • Quality licensing  
• Quantity licensing when faced with capacity constraints |
| Section 57 registration | • Bunkering  
• Diving  
• Pest control | • Only requirement is compliance with port rules |
| Section 65 operating leases | • Existing terminal operators  
• Existing ship repairers  
• Existing rail operators  
• Existing waste disposal | • Lease renegotiation linked to semi-automatic issue of Section 57 licenses  
• Commercial leases not covered by Act |

Transnet licenses (TPT & TFR) terminate if 3rd party is authorised to take over
What do these key statements of regulatory intent actually say?

2009 Regulatory Principles

1. Benefits of regulation should exceed costs.
2. Competitive neutrality between public and private sectors
3. Equity (BBEEE)
4. Tariff approval based on Price Cap & Rate of Return approaches
5. Promotion of competition via quality of service regulation
6. Light touch regulation, with more prescriptive approach if this doesn’t work
7. Use of either incentive-based, market oriented instruments or command-and-control approach
8. Use of other approaches (voluntary agreements, moral persuasion, joint regulation etc)
9. Ex-ante Regulatory Impact Statements for significant regulatory interventions
10. Promotion of competition where appropriate
11. Engagement with other regulators
13. Consultation with other regulators
14. Management of unintended consequences
15. Neutrality in respect of different stakeholders’ interests
16. Protection of sensitive information
17. Assessment of accuracy and appropriateness of all information
18. Relationships between connected parties to be assessed in terms of public interest
19. Active monitoring of the ports industry
20. Public engagement of stakeholders when nationally significant issues are under consideration.
21. Consideration of impacts of actions on foreign investors
22. Periodic regulatory reviews – public submissions every five years on the quality and relevance of the Regulator’s policies and methods
Challenges faced by the Ports Regulator

- Failure to separate TNPA from Transnet
- Establishment of a Single Economic Regulator
- Ambiguous policy environment
  - level of port capacity required to support the South African economy
  - whether to increase capacity through squeezing assets or building new ones
- Inert stakeholders
  - tariffs (unstructured, self-interested responses)
  - complaints that are never formalised for fear of victimisation
- Global financial crisis
  - increased risks of industrial restructuring
  - lack of expansionary space for regulatory intervention
- Lack of resources
  - Regulator operating at 45% of full strength

Source: 2012 Port Regulator’s Three Year Strategic Plan

Strategy: deal with most pressing concerns whilst postponing other parts of mandate
Other countries’ experience
Regulatory models of interest to South Africa

- **Strength**
  - India

- **Scope**
  - Victoria
  - S.Australia
  - W.Australia
  - NSW
  - Scotland
  - Peru

- **Ports regulator**
- **Multi-sectoral regulator**
- **Competition authority**
- **Ministry**
India

Heavy handed regulation ending up in a bit of a mess
India: Tariff Authority for Major Ports (TAMP)

**Scope**

**Geographical**
12 Major Port Trusts (Union Government)
*but not*
200 minor ports (State Governments)

Minor ports market share has increased a lot

<table>
<thead>
<tr>
<th>Year</th>
<th>Share</th>
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<tbody>
<tr>
<td>1997</td>
<td>13%</td>
</tr>
<tr>
<td>2012</td>
<td>39%</td>
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**Institutional**

Public Major Port Trusts
- infrastructure & services

Private sector terminal operators

**Regulatory powers**

Tariffs only
- inc tariff conditions & lease rentals
Excludes market access, M&A, anti-trust
India: Tariff Authority for Major Ports (TAMP)

**Objectives**

- Reduce & rationalise tariffs
- Create tariffs incentives to increase productivity
- Create a level playing field for private investment

**Working method**

**TAMP**
- Bottom-up
- Initially reactive
- Case-by-case

**Ports Regulator**
- Top down
- Initially pro-active
- Establish general principles

Convergence over time

50-70 tariff decisions p.a.  One tariff decision p.a.
India: Tariff Authority for Major Ports (TAMP)

More deterministic intervention

1997-2005

- Cost plus tariffs
- Interactive hearings
- Policy guidelines - Min. of Shipping

2005-2008

- Structured tariffs based on:
  - OPEX
  - return on regulatory asset base
- Indexed to WPI / forecast traffic
- 3 year reviews, with operators keeping 50% of cost savings

2008-2012

- Ex ante tariffs for new PPPs
- Prescriptive costs & concession fee adjustments
- Indexed to 60% of WPI
- 5 year reviews with assumed fall in costs

2013

- Proposals for:
  - abolition of TAMP
  - regulation of higher than reference tariffs
  - performance-linked tariffs
  - conversion of TAMP into a Port Competition Regulator

Process

Outcomes

- Variable tariffs
- Variable costs
- Political opposition

- Confusion
- Arguments
- Non-level playing field

- Drop in private investment
- Operators rebel

- No decision

The story continues
## Lessons for South Africa

### Difficulties

- Working with individual cases rather than general principles
- Regulating all tariffs rather than focusing on market abuse
- Using tariffs alone to stimulate efficiency gains
- Setting long-term escalation rates when technology, capacities & costs are changing
- Gaining the trust of operators
- High level of regulatory uncertainty diverts investment to other ports

### Successes

- Rapid impact of regulation on excessively high tariffs
- Increase in transparency
- Independence & objectivity - avoidance of regulatory capture

Need for intelligent and experienced staff ➔ capacity building requirement
Australia

*Light-handed regulation: reaching the desired end state*
Australia

**Regulatory framework**

- Regulatory principles centrally determined, but implemented at State level
- Focus on establishing competitive markets as alternative to regulation
  - strong parallel action to restructure the ports industry (e.g. Waterfront Industry Reform Authority 1989)
- Light-handed regulation aimed at preventing abuse of market dominance
  - monitoring and transparency of prices
  - negotiated access to port services
  - intervention as the last resort
  - threat of intervention keeps markets competitive without need for costly regulatory institutions
- State-owned facilities required to operate on a competitively neutral basis

*Australia has a mature regulatory environment in which most of the hard work has been done*
## Regulatory institutions

**Federal**

- Australian Competition & Consumer Authority
- Bureau of Infrastructure, Transport & Regional Economics
- Competition & Infrastructure Reform Agreement (2006) – regulatory review mechanism

**States**

<table>
<thead>
<tr>
<th>State</th>
<th>Regulatory body</th>
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<tbody>
<tr>
<td>Victoria</td>
<td>Essential Services Commission</td>
</tr>
<tr>
<td>South Australia</td>
<td>Essential Services Commission</td>
</tr>
<tr>
<td>Queensland</td>
<td>Queensland Competition Authority</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Portfolio and Shareholder Ministries</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Department of Planning &amp; Infrastructure</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Chief Minister</td>
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</table>
Australia: Victoria

**Essential Services Commission**

**Coverage:** port & rail infrastructure, grain handling, water utilities, energy retailers

**KPIs:** activities/traffic, service quality/performance, tariffs/revenues, financial performance, customer satisfaction surveys, registration of complaints
Australia: Victoria

Policy framework

Move from consensual planning to market competition

1989 - 95

Port reform

- Labour reform
  - downsizing of workforce
  - enterprise-based contracts replace national negotiations

- Private sector restructuring
  - terminalisation
  - industry concentration
  - restrictions on competition to promote investment in world-class facilities

- Increased autonomy for public port authorities

1995-97

Privatisation

- Melbourne split into three
  - landlord port authority
  - port services co. (minor)
  - Victoria Channel Authority

- Three smaller ports sold

- Private sector already in place
  - container duopoly (P&O, Patrick)
  - captive user terminals
  - licensing of smaller service providers

1997 to date

Competition policy

- Abuse of market power mainly in public sector
  - private sector competition doing its job

- Market access disputes resolved in Court

- Large initial fall in tariffs followed by consolidation
Australia: Victoria

**Regulatory framework**

*Less deterministic intervention*

### 1996-2004
- Tariffs for “prescribed services” set by Regulator
- CPI-x regulation applied to tariff “basket”
  - excluding leases & agreements
- Draconian “x” values
  - non-transparent methodology

### 2004-2009
- List of “prescribed services” reduced
- CPI-x regulation replaced by tariff monitoring
- Tariffs checked against revenue requirements

### 2009 to date
- Very few “prescribed services” now left
- Form of regulation linked to market power
- KPI-based monitoring
- Threat of intervention still a powerful control

**Outcomes**

- 50% fall in wharfage rates
- Berth hire charges to end by 2003
- Low profits inhibiting investment

- Improved relationships
- Increase in benchmarking
- Sounder intellectual base

- Increase in negotiating strength of port users
- Customer satisfaction now key aim
Lessons for South Africa

• Requirement for parallel policy action if ports sector is to be reformed

• Competition reduces need for regulation, but must be genuine (no collusion)

• Powerful port users with countervailing power also help
  - but only if they have alternatives available

• Threat of regulation can be as effective as regulation itself

• Ideal “end state” is Regulator putting itself out of business
  - but only after its objectives have been met
Peru

Good intentions but weak implementation
OSITRAN is a multi-sectoral regulator dealing with ports, railways, airports and private sector investments in roads.

It deals with two areas of port regulation:
- access rights
- tariffs

Unlike South Africa, Peruvian ports operate like “tool” ports, with common user, open access - Callao South was first terminal with exclusive private operating rights.
### Access rights


- **Right of access to essential facilities**  
  - port users & port service providers

- **Negotiation backed by threat of intervention**

- **Basic principles:**  
  - competitive neutrality  
  - efficiency improvement  
  - promotion of *private* investment

- **Back-stop methodology for calculating access charges**

**ENAPU (2004)**

- **Three different levels of access**  
  - resembling TNPA 2008 Guidelines

- **Stevedores, land transport & bunker suppliers get automatic access to port**

- **Marine service providers need formal contract with ENAPU, but few access difficulties**

- **Cargo handling companies – detailed evaluation of request followed by negotiation or auction of access rights**
<table>
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<tr>
<th><strong>Tariff regulation</strong></th>
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<tr>
<td><strong>Matarani</strong></td>
<td><strong>Original tariffs determined by competitive tender for concession</strong></td>
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<td></td>
<td><strong>Then five year tariff reviews, based on RPI – x</strong></td>
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<td><strong>Ring-fencing of some major tariff items to protect competition</strong></td>
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<tr>
<td></td>
<td>- marine services, berthing, wharfage, grain storage</td>
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<tr>
<td><strong>Callao South</strong></td>
<td><strong>As above, but</strong></td>
</tr>
<tr>
<td></td>
<td>- <strong>RPI – x only applies when income is &gt; 20% above certain level</strong></td>
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<tr>
<td></td>
<td>- <strong>No ring-fencing of individual tariffs</strong></td>
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<tr>
<td><strong>ENAPU</strong></td>
<td><strong>Initial experiments with many different approaches</strong></td>
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<td>- incremental costs, LRMC, Ramsey pricing, fully distributed costs, efficient business modelling, tariff benchmarking</td>
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<td><strong>In early 2000s adopted cost plus (ignoring inefficiencies)</strong></td>
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<td>- disputed treatment of pensions costs</td>
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<td><strong>Intention to move to price cap regulation in 2009</strong></td>
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ENAPU has refused to accept OSITRAN tariff regulation

Further concessioning under consideration
Lessons for South Africa

- State-owned enterprises can outlast Ministers and act as a major blockage to port reform
- Additionality (concessioning of new infrastructure) provides a firmer regulatory base
- Capacity building in the Regulator only works when there is strong political support
Other interesting countries

- United States (FMC)
- EU (Competition Directorate)
- Brazil (Antaq)

Countries without competition

- Singapore (Maritime & Port Authority of Singapore)
- Dubai (Dubai World/Ruler’s Office)
South Africa – where next?
The future shape of port regulation in South Africa depends on three key questions:

• Does South Africa want more competition?
  - within ports
  - between ports

• Is South Africa prepared to restructure Transnet?
  - current option is corporatise and separate out TNPA
  - better option is corporatise and separate out TPT

• Should regulation be via Ministry, landlord port or independent regulator?

What do you think?