

REGULATION OF PORTS AND MULTI-MODAL TRANSPORTATION

By

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Regulation of seaports and multi-modal means of transportation vary with countries, laws of those countries, the degree of competition that exists and particular circumstances that are prevalent in each transport sector. In this paper we will seek to identify the various methods adhered to in other countries and present the pros and cons of each method. Since seaports differ greatly from truck and rail transportation we will separate the discussion into 2 sections.

In most circumstances regulation is sought by countries that are privatizing their transportation system and seek to establish protection for in-country users of the system, at least until sufficient competition is established to create market control.

Regulation in itself brings problems that must be dealt with initially.

- The major problem is that there never seems to be a “sunset” for any government agency, committee, or forum.
- The second greatest problem is the “power” factor of some regulators. Some regulators bask in their own power and seek to establish a greater base for themselves by exercising control over others.
- The 3rd most prevalent problem is that circumstances change with time, but law and government policy never seems to. This problem can destroy the effectiveness of a regulatory body and make them redundant, if they are allowed to continue beyond their useful life.

Regulation also brings problems that emanate from the sector being controlled. Some of these are:

- Entities under regulatory control, that have political influence, seek to by-pass the regulatory agency and attempt to exert political influence on the agency. To protect against this the head of the regulatory agency must be tough and willing to withstand pressure. He must also have law that protects the agency from such practices.
- No one likes to be ruled against, however, in a dispute there is always a winner and a loser, or at least one is perceived. Again political retaliation is sometimes the reaction. The Law is the only protection against such retaliation.
- There must always be the opportunity for anyone who is ruled against to seek redress in a court of law. However, courts must put great emphasis on a regulatory agency’s ruling and seek to prove a gross injustice before ruling against the agency’s decision.

REGULATION OF SEAPORTS

Methods used in Other Countries:

We present examples from 3 sections of the world to show strengths and weaknesses of systems that are in use or proposed for use. Briefly we present below methods used in the United States, Colombia and proposed for India.

United States: In the United States the Federal Maritime Commission was established by the Federal Government even though the seaports were owned and then operated by individual states. The Federal government retained the ownership of land under tidal waters and thereby must maintain those shipping channels to the requirements of the particular harbour. The State maintains ownership of the land and thereby the responsibility for port facilities. This means that the states compete with each other for cargo through their port systems. Competition sometimes creates practices that are not in the best interest of the nation or its transportation system.

The primary reason for the FMC (or any other regulation authority) is to deal with abuses or discrimination in the system, where a monopoly or monopolistic practice exists.

To monitor these possible abuses the FMC was given oversight and organization as follows:

- To serve as an agency reportable to the Administration and not the Congress.
- Assurance that seaports did not compete with each other by using subsidized funds to create a not compensatory predatory pricing structure for the particular port, steamship line or terminal operator.
- That the rate structures of steamship lines did not show unfavourable bias toward particular ports or the nation.
- To approve the tariff rate structure of each Port Authority and Terminal Operator and assure that rates charged to customers reflected a reasonable structure based total operating costs. This prevents a price structure that takes advantage of the source location of the cargo.
- To approve and make public, contracts between port users and the Port/Terminal Operator to assure that contracts did not deviate from the approved tariff unless valid reasons could be given for such deviation that was economically sound.
- The establishment of an Administrative Law Judicial System to hear disputes from all regulated entities and the shipping public.

Note: As long as a regulated entity adhered to the regulatory policies of the FMC, the entity would be given certain immunity from lawsuits.

The FMC has existed for over 100 years in the US, but not without change. Gradually they have relaxed their systems of approvals as competition between the regulated entities became balanced and replaced the need for government monitoring. Some of the relaxed authorities include:

- The necessity of not filing tariffs or contracts if the regulated entity waives legal immunity granted by the FMC.
- Relaxation of proof that prices are compensatory. (Most Ports in the US must now make a profit or at least a positive cash flow, so pricing of individual commodities and services are no longer deemed necessary to monitor closely. This is market forces at work.)
- Steamship lines are sufficient in number, routes served and ports called, so the FMC have relaxed their requirement for filing of public ocean tariffs.
- Since the FMC was created, containerization has occurred, computers have replaced manual methods, terminal equipment has evolved that changed the cost of services, and facilities have been constructed that have actually lowered costs, even with wage increases. All this has made regulation of the industry mostly unnecessary.

Unfortunately, when the FMC was created there was no anticipation of a sunset provision if competition became such that they were considered redundant. The relaxation of certain approvals has helped keep the FMC from redundancy. We feel that

in the future, an administration, in an effort to cut costs, will see the wisdom of competition replacing regulation and the sun will set on the FMC.

India: In India the foremost problem anticipated was “charges billed for services by waterfront entities”. The system in India evolved where, in most cases, port service charges were billed to agents and the agents charged fees that may or may not be reflective of the actual service. Since India was incorporating its ports and concessions were being offered in certain ports, it was deemed necessary that government initiate some type of regulatory control. Unfortunately, complaints from the shipping public encouraged politicians to hastily establish an organization called TAMP (Tariff Authority for Major Ports).

The 1st problem became haste. Prior to legislation there was insufficient study concerning the requirements of a Tariff Authority, so omissions were so extensive that no one could determine what authority TAMP was given, what they were to monitor and how they were to mitigate disputes. The most glaring omissions were (1) grossly insufficient funding of personnel, (2) inadequate government administrative reporting, (3) no formal administrative law procedure to handle disputes and (4) no authority over 22 minor ports.

While the TAMP began its existence immediately after legislation, it also began to get complaints that were difficult and some beyond their perceived authority or knowledge. This brought about a retrenchment process whereby authority and procedure had to be redefined and legislation altered. During this process and without sufficient funding, the complaints continued and had to be handled with as much knowledge the management could muster.

A big lesson is to be learned for a country without maritime regulatory control on what should be done prior to establishing such controls. The lesson is “Know what you want, how it will be structured, where the authority will be placed and study the specific need that the country has.

Our firm was called in to establish the information that should have been prepared prior to legislation. This report included suggestions for goals as follows:

- TAMP is to encourage competitive pricing
- They must protect against monopolies and monopolistic practices
- They are to encourage efficient use of resources where competition does not exist
- TAMP should establish a pricing model for port to utilize that is based on cost of new facilities and not fully depreciated ones. (This is done for supplying capital in the future and not to create a pricing structure for old terminals with which a new terminal cannot compete.)
- They are to encourage uniform tariff categories across the country’s ports.

On the surface this gives the appearance of “Apple Pie” and “motherhood” or who could be against such worthy goals? However, these have given TAMP a base under which it will prepare specific functions to accomplish these goals.

TAMP had to be structured around existing laws, so TAMP reported direct to the Parliament, but coordinated with the Ministry of Transportation. Parliament therefore, could modify or cancel a TAMP decision. The specific functions proposed to augment the goals include:

- A requirement that all port entities file their tariffs with TAMP and receive approval for any rate alterations.

- They would monitor only the major ports since law prohibited monitoring minor ports.
- They would establish a rate setting model for vessel and cargo services.
- They would monitor anyone using port land or facilities which included BOT organizations.
- They would establish a set procedure for filing complaints and guarantee action within 30 days of receipt.
- Complainants would have regress in the court system if they were not satisfied with TAMP's decision.

A major point to TAMP's existence is that there will be a review every 5 years to determine when and if the regulation function will be phased out.

Colombia:

Colombia is a model that works for them, but is not in our opinion, a model for general acceptance in other country situations. After all the ports were privatized, the General Port Superintendent was appointed as the regulatory authority. In the proper practice of a regulatory agency the Port itself is one of the regulated bodies, but in the Columbia experience the Regulator is not regulated. Some of the abuses that the Superintendent is to monitor include:

- Prevent unfair competition
- Monitor a minimum rate of return
- Set the guidelines for tariffs
- Insure that port services are not too expensive.
- Establish and collect a fee for the mitigation of environmental damage.

In reality this is a very limited scope for a port regulator since all tasks other than to set the tariff guidelines and collect fees are subjective in nature. They do not include specific methods for determining "unfair", "minimum" and "too expensive". The collection of fees is not a function of a regulator, but in Colombia it serves its purpose.

While the Superintendent is imminently qualified as a regulator by having 1st hand knowledge of the industry, he is not in a regulatory position as head of an agency that contracts with persons being regulated.

We use this example, as well as the other two, to point out strengths and weaknesses of established systems and to learn from experiences when considering whether or not to have a maritime regulatory body.

INLAND TRANSPORTATION REGULATION

In most countries Inland transportation is not regulated as often as is the maritime sector. The primary reason is that transportation is usually a domestic matter while maritime transportation always crosses borders and international ownerships.

One of the most well known regulators of road and rail transportation was for many years the Interstate Commerce Commission in the United States. The ICC approved rail and truck routings to the point that transportation costs were at high levels to/from certain US destinations since the ICC would not approve additional competition in those corridors. In the 1980s it was determined that the ICC had regulated far beyond the country's need

and was now a protection system for profitability of small truck lines and short line railroads. At that time the ICC was abolished.

The abolition of the ICC was needed because they had become overly bureaucratic, however, their was found to be certain matters of inland transportation that was still required and now no one was authorized to deal with such matters. One such matter was that the North American Free Trade Agreement was now in place and the practice of foreign vehicles moving into the US from northern and southern borders were an issue. Many of these trucks did not meet safety standards, pollution requirement or licensing laws in the US. A few years later the requirement for limited regulation was restudied and a new agency known as the Transportation Safety Board replaced the ICC, but with a greatly modified function.

This example only shows that any type of transportation regulation function must be thoroughly studied with an open mind as to what is needed and what the long term results will be if the function is established.

FORMING A REGULATORY AGENCY

We have presented a few examples of what is being done or has been done and attempted to show the dangers from lack of thinking and not perceiving long term effects from regulation. To go further we present below some of the responsibilities of regulatory organizations, some organization aspects and a sample process on how to approach regulation.

Sample Responsibilities of a Regulation Agency

When it is determined that a country needs a maritime or transportation regulation practice, a review of the regulator's function should be accomplished. Following is a list of some of the more important functions that a regulator may perform.

- Approval of public tariffs and changes thereto.
- Approval of contracts with international entities to assure consistency of practices and rates.
- Adherence to published operating rules and regulations.
- Protection for shippers against predatory rate practices.
- Assure that government services are provided equally to private entities as established by law.
- Monitor ocean-shipping rates to and from the country to determine if all parties are being treated fairly in international shipping tariffs.
- To hear complaints from the shipping public and regulated bodies and expeditiously rule on such complaints.
- To hear matters of inland rate controversies where they are being applied in an inconsistent manner.
- To hear complaints between Private Operators and the Port Authority on matters concerning contract disputes.

Organization Aspects

One of the most important factors of establishing a governmental regulation unit is the reporting authority. The first consideration is that the Authority must not report directly or indirectly to any governmental agency involved in any transportation function. Sooner or later a transportation unit may become involved in a primary or 3rd party case that will require a decision of the regulatory body.

Some of the lines of authority reporting that may be considered are:

- A part of the Judiciary branch of Government
- A part of the Administrative branch, but with direct reporting authority to an agency not connected to Transportation.
- As an independent agency reporting to the President.
- If there is a Maritime Administration, it could be the judicial arm of that Agency.
- An independent Authority formed with non-government employees.
- A department of government reporting direct to the legislative branch.

There are, of course, other possibilities that would have to be reviewed and be considered based on the country need and the organization of the national government.

Process for Establishing a Regulatory Agency

To begin such a process the best approach is to learn from errors made in other countries and applications in other countries that do not apply to your country. The process would flow as follows:

1. Determine if there is a valid need for regulation.
2. Research the laws of the country and determine what is possible and if laws have to be altered to accomplish a regulatory function.
3. Establish a set of goals and direction that is desired based on the particular needs of the country and its water or inland transportation system.
4. Determine how the reporting of such an agency will function in government.
5. Propose that funding for the regulatory agency will be supplied from the national budget and not a fee charged to those who are regulated.
6. Write a law and have it passed that creates the authority base under which it can function from a point of strength.
7. Select a person to head the agency that is an independent minded and fair individual who will administer regulation without fear of political reprisal.
8. Establish a set of functions that determine specifically, "What and who will be monitored".
9. Establish procedures for resolving complaints.
10. Establish procedures of how the staff will conduct the function as a monitor, how complaints will be processed, how tariffs rates will be judged and how communication will be conducted with regulated entities.
11. Above all, make sure that response and resolution of approvals and complaints are expeditious and does not delay rate alterations.