
GOVERNMENT NOTICES

DEPARTMENT OF TRANSPORT

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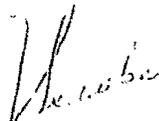
6 August 2009

PORTS REGULATOR

REGULATORY PRINCIPLES

I, Gloria Tomatoe Serobe, Chairman of the Ports Regulator hereby publish the Regulatory Principles developed by the Ports Regulator relating to the principles guiding the Regulator in the proper performance of its functions.

The Regulatory Principles are published for general information and shall come into operation on the date of publication.



GLORIA TOMATOE SEROBE
CHAIRMAN : PORTS REGULATOR

Date: 17 July 2009

**REGULATORY PRINCIPLES OF THE PORTS REGULATOR
2009**

CHAIRMAN'S INTRODUCTION

1.1 The Ports Regulator was established under the provisions of the National Ports Act, 2005. Under this Act, the main functions of the Ports Regulator are to:

- a) exercise economic regulation of the ports system in line with government's strategic objectives;
- b) promote equality of access to ports and to facilities and services provided in ports;
- c) monitor the activities of the National Ports Authority NPA to ensure that it performs its functions in accordance with this Act.

1.2 The Members of the Ports Regulator were appointed in December 2006. Its first meeting was held on 28 March 2007.

The current members of the Ports Regulator are:

- Mrs Gloria Tomatoe Serobe (Chairman)
- Ms Phumzile Langeni
- Ms Tandiwe Njobe
- Mr Andrew Pike
- Mrs Ella Ntshabele
- Dr Brian Gowans
- Mr Randall Howard
- Mr Mawethu Vilana

1.3 The Ports Regulator recognises its obligation to discharge its regulatory responsibilities efficiently, equitably and in the best interests of the people of South Africa as a whole. It acknowledges that regulation can produce gainers and losers; and that it can affect property rights, economic growth and income distribution. It is well aware that regulation generates compliance and other costs which must be measured against the benefits associated with regulatory activity. These principles thus guide the Regulator and inform the expectations that stakeholders can have of the Regulator.

1.4 These Regulatory Principles were developed and determined in the context of the provisions of the National Ports Act, 2005; other relevant legislation; and the policy objectives determined by the

government, and with the input of various stakeholders over the period of its development.

1.5 Government policy with respect to South Africa's commercial ports is as follows:

Vision: *South Africa's commercial ports system should be globally competitive, safe and secure, operating at internationally accepted levels of operational efficiency consistent with the goals and objectives of the Government's macroeconomic strategies. The commercial ports system must serve the economy and meet the needs of port users in a manner which is economically and environmentally sustainable. [White Paper on National Commercial Ports Policy, 2002, p.11]*

Goals:

- *To invest in port infrastructure, superstructure, equipment and system in ways which satisfy social, financial, economic or strategic investment criteria;*
- *To improve the safety, security, reliability, quality and speed of port operations and services;*
- *To enable port users to access the port system in the most efficient way possible;*
- *To promote good employment practices and standards;*
- *To achieve the above goals in a manner which is economically and environmentally sustainable, and minimises negative externality impacts on non-users; and*
- *To promote intermodalism.*

[White Paper on National Commercial Ports Policy, 2002, pp.11-12]

Objectives:

- *Ensure safe affordable, effective and efficient port services;*
- *Encourage fair competition based on transparent rules applied consistently across the transport and port system;*
- *Improve infrastructure and service levels where appropriate, based on user needs;*
- *Ensure safe transportation, a clean environment and service to designated areas;*
- *Establish appropriate institutional arrangements and legislation to support the governance of ports;*

- *Promote the development of an integrated regional production and distribution system of support of government industrial policies;*
- *Facilitate and enhance the expansion of international trade and tourism in general, and export in particular;*
- *Promote the development of an efficient and productive South African port industry capable of competing in international markets;*
- *Establish an appropriate regulatory framework that is also flexible and responsive;*
- *Ensure high quality training and development of human resources;*
- *Promote increased international relations;*
- *Ensure cost effective and efficient port management and operation;*
- *Ensure proactive integration of social, economic and biophysical environmental aspects during the early stages of port planning and throughout the port development cycle including the planning, design, construction, operation and decommissioning of port developments;*
- *Ensure proactive communication and consultation with port stakeholders early on in the port planning stages;*
- *Ensure that strategic port planning is closely aligned with the integrated development planning process of the associated city; and*
- *Promote Black Economic Empowerment and Small, Medium, and Micro Enterprises.*

[White Paper on National Commercial Ports Policy, 2002, p.12]

National Commercial Ports Policy, Basic Principles:

- *National needs, aspirations and requirements shall be of primary consideration;*
- *Consideration of user and other stakeholder needs and views;*
- *Port system development, management and enhancement will primarily remain a national function;*
- *Regulation should be kept to a minimum without compromising national aspirations, safety, health, security, efficiency and environmental sustainability;*

- *Participants in the market should be treated equally and fairly;*
- *The principle of user pays or cost recovery, benchmarked against international best practice to ensure that the costs are globally competitive will be applied as far as possible, including an appropriate return; and*
- *Strategic port planning will include the integration of social and biophysical aspects at the earliest stages to ensure sustainable port development.*

[White Paper on National Commercial Ports Policy, 2002, p.13]

The Ports Regulator will advance these policies at the minimum cost to the South African community through the responsible and efficient exercise of its powers as defined in the National Ports Act, 2005.

The Ports Regulator is committed to the principles of public accountability. Each year it will, amongst other things, commission an independent, developmental evaluation of its performance, and its corporate governance processes for every year following the publishing of the Directives issued under the National Ports Act.

Thank you.

GLORIA TOMATOE SEROBE
CHAIRMAN

REGULATORY PRINCIPLES FOR THE PORTS REGULATOR

1. **Economic regulation shall be exercised such that the benefits of regulation exceed the costs.**

The Ports Regulator maintains that, as a general rule, only regulation which produces a net benefit in terms of the government's national commercial ports policy should be exercised. This is consistent with the principle that: *"Regulation should be kept to a minimum, without compromising national aspirations, safety, health, security, efficiency and environmental sustainability"* [White Paper on National Commercial Ports Policy, 2002, p.13]. The Ports Regulator will, nevertheless, take equity considerations into account as necessary in applying the general rule.

The Ports Regulator will conceptualise benefits in terms of the government's policy objectives for South Africa's commercial ports and will consider all relevant costs in its decision-making. Benefits and costs must necessarily be conceptualised and measured in qualitative as well as quantitative terms. Measuring the costs and benefits of regulation [including compliance costs] is not a straight-forward task. Often, moreover, one stakeholder[s] may enjoy the benefits of regulation while some or all of the costs are borne by others. The Ports Regulator will apply its mind in good faith to such matters.

2. **The Ports Regulator shall exercise competitive neutrality between the public and private spheres.**

Competitive neutrality means that public sector organisations which compete with the private sector should not have competitive advantages, or disadvantages, by virtue of their government ownership or control unless government policy specifically dictates otherwise.

3. **The Ports Regulator shall address certain matters of equity.**

Important matters of equity can arise, for example, when considerations of third party access to infrastructure arise. The Ports Regulator will give special consideration to the principles by which third party claims for access to existing infrastructure are determined and will expect evidence to be presented on this matter in relevant cases.

In the context of the government's Black Economic Empowerment policies, moreover, one of the Ports Regulator's priorities will be to remove artificial barriers to the entry of new participants in the economy of the ports. In general, all barriers to entry will need to be considered in terms of their impact on firms wishing to establish or to expand their business in the ports.

The benefits and costs of regulation and the individuals and social groups to which they accrue all need to be identified in the regulatory process. A regulation which confers benefits on one party may impose costs disproportionately on another without compensation. Even though, at an aggregate level, the benefits may exceed the costs in this case, the regulation may not be acceptable on equity grounds unless compensatory arrangements are feasible.

4. The Ports Regulator shall exercise its tariff approval powers using the Price Cap Approach.

The Ports Regulator will utilise a price cap form of regulation, and incorporate rate-of-return approaches, among others, in its tariff rebasing processes. The price cap emphasis is favoured, on balance, because, amongst other things, of the incentives which it provides to organisations to devise and implement cost minimising/productivity enhancing strategies, as well as the information asymmetries that abound in the initial phases of the Regulator's existence.

The Ports Regulator will place great emphasis in its evaluation of proposed tariffs on evidence that such strategies are being implemented to good effect. The Ports Regulator will not permit tariff increases to subsidize poor management practices, sub-standard management information systems, any other inefficiencies including those which are associated with monopolistic or quasi-monopolistic industry structures and/or practices, and so on. A tariff re-basing shall be performed every five years to set appropriate incentives for a timeous and cost-effective investment programme in appropriate port infrastructure. The first tariff re-basing shall occur two years after the first Directives are published.

As a general rule, the Ports Regulator will require that proposals to vary tariffs must demonstrate, amongst other things, that such variations serve the government's national commercial ports policy and the objects of the National Ports Act, 2005, and do not contain a monopoly premium.

5. The regulation of service quality is a means by which regulated competition in the provision of port services may be promoted.

Performance standards are typically involved in this type of regulation. Such standards can be reviewed periodically by the Ports Regulator on its own initiative or by application from an interested party. The Ports Regulator acknowledges that minimum standards must relate to those variables over which regulatees have a meaningful degree of control, and that the application of minimum standards to each and every stage in the ports production process would not always generate net benefits. Appropriate minimum standards are best determined through a process which includes public consultation.

Defining performance standards is also an appropriate means of regulating matters of servicing times and safety. The Ports Regulator would not necessarily wish to be prescriptive in the choice of techniques used to meet, or exceed, the standards. Such decisions, in the first instance, are best left to the relevant port organisations.

6. The Ports Regulator, as a general rule, will initially seek to employ a "light touch" form of regulation.

If, however, inappropriate advantage is taken of this, or it proves to be ineffective for other reasons, then the Ports Regulator will consider more prescriptive forms of regulation.

7. Economic regulation may be effected by means which include incentive-based, market oriented instruments or command-and-control instruments.

In submissions to, and in hearings conducted by, the Ports Regulator, evidence may be presented as to which matters are best handled by incentive-based, market oriented instruments, which are best handled by command-and-control instruments, and which are most efficiently regulated by a mix of instruments. This may include, but are not limited to, evidence concerning the extent, and in which instances, the Ports Regulator should rely on, and encourage, self-regulation. Agreements negotiated through self-regulation processes may, nevertheless, be subject to a public interest test at the discretion the Ports Regulator.

8. The Regulator shall explore all legal alternatives to ensure the spirit and the letter of the National Ports Act is followed.

Reliance on statutory powers exclusively may be an inefficient way of securing compliance with regulatory decisions. Under some circumstances, there may be other incentives for regulatees to comply.

The Ports Regulator will explore the appropriateness of voluntary agreements as a means of negotiated, joint regulation by the Ports Regulator and relevant parties. It will also use moral suasion to encourage compliance with its decisions, and will analyse the lessons which can be learned from international experience of ports regulation in matters of implementation and compliance.

9. Regulatory Impact Statements [RIS] shall be developed for significant regulatory interventions.

In many international jurisdictions, if a proposed regulation is likely to impose appreciable costs on the community or part of the community, a Regulatory Impact Statement must be prepared before the regulation is made. Its purpose is to explain the need for the regulation and to set out the benefits and costs which would flow from its adoption. It also explains if any alternatives to regulation were considered and why they were rejected. The Ports Regulator proposes to follow this practice. It may also produce *ex post* RIS whereby the actual costs and benefits of regulation are determined in the light of experience in especially important cases.

10. The Regulator shall foster competition in the ports sector where appropriate

Section 30 [2] [b] of the National Ports Act, 2005 requires the Ports Regulator to "... *negotiate and conclude an agreement with the Competition Commission ... to co-ordinate and harmonise the exercise of jurisdiction over competition matters, ...*".

Without in any way attempting or wishing to pre-empt any aspect of these negotiations, the Ports Regulator notes that, in the absence of economic regulatory oversight, a port operator with a dominant or monopoly position could attempt to engage in certain anti-competitive practices, the effect of which could be to drive out potential competitors and increase costs to port users and the economy at large. Such practices could include:

- Price gouging - using monopoly power to charge excessive tariffs for port services.

- Service bundling - extending monopoly power in one area of port operations to another potentially competitive area. This is also referred to as a tying arrangement.
- Increasing entry barriers - constructing hurdles to increase the share of the market needed to operate at maximum efficient scale, raising absolute costs of entry, or by tending to foreclose competitors from needed resources or outlets.
- Raising rival's cost - increasing the cost of services required by a rival to place him/her at a competitive disadvantage.
- Exclusive dealing - requiring suppliers to sell only to them and not to any potential competitor.
- Predatory pricing - selling services below cost to induce a rival's exit from the market, deter future entry or dissuade a rival from future competition.
- Price discrimination - similar to predatory pricing in that selective price discrimination by a powerful seller can eliminate competition or otherwise entrench the discriminating seller's monopoly power.

The Ports Regulator also notes that issues of competition *between* South Africa's commercial ports may impact on the achievement of the government's commercial ports policy. The National Ports Act, 2005, furthermore, requires the Ports Regulator to "*promote regulated competition*" [Section 30 [2] [e]]. The detailed meaning to be given to this legislative instruction is a further matter which will be discussed with the Competition Commission.

In some circumstances, proposed regulatory measures may be likely to restrict competition. The Ports Regulator would be reluctant to act in this way unless it can be demonstrated that the government's commercial ports objectives can best be achieved by restricting competition. This matter will also be a subject of the discussions which the Ports Regulator must conduct with the Competition Commission under Section 30 of the National Ports Act, 2005.

11. Co-operative engagement with other regulators

There are other regulatory matters, such as some environmental issues in the ports, which may come under the jurisdiction of the Ports Regulator, but which may be better handled by means of agreements with other regulatory bodies.

The Ports Regulator will identify all the other regulatory bodies which have mandates which overlap in any way that of the Ports Regulator. It will

negotiate the principles by which matters of overlapping responsibility will be governed.

12. Consultation on matters of policy trade-offs.

Regulating in pursuit of a given government policy objective may inhibit the achievement of another [others]. The Ports Regulator will seek to take into account the likely effects of its regulatory decisions on the wider economy. Where significant trade-offs between government policy objectives may arise in the ports regulatory process, the Ports Regulator will invite government to be independently represented in such proceedings to define the dimensions of any necessary policy trade-offs.

13. Existing regulatory regimes and institutions to be considered and consulted where indirect impacts manifest.

Regulation does not take place in a regulatory vacuum. There is an existing pattern of regulation within a given industry and elsewhere in the economy. Any new regulations may change this significantly.

The Ports Regulator will consider evidence in any hearing, or otherwise, which will assist it to take into account the likely impact of a proposed regulation on existing regulatory outcomes.

14. System impact perspectives shall inform the Regulator in its decisions.

The Ports Regulator is aware that regulation may have unintended consequences. The Ports Regulator will be sensitive to the need to identify and manage the possibility of unintended consequences of its regulation.

An enterprise, moreover, subject to the regulation of certain aspects of its activities may respond strategically and seek to circumvent the impact of regulation by altering prices, costs, contracts and so on in those of its activities which are not regulated. The Ports Regulator will seek to manage any undesirable strategic responses to regulation without inappropriate "tit-for-tat" responses.

15. Neutrality as to the interests of all stakeholders in the industry

Industry, and other, pressures may be placed on the Ports Regulator for regulation which favours certain interests. Certain organisations, for example, may argue strongly for regulation which insulates them from desirable types and levels of competition. The literature on economic regulation also raises the

risk that regulators may be subject to forms of external and/or internal “capture”. The Ports Regulator acknowledges a responsibility to advance the government’s national commercial port’s policy without fear or favour.

16. Protection of sensitive information

Stakeholders of the Ports Regulator may claim “commercial-in-confidence” standing for information requested by the Ports Regulator, or for information supplied to the Ports Regulator. The Ports Regulator will consider applications for “commercial-in-confidence” status to be granted to information supplied to the Ports Regulator on a case by case basis in terms of the Ports Regulator’s Directives.

17. The Regulator shall actively assess the accuracy and appropriateness of all information submitted

An enterprise can possess information on, say, technology which a regulator does not have and cannot directly observe. A possible consequence is that the regulatee can extract an informational rent, by manipulating the information it provides to the regulator in order to obtain favourable regulatory measures. The Ports Regulator will take steps to identify and to efficiently mitigate this risk.

18. All relationships between connected parties will be assessed and considered by the measure of public interest.

The National Port Authority is the sole landlord in all South African commercial ports. Transnet Port Terminals [TPT], a division of Transnet Limited, is a significant operator in all South Africa’s commercial ports. As appropriate, the Ports Regulator will require convincing evidence that the commercial and other relevant relationships between NPA and TPT, and the commercial strategies employed by NPA and/or TPT to achieve their objectives, are necessarily in the public interest.

19. The Regulator shall actively monitor the ports industry.

The primary form of engagement of the Regulator in its quasi-judicial role will be on initiative of interested and affected parties, but the Regulator shall initiate its own action where it deems appropriate. Apart from those provisions of the National Ports Act, 2005 which require the Ports Regulator to take the initiative, the Ports Regulator will rely principally on interested parties to bring matters before it through the appeal and complaints processes as defined in the Act, Regulations and Directives. There may, by the same token, be

occasions on which the Ports Regulator will take the initiative on its own authority and conduct hearings on, or otherwise deal with, certain matters within its jurisdiction.

20. The Regulator shall publically engage stakeholders in the process whenever nationally significant issues are under consideration.

When the Ports Regulator exercises its powers under the National Ports Act, 2005, in especially significant cases it will consider issuing a discussion paper and/or a preliminary statement of findings for stakeholder and/or public response.

21. The Regulator shall take consideration of the impacts of its actions on the external and internal views of the economy as an investment destination.

South Africa's reputation as a destination for both domestic and foreign investment will be influenced by the credibility of the Ports Regulator and its decisions.

The Ports Regulator will do all that it reasonably can to ensure credibility with existing and potential investors and other stakeholders in South Africa's commercial ports. It will consult with, and will appreciate feedback from, all South Africans and other interested parties on how regulatory credibility can be enhanced.

22. Periodic regulatory review

The Ports Regulator will seek public submissions every 5 years on the quality and relevance of its regulatory policies and methods. These shall be aligned with the re-basing cycles, and other regulatory development cycles.