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Public Private Partnerships in Ports / Port Reform

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With the majority of global trade carried by sea, ports are critical gateway infrastructure which connect an entire region and its inland transportation network (i.e. road, rails, inland waterways) to the international market. Therefore, developing strong, well-functioning maritime transport infrastructure is a key element of economic growth for many developing and emerging countries. Public-private partnerships ("PPPs") in ports have become a means to manage port operations more effectively, as well as to develop new port infrastructure, traditionally both exclusively government functions.

Key considerations in structuring PPPs for ports include:

- **allocation of demand / revenue risk** – the port's primary source revenue would be the charges levied on port users and depends on the actual throughput volume. Often, under a concession arrangement, the private operator pays a concession fee to the public authority and collects the port user charges (i.e. demand and revenue risk sits primarily with the private party). In some cases, the public authority may be required to provide a minimum revenue guarantee to make the project commercially attractive to the private contractor (and its lenders). There might also be mechanisms for sharing revenue upsides between the private and public contracting parties. The precise allocation of this risk will need to be considered carefully in light of the specific circumstances of a project;
- **competition** – the private operatorship of ports can give rise to complex competition issues. On the one hand, the private developers would often want to protect the profitability of the port through government undertakings not to develop competing port facilities within a certain geographic region. On the other hand, the government would need to ensure that the private operator does not abuse its monopoly position by restricting port access to its upstream or downstream competitors (as the private developer may also have a business interest in the supply chain upstream and downstream of the port); and
- **supporting infrastructure** – throughput at a port will be affected by availability of supporting and associated infrastructure such as road and rail networks that connect the port to the inland region (which may be operated by a public authority or another third party). The interface between the port and such other connecting infrastructure and responsibility for making such connecting infrastructure available are other key areas of concern in port projects.

Different port management structures are used worldwide but in the majority of large and medium sized ports the landlord port model is used. In this model, management responsibilities are delegated to the private sector, while the titles in the land and assets remain with the government.

What is a "landlord" port?

In the landlord port model, the public sector is responsible for port planning, acts as regulatory body, and owns port-related land and basic infrastructure. The infrastructure is typically leased to the private operating companies or to industries such as refineries, tank terminals, and chemical plants. The private port operators provide and maintain their own superstructure (i.e. terminals) including buildings. They also purchase and install their own equipment on the terminal grounds and are responsible for the terminal operations.

The contractual relationships are explained in the landlord port graphic.

- Sample Agreements
  - Latin America and the Caribbean
  - South Asia
  - Sub-Saharan Africa
  - Europe
- Another type of port PPP is in river navigability and ports. Colombia (below) is one example.
- Further Reading and Resources
- Toolkits

Laws and Regulations

Spain

The regulation of ports in Spain is mainly implemented through Royal Legislative Decree 2/2011, 5 September, approving the Ports of the State regulations ("**RDL 2/2011**").

In general terms, ports in Spain can be classified as:

- ports of general interest (those with international commercial activity, or affecting two or more Spanish Autonomous Communities, which serve specific strategic sectors, or essential for maritime safety). These ports are regulated by RDL 2/2011 and are managed by Puertos del Estado, which is a public law entity with oversight over each Port Authority. Currently there are 46 ports of general interest in Spain, managed by 28 different Port Authorities; and
- those ports not considered of general interests (marina or others not developing commercial activities) may be regulated by the relevant regulations of the specific Autonomous Community in which they are located.

In addition, given the location of ports, the Spanish Coastal Law may also be considered.

As per RDL 2/2011, the uses and activities that can be carried out in the port's public domain are, mainly, the interchange between different transport modes, port services, commercial port activities, fishing activities, and ancillary services (such as logistics and storage activities).

The occupation of the port's public domain with non-removable works and facilities is subject to a concession for the occupation of such domain. Such concession can be granted through a direct adjudication (in certain specific cases such as, for instance, the concession for the occupation of less than 2,500 square meters), but the general rule is that the adjudication of concessions for port services of general use, docks and terminals for private uses, are granted through a competitive bidding process, whose main features are:

- freedom of access to bidders, non-discrimination and equal treatment; and
- transparency and publicity of the proceedings.

The specific regulation approving the general bidding terms of State ports public domain is set out in Ministerial Order FOM/938/2008.

Note also that by means of the different concessions, the underlying assets would be owned by the public authority and thus, at the end of the concession term, such assets must be returned by the concessionaire, notwithstanding the right to use and/or operate them by the awarded entity during the concession term.

Further information of the different bidding processes and tenders published by the different Port Authorities in Spain are available on the website of the platform for contracting with the Public Sector in Spain.

The website of the Spanish Transport Ministry also includes specific information on maritime transport statistics, both in aggregate and at the level of each of the 28 port authorities.

The website of Puertos del Estado, together with the websites of the 28 eight different Port Authorities (e.g. Valencia, Algeciras, Barcelona, Santander, Vigo, etc.) also include useful information on the regulation, structure and sector related activities.

Sample Agreements

Europe

Spain

The sample provided is the general and particular bidding terms (in Spanish) issued on October 2019 by the Port Authority of Santander (Spain) for the awarding of the administrative concession for the construction and operation of a port terminal of solid fertilizers open to the general traffic in the Port of Santander.

This sample is an standard example of the terms and conditions of administrative concessions in general interests ports in Spain issued pursuant to RDL 2/2011 and Ministerial Order FOM/938/2008.

Even though the document is in Spanish, many Port Authorities also issue the relevant documents in English, although these are available only through specific request of the interested bidder.

The sample terms contemplate a risk framework under which demand / revenue risks are substantially passed onto the concessionaire. For key features of the sample Concession general and particular bidding terms, read more...

Here is another example of general bidding terms for a concession agreement terms (in Spanish) for the construction and exploitation of a terminal for solid bulk open to the general traffic, issued by the Port Authority of Alicante.

Latin America and the Caribbean

Costa Rica: Concession Agreement for Moin Container Terminal - Concession agreement for the design, planning, financing, building, exploitation and maintenance of the new Puerto Moín Container Terminal in Costa Rica, located within the existing seaport complex of Limon and Moín. The project involves the Government of Costa Rica, APM Terminals Moín S.A. and APM Terminals Central America B.V. and is governed by the Federal Concessions Act of Public Works with Public Services. The link above highlights salient clauses. Civil law jurisdiction (Spanish).

Honduras: Puerto Cortés Container and Cargo Terminal: Contrato de Fideicomiso para la Estructuración, Desarollo y Financiamiento de la Operación de la Terminal Especializada de Contenidores y Carga General de Puerto Cortés

Management Trust Agreement for the Structuring, Development and Financing of the Operation of the Puerto Cortés Container and Cargo Terminal between the Comisión para la Promoción de Alianzas Públicas-Privadas (COALIANZA), Empresa Nacional Portuaria (National Port Company) and Banco Financiera Comercial Hondurena S.A. (FICOHSA BANK) (Spanish).

Honduras: Puerto Cortés Bulk Cargo Terminal - Contrato de Fideicomiso para la Estructuración, Desarollo y Financiamiento de la Operación de la Terminal des Graneles de Puerto Cortés

Management Trust Agreement for the Structuring, Development and Financing of the Operation of the Puerto Cortés Container and Cargo Terminal between the Comisión para la Promoción de Alianzas Públicas-Privadas (COALIANZA), Empresa Nacional Portuaria (National Port Company) and Banco Atlantida S.A. (Spanish).

South Asia

India: Model Concession Agreement (MCA) for Ports- Model Concession Agreement for Private Sector Projects in Major Ports developed by the Shipping Department of the Government of India with annotations. For key features of a MCA for State Ports see also the Overview of the Framework provided by the Planning Commission of the Government of India.

India, Province of Gujarat Model Port Concession (Draft) - Draft concession agreement between the Gujarat Maritime Board and a private company. The concession agreement was developed in particular for smaller ports. Some areas in the draft might benefit from updating: Issues such as financial leases for equipment and what happens to new structures constructed late into the concession period need to be considered as well as providing for continuing business on termination. For further information on Ports in Gujarat, go to the Gujarat Infrastructure Development Board website. There is also useful information on the website of the Gujarat Maritime Board, including links to the Build-Own-Operate-Transfer (BOOT) law and policy applicable for private sector participation in Gujarat.

Sample Concession Agreement for Port - Sample concession agreement together with definitions schedule, implementation agreement and port services agreement. Drafted for common law jurisdiction but could be adapted to civil law jurisdiction. Relevant where the State wishes to improve port services by introduction of private sector expertise and funding. This is a useful document to form the basis of a port concession agreement, with appropriate adaptation to the specific circumstances.

Sub-Saharan Africa

Sample Concession Agreement for Port - Agreement relating to the concessioning of a port between a port authority and a special purpose company (the Concessionaire). This is a simplified agreement seeking to improve an existing port through private sector involvement. Prepared for civil law jurisdiction and not easily adaptable to a common law jurisdiction.

Pro-forma Port Convention – West Africa (Guinea) - The sample Port Convention provides an example of an agreement on a “build-operate-transfer” model. It is to be signed by the State, the infrastructure owner entity (who will construct the port) and the operating entity (who will operate the port).

Given that in this model, it is private entities who will bear the risk of the financing, design, construction and operation of the port, the Convention is drafted to obtain optimal rights and security for those entities. It provides an example of some of the guarantees which private consortiums may seek from the host government of a developing economy, as preconditions to undertaking critical infrastructure developments. For key features of the Pro-forma Port Convention, read more...

Colombia- Magdalena River Navigability PPP

- This is a public-private partnership to recover the navigability of Magdalena River under a Design, Build, Finance, Operation and Maintenance contract. The parties to the contract are Cormagdalena (special public entity of the national order) and Navelena S.A.S (single purpose corporation.) Term of the contract is 162 months, or 13.5 years, signed on September 13, 2014. Value of the Contract: Around $45 million dollars. Navelena will receive a periodic and variable remuneration depending on

the fulfillment of the established service levels.
- *Esta es una alianza público-privada para la recuperación de la navegabilidad del Río Magdalena bajo la modalidad contractual de diseño, construcción, operación y mantenimiento. Las partes del contrato son Cormagdalena (entidad pública especial del orden nacional) y Navelena S.A.S (sociedad de objeto social único). El término del contrato es de 162 meses, o 13.5 años, el cual fue celebrado el 13 de septiembre de 2014. El valor del contrato es de alrededor de los $45 millones de dólares estadounidenses. Navelena recibirá una remuneración periódica y variable dependiendo del cumplimiento de los niveles de servicio establecidos.*

Further Reading and Resources

- A Framework to Approach Shared Use of Mining-Related Infrastructure by Perrine Toledano, Sophie Thomashausen, Nicolas Maennling, and Alpa Shah, Vale Columbia Center on Sustainable International Investment, Columbia University, 2014. The publication presents an economically, legally and operationally rational framework to enable shared use of mining-related infrastructure, including rail, ports, power, water, and internet and telecommunications (ICT).
- *La experiencia española en concessiones y APPs: Puertos y Aeropuertos, by Andrés Rebollo Fuente, Programa para el Impulso de Asociaciones Publico-Privadas en Estados Mexicanos (PIAPPEM) and Multilateral Investment Fund (MIF) of the Inter-American Development Bank (IADB), 2009 (Spanish).*
- *Beyond the Bottlenecks: Ports in Africa,* Africa Infrastructure Country Diagnostic, Background Paper 8, World Bank 2009.
- United Nations Conference on Trade and Development (UNCTAD) Guidelines for Port Authorities and Governments on the privatization of port facilities, UNCTAD, September 1998 - This report looks at different forms of privatization schemes for ports. It contains sample clauses for leases, concessions and Build-Operate-Transfer (BOT) arrangements together with procedures for tendering, and contents of bidding documents, performance measures to establish true financial value of bids as well as operational performance measures.

Toolkits

- Port Reform Toolkit: Effective Support for Policymakers and Practitioners - World Bank and Public-Private Infrastructure Advisory Facility (PPIAF), second (2nd edition), 2007: The toolkit aims to provide policy makers and practitioners with effective decision-making support in undertaking sustainable and well-considered reforms of public institutions that provide, direct, and regulate port services in developing countries. Module 4 (Legal Tools for Port Reform) includes sample clauses for port concessions and a short list of the important topics usually treated in a concession agreement and related documents. It also contains information on ports laws and ports regulation. Annex I of Module 4 presents a comprehensive checklist of concession/Build-Operate-Transfer (BOT) agreement provisions. The checklist relates to a concession for the management and operation of an existing terminal and a possible extension.
- Developing Best Practices for Promoting Private Sector Investments in Infrastructure - Ports, Asian Development Bank (ADB) 2000 - This volume of a five-volume set reviews the various arrangements used throughout the world to transfer public port activities and assets to the private sector. It examines the trend toward terminal concessions and the transition from operating ports to landlord ports, and considers best practice. Appendix 5 includes useful summaries of six basic contractual relationships that can be used to increase private sector participation in the port sector and the related objectives

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- **Gender & Transport Projects**

Additional Resources

- Selected World Bank Tools
- Municipal Public-Private Partnership Framework
- World Bank Group Climate Toolkits for PPPs

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