

Friday 27 June

Is Public Authority Still Necessary Following Privatisation

Dr Jean Grosdidier De Matons
International Transport Consultant

IS A PUBLIC AUTHORITY STILL NECESSARY FOLLOWING PRIVATIZATION?

J. Grosdidier de Matons, Ph.D.
International Transport Consultant

Ladies and Gentlemen,

It is difficult, when you make an intervention after so many distinguished speakers, to say something more and anything else than what they have said already. As this conference developed, I became more and more concerned, if not frankly aghast, at the idea that I would have nothing left to deliver. I shall try to avoid here to be repetitive. If I am, however, please accept my apologies.

I

We are here facing a problem which is not simple: is a public authority still necessary in ports following privatization? The respected and learned Professor Richard O. Goss examined the problem in *Maritime Policy and Management* (Cardiff, 1990) under the heading "*Are port authorities necessary?*". He came with the timid conclusion that some form of light port authority was justified, as a holder of property rights, as a planner, because of the existence of public goods in ports, since externalities had to be dealt with, and to promote efficiency. For others, particularly for port managers or politicians in some developing countries, the question makes no sense; the issue is rather to limit the extent of privatization to the **minimum**, rather than eliminating the public port authority or public control over ports. Few authors have pleaded for the complete elimination of the public port authority.

In addition, the word "privatization" itself is terribly vague. Privatization takes place only when there is a sale of public property to private individuals. In that respect, only the United Kingdom, following its 1991 Ports Act, actually privatized ports. In most if not all other countries, most so-called privatization schemes were the development of private intervention in ports, something quite different from privatization, and which had been in existence for some time.

Private intervention in ports took the form of either participation to management in board of directors or advisory boards. Or, it was implemented through build-operate-transfer operations, concessions, leases, licenses, etc, all centuries-old procedures for the use of public property by private operators, or for the performance or delivery of public services. It may have been necessary to improve and to modernize these procedures. It remained that they were well-known already; their introduction cannot be considered as a novelty, even less as a revolution.

I propose to examine rapidly the subject matter in two points. The first is to find out why port authorities have a public character. The second is to determine what can be left now of their public character, if such a public character is justified.

Some forty years ago the professional literature was full of developments on the public port authority, seen as the quasi perfect system of port management- in the form of the statutory port corporation. The statutory port corporation was a body corporate **in** its form (independent management) but had no shareholders. It was therefore established by statute, by the free will of representatives of the people, assembled in parliament, not by the free will of associates who would take responsibility for it and risk their own money in the business. Clearly, such an arrangement could make it only a public body; those who were appointed to run such a business could be only public appointees and had to report to the public. If not, to whom should they have reported?

The point is important. because the professional literature has been full of the notion that ports should be kept "out of politics". it has also been stated that department managers of a port authority should constitute the board of directors of a port authority and run the authority "as a commercial business", independently of "any outside or political interference". Sorry, but this does not stand examination. First, when there are no shareholders, a corporation is a corporation by name only, where corporate management is only a technique of management of assets earmarked (in that case by Government) for a specific purpose. It does not constitute a body resulting from the *affectio societatis* of associates. Second, politics is the business of the city and of its citizens (we all know that polis in Greek is the city). A public body, that is a body established by Government, is in politics up to its shoulders, it exists only for the implementation of a policy; outside interference is the interference of the representatives of the owners. that is of the shareholders.

Granted, it has been said that shareholders, were sometimes sheep, sometimes tigers, always animals, to be treated like mushrooms, that is kept in the dark and fed with garbage. If this is the basis on which some port authorities have been managed in the past, their failure in public opinion is not surprising and it is quite normal that any scheme of port privatization has been considered better than management by a statutory corporation. In one of his fables, LaFontaine shows a bat -in French a chauve-souris or bald mouse- disputing first with birds and then with rats and saying successively: "I am a bird, see my wings " and "I am a mouse- long live the rats". As it has been often the case in nationalized industries, the statutory port corporation, under the control of small groups of cronies who organized their respective careers through mutual agreement, the public port corporation has developed a system of niches, by which it draws the best of the public sector and the best of the private sector, so that its management can live happily ever after by exploiting to a maximum any economic rents available and by reporting to nobody . There are definitive signs, however, that the private port industry tends to follow similar policies.

Why have been ports public after all? Public port administration means port in public policies, ports in politics. In all countries, it has a similar origin: the need to control the foreshore and adjoining navigable waters. Ports are in politics because there is a government policy regarding scarce land and other resources on the foreshore; the legal regime of shoreland derived from its economic characteristics. As regard location, ports are unique; as such, they are of interest to all, and therefore are of public interest. For that purpose, Roman Law built the concept that the foreshore was *in dominium populi*, that is for all the people

to use freely, under the authority of government. With five consequences: (i) first the foreshore, that is the port, would be freely accessible to all, since it belonged to all; (ii) second, being open to all, competition would exist, whenever possible and reasonable, between port operators; (iii) third, the foreshore could not be sold to any private party without the agreement of all, since it was common property; (iv) for the port would be kept under some public management, since government represented the country; and (v) five, such management would be in the common interest, not exclusively in any corporate interest (including the interest of the corporate body to which management powers had been delegated) since the owners were the people. In different terms, we find here all the elements listed by Professor R. Goss to justify public intervention in-port.

All this makes a pretty solid basis for public port management; it does not exclude intervention of the private sector. Quite to the contrary, it encourages it and intra-port competition. Because the port is public, that is open to all, private sector intervention in operations is the norm; privatization is always present in a landlord or tool port. But such intervention and such presence take place only in the frame work of the public interest, through concessions, licenses, leases, etc. Significantly, the build-operate-transfer scheme, presented to day as a novelty, has been in existence in the form of *the concessio* in Roman Law since the earlier treatises at our disposal.

The Roman law construction around the notion of public interest has supported the principles of port management in continental Europe for some two thousand years, and has been affirmed by courts and legislators alike. It has known a number of legal variations resulting, for example, from the development of the public interest doctrine in the more elaborate public service doctrine. Importantly, it has been the doctrine on which rests the system of port administration in the United States since 1910, after the failure of the privatization of ports by railway companies in the XIXth century and the re-publicizing of ports which resulted. To summarize, the public control of the port and the operation of the public port in a common, rather than in a corporate interest, has been a guarantee of the presence and protection of private interests.

The extension of privatization in this type of port, while raising issues, because of the basic principle that some public control remains to be exercised, has not been a sanguine problem in this type of port-but the development of centuries-old policies. English Law constructed things differently by giving to the Crown a private property right on the foreshore, permitting the sale of land and therefore of ports. But it submitted this private right to the public right of navigation, which gave the public the right to freely use the foreshore and port facilities for its trade. The sovereign, or the Crown, was the trustee of the public right of navigation. This original legal construction, as a consequence, had an impact similar to that of Roman law, basically of free and competitive use of the foreshore by private parties, under the protection and control of agents of the sovereign, originally the harbour masters.

The sale of the private property rights of the Crown in Great Britain, starting in the late Middle Ages and accelerating in the XVIIth century, weakened the rights of the public to free access to the foreshore. Ports were fully private: private property of soil and buildings, private and monopolistic operations, and free choice of users under freely negotiated contracts. In the United Kingdom, as in the United States in the XIXth century, privatization deprived the public of its rights, without compensation. The creation of port authorities in the form of statutory corporations, starting in 1860, resulted not only from the financial failure of the first generation of privatized ports. It was a reaction in favor of a recognition of public rights on the foreshore and on ports, which was the reason why these ports authorities were denominated trust ports. The Mersey Dock and Harbour Board of Liverpool, the first statutory port corporation, was established because the municipality of Liverpool abused its ownership of port facilities: the port was privatized for its benefit, not for the benefit of traffic. The Bombay Port Trust was established a few years later because the East India Company was acquiring too much land on the foreshore and was therefore privatizing what should have remained the property of all. Not one statutory port corporation has been established in

history without consideration of the public interest and without a reference to the notion of trust to the public. But, over the years, and by insisting on their commercial management (a sound management principle), statutory port authorities have reduced or eliminated private sector intervention. Corporatisation has meant the development of the private interests of the public port authority itself, the authority has become an egotistic, self-centered, monopolistic agency performing all or most port operations on force account.

As a result, the issue of privatization, that is of transfer of property of the agency to the private sector has been both sanguine and simple. Sanguine, because any partial transfer of port property to the private sector translates in a levy on the self-contained system of the service port authority, with associated financial losses. Simple, because, the public interest being no longer a criteria of management, the objectives of the port agency - maximizing its financial return - are the same whatever its regime of ownership.

There are variations around the two basic schemes described above. Specially, the issue of dock labour blurs the picture in many ports and in many countries, where privatization has been used mainly to resolve that issue.

It results from the above that the answer to the question: "is a public authority still necessary following privatization" depends highly on the type of basic approach adopted. If the approach is the first one: ports are businesses affected with a public interest and open to all, the operators operating more or less in competition, then a public authority is automatically necessary. If ports are pure corporate ventures operating in their own self-interest, for the better and for the worse, and then there may be no room for any public authority of any kind.

In fact, a detailed examination of legislation and practices in different countries shows that the reality is not as clear cut. On the one side, no port is really without some public character. On the other, no private port has reached the objectives of the pure public port: free access of all, competition, etc. It is significant that private ports are anxious to select these activities that maximize financial revenues; few private ports, for example, are disposed to accept money-losing fishing vessels accommodation together with container terminals. A few additional points are significant.

First, a number of privatized ports kept some public character. If I am not mistaken the private ports established by the 1991 Ports Act, in the United Kingdom, have kept the benefits of the laws on condemnation of private land for public purposes. Still, there can be no condemnation of land without recourse to the notion of public interest. Hence ports keep some public character.

Second, there has been, in the general public, a growing suspicion of abuses of monopolies by private ports (no competition between terminals, all port-controlled), and of the private ports invading the transport (e.g. trucking) sector at the expenses of other transport industries that do not have the opportunity of operating ports. Private ports are therefore in monopolistic position here and in a competitive position there. In both cases, they are at their advantage. Still, any monopoly calls for regulation, again in the public interest. As regards Europe, there is little doubt that one day or another, the stipulations of the Rome treaty will apply to ports and I wish plenty of luck to monopolistic operators when Brussels starts looking into their practices.

Third, when the Chamber of Commerce of Calais showed interest for participating in the privatization of the Port of Dover, there was an uproar in the United Kingdom; the privatization scheme was dropped at a remarkable speed, given the traditional slow pace at which Whitehall usually operates. How come that foreigners might control a port in the United Kingdom? But how come that it was an issue since ports are purely commercial ventures? It should not matter more than Harrods being controlled by Egyptian interests. What would have been public reaction in the United Kingdom if the sale of Baring to Dutch

interests for f 1.00 had included the sale of major port assets? What if foreign interests close a private port which they have been able to take control of through the stock market?

Fourth, even though the traditional service port authorities have managed to forget and to bury their original role as *trustports*, that is as agencies established for the common good, port legislation in many countries limited their jurisdiction, precisely in the public interest. For example, there are very few, if any, port acts in countries of English law which leave a free hand to a port authority to sell land or buildings. A ministerial and sometimes a full Cabinet decision is needed; the control of land transactions is in fact stricter in many in these countries than it is in countries of administrative law, where the rules of the "domaine public" are applicable but where these matters are settled at administrative level between the port agency and the Government land and estate agencies.

Fifth, and lastly, the more the private sector is involved in port operations, the more ports are privatized, the less government is likely to be indifferent to performance, results, long term plans, real estate and construction policies, etc. In an illuminating essay, Mr J. Don Brison, President and Chief executive officer of the Port of New Orleans I stated that *"a critically important service performed on port authority facilities for decades by a certain company can be diminished or impaired overnight by a decision made in corporate headquarters far from the port "... "a port authority that has invested hundred of millions of dollars in terminal facilities in a good-faith reliance upon the service providers should monitor and understand the plans and commitments of these service providers"*. Indeed, if public port authorities have invested in the past in channels, berths and terminals, it was because of a market failure: the private sector was not interested in generating public good through long term public investments. Privatization can be viewed as a transposition of public policy by which *"objectives to generate positive results for the public good are shifted from the public to the private sector"* (Brison, at 12). But it is clear that if the private sector must now run the major financial risks associated to large port infrastructure, it must enjoy more freedom of planning and management than in the past. The legal framework of concessions, BOT and leases must be adjusted accordingly,

It seems difficult to spare some degree of public monitoring of port activities. Government **cannot** remain indifferent to the use of unique foreshore land and to large investments which have a major environmental, road traffic, architectural, aesthetic, etc. impact. There will always be some port authority, and no port will be as free and independent as the baker at the corner of the street is. There seems to be an agreement on this.

The port authority may be a set of legal arrangements directly administered by a Minister, assisted or not by some form of port council. With the exception of the port council, this is basically the British set-up. Incidentally the magnitude of legislation relating to ports, in the United Kingdom even after privatization, is there to demonstrate that ports are less "private" than it would seem.

The port authority may be a local agency, either government or municipal, or regional. This is the present landlord or tool port authority. It would be likely to be more modest than the present port authorities, most of which are grossly overstaffed, and tend to be more and more. It would deliberately privatize any revenue earning activity. At the limit, the port authority could be reduced to a small team of economic and engineering planners operating a set of contracts (concessions, leases, BOT, etc) with different port operators and owners of facilities. Beyond its regulatory role, such a port authority would remain in control of land and land use policies. It would derive its revenue from fees and rents from operators and would abstain of any commercial activity.

The conclusion is clear: contrary to general opinion, privatization does not imply that public port

authorities should have a more "commercial" approach. Port authority managers, while having a perfect understanding of the commercial operations performed by the private operators, will need to be first class public administrator. because their main objective will be the protection of the common interest.or public good. It will be a very difficult task,of monitoring rather than of control, of listening as well as of advising, of recommending rather than of prohibiting, of respect of the financial imperatives of the operators and of the care of the economic objectives of the community. Professor R. Goss, quoted at the beginning of this short lecture was right in listing property rights, the existence of public goods, externalities, etc as valid causes of the existence of port authority. Each of these is a different aspect of the public interest. Altogether they constitute a permanent body of presumptions in favor of some degree of public port administration, however light such administration may, and should be. If public port administration is organized on **that** basis, it will be a trusteeship for the common good and port authorities will, once again, deserve their names of *trustports*.