

Peru

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GENERAL

Key ports

1 | Which are the key ports in your jurisdiction and what sort of facilities do they comprise? What is the primary purpose of the ports?

The Peruvian port system has more than 100 port facilities, which are classified as marine, river and lake ports. In spite of such port facilities, maritime commerce in Peru is mainly concentrated on eight major coastal ports: Callao, Talara, Paita, Salaverry, Chimbote, San Martin (Pisco), Ilo and Matarani.

Out of these ports, Callao is the most important in terms of cargo movement, since 70 per cent of the total cargo in Peru is loaded and discharged in this port. In addition, it has positioned itself as a regional hub, considered the most important container transshipment port on the west coast of South America.

The major private maritime ports and terminals in Peru offer the following facilities, from north to south:

- Port of Talara (operated by Petroperu). This is a pier for loading and discharging various types of hydrocarbons such as oil liquid cargo, including industrial fuels and liquefied petroleum gas (LPG) and one buoy for the discharge of dirty products.
- Port Terminal of Paita (operated by TPE). It mainly loads and discharges agricultural, natural and frozen products, as well as grain, minerals and fishing products.
- Pier of Bayovar (operated by Valle Do Rio). This is a pier for the loading of phosphates and other minerals.
- Port of Salaverry (operation awarded to TRAMARSA in 2018). It consists of two piers: one for general cargo and one for sugar and ethanol. It also contains a multi-buoy terminal, operated by Petroperu, for liquid cargo.
- Piers of Chimbote (operated by Siderperu). Two piers for the loading and discharge of iron ore, coal and steel cargoes.
- Pier Punta Lobitos (operated by Antamina) specialises in bulk cargoes such as copper and zinc concentrates.
- Port of Callao, which contains four terminals and berths. DP World Callao operates the south terminal, and APM Terminals operates the north terminal and Pier 7, which specialises in hydrocarbons. Finally, Transportadora Callao SA is in charge of the mineral pier located at the northernmost side of the port, which has access via a railway and consists of an isolated belt of 3.1 kilometres. The Port of Callao specialises in containerised cargo and general cargo such as:
 - metals;
 - grains;
 - fertilisers and chemicals;
 - coal;
 - vegetables;

- fish oil;
- machinery;
- mineral concentrates; and
- hydrocarbons including liquefied gas.
- Pier of Conchan (operated by Cementos Lima). Its main activity is the export of cement and the import of coal.
- Multi-buoy Terminal of Conchan (operated by Petroperu). Its main activity is the coastal trade of oil cargo and industrial fuels.
- Pier of Melchorita (operated by Peru LNG). This is a gas liquefaction plant that is the first of its kind in South America for the export of liquid natural gas (LNG).
- Offshore terminal of Camisea at Pisco (operated by Pluspetrol). Its main activity is the coastal trade of LPG and white and dirty oil cargo, as well as export of Naftas.
- Port of San Martin at Pisco (operated by Terminales Portuarios Paracas). Its main activity is scrap and bulk cargoes including grain, maize, fishmeal and steel cargoes; general cargo, containers and machinery.
- Pier San Nicolas (operated by Shougang Hierro Peru) specialises in bulk cargo (iron ore concentrates) and liquid cargo (diesel).
- Port of Matarani (operated by TISUR). This port facility has access via road and rail. This is a port for loading and discharging grains and minerals.
- Port of Ilo (operated by the National Company of Ports (ENAPU)). Its main activity is the import and export of cargo in pallets and containers. It is mainly used for serving Bolivia. There is also a pier operated by Southern Peru Copper Corporation. Its main activity is the coastal trade of liquid cargo (chemicals) and the export of copper concentrates.

Reform and port models

2 | Describe any port reform that has been undertaken over the past few decades and the principal port model or models in your jurisdiction.

The main port reform undertaken by the government is applied through the Law of the National Port System, modified by Legislative Decree No. 1,022, which entered into force in 2003. It was enacted to modernise the Peruvian Port System, promoting private sector investment in port infrastructure. Further, this law provides a new legal and regulatory framework that guarantees legal certainty and stability to a booming sector.

In this regard, there are substantial reforms such as the creation of the National Port Authority (APN), which is a public entity ascribed to the Ministry of Transport and Communications. It was created to promote private investment in ports, improve port infrastructure and design a new model of port services.

Both landlord and terminal port models apply in Peru. Peru cedes the administration of its ports by means of a concession contract in favour of the private sector.

State development policy

3 | Is there an overall state policy for the development of ports in your jurisdiction?

Peru has a National Port Development Plan, which was enacted by means of Supreme Decree No. 009-2012 on 11 August 2012.

This official document focuses on modernising infrastructure and services to bring them up to the levels necessary to allow the country to compete internationally. The framework includes putting in place national and regional port authorities, and issuing regulations clarifying the working relations between these authorities, the Ministry of Transport and other relevant regulatory agencies.

Furthermore, the Law of the National Port System establishes, among other things, the following port policies:

- the promotion and planning of competitive port services and national, regional and international trade;
- the promotion of coastal trade and multimodal transport;
- the promotion of activities to offer aggregate value to the services provided by port facilities;
- the protection of the environment; and
- the preservation of the national port heritage.

Green ports

4 | What 'green port' principles are proposed or required for ports and terminals in your jurisdiction?

There are no green port principles or regulations in the Peruvian legal framework.

LEGISLATIVE FRAMEWORK AND REGULATION

Development framework

5 | Is there a legislative framework for port development or operations in your jurisdiction?

Apart from the Law of the National Port System and the National Port Development Plan, there is the Law of Public-Private Partnership (PPP) dated 25 September 2015 (Legislative Decree No. 1224) and its regulations. These rules set out the classification of, among other things, PPP, financial and non-financial guarantees, private finance initiative, rates of return and proceedings regarding the declaration of interest of private initiatives.

Regulatory authorities

6 | Is there a regulatory authority for each port or for all ports in your jurisdiction?

OSITRAN is the agency that controls the execution of the port concession, including the regulation of tariffs as well as deciding claims on appeal by port users against the corresponding ports. Peruvian regulations also provide shared functions to the APN and the General Directorate of Captaincies (DICAPI) for the monitoring and surveillance of national ports. These institutions regulate the applicable policies at national level, but nonetheless, the execution of these policies is performed through the regional port authorities and port captaincies.

7 | What are the key competences and powers of the port regulatory authority in your jurisdiction?

The APN establishes their main competences as follows:

- carrying out the strategy for public investments and inviting private investors for the development of port services;
- promoting concessions of port facilities to the private sector and protecting the interests of port users;
- coordinating the integration of port terminals, infrastructure and port facilities into the national port system, and promoting its development; and
- promoting the modernisation of ports and the preservation of the environment.

OSITRAN regulates the execution of concessions and port tariffs. It also acts as a second instance for claims by port users.

Harbourmasters

8 | How is a harbourmaster for a port in your jurisdiction appointed?

The institution in charge of designating harbourmasters for each port is DICAPI, the Maritime Authority in Peru. The harbourmaster must be a navy officer specialised in coastguard activities.

Competition

9 | Are ports in your jurisdiction subject to specific national competition rules?

All Peruvian ports, including offshore rig facilities, are regulated under the Law of the National Port System dated 1 March 2003 and its regulations.

Tariffs

10 | Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdictions and how are tariffs collected?

Yes, the tariffs are subject to regulation. The collection method of these tariffs are as per the internal rules of each port or terminal.

11 | Are there restrictions relating to the currency applied to the tariffs or to any fees that are payable by a port operator to the government or port authority? Are any specific currency conditions imposed on port operators more generally?

There is no restriction other than what is agreed in the concession agreement between port operator and the Peruvian state. The currency is usually fixed in US dollars.

Public service obligations

12 | Does the state have any public service obligations in relation to port access or services? Can it satisfy these obligations through a contract with a private party?

As established in concession agreements, the state provides facilities to allow appropriate port access via land or sea. In such contracts, the state and the private entity agree to cooperate to provide safe access to the port.

Joint ventures

- 13 | Can a state entity enter into a joint venture with a port operator for the development or operation of a port in your jurisdiction? Is the state's stake in the venture subject to any percentage threshold?

No. The state has no participation in the administration or operation of any port or terminal in a joint venture model.

However, some port facilities are administrated by ENAPU. The participation of ENAPU as a national port operator has decreased over the years, as the current port policy of Peru is to give in concession its ports and terminals to the private sector.

Foreign participation

- 14 | Are there restrictions on foreign participation in port projects?

No. However, at present there is no longer a need to register in the National Register of Suppliers.

PUBLIC PROCUREMENT AND PPP

Legislation

- 15 | Is the legislation governing procurement and PPP general or specific?

Supreme Decree No. 245-2017-EF, which unites Legislative Decree No. 1,224 and 1,251, issued on 30 August 2017 approves and regulates the PPP Law, is mainly of general character and is applicable nationwide. It empowers the national entity Proinversion as the administrative authority in charge of the supervision of all PPP proceedings throughout its stages. It also brings assistance to regional and local governments in the promotion of their own PPP.

Proposal consideration

- 16 | May the government or relevant port authority consider proposals for port privatisation/PPP other than as part of a formal tender?

The Peruvian government accepts private investment proposals that are not part of an existing formal tender, through the National Agency of Promotion of Private Investment (Proinversion) created by Supreme Decree No. 060-97-PCM, to promote the competitiveness of Peru and sustainable development.

If interest is declared, Proinversion is instructed to analyse the proposal and liaise with the party and the sector in order to determine the definitive interest of the latter in the original proposal or a revised alternative. Only the Ministry of Transport may declare its definitive interest (with a declaration of interest) after a period of time and a comprehensive assessment. If so, the law provides for a term of 90 days for third parties to file alternative proposals.

If there is more than one competitor with a project proposal for or on a given port, Proinversion launches a process (ie, bid terms and contracts) according to the regular terms for any PPP initiative. If there are no competitors after 90 days, the project is awarded to the original proposer party directly.

A PPP proposal can be submitted by any public entity of the three levels of government (national, regional and local) – in which case it is called a 'PPP by public initiative' – and also by any private investor who submits a project to Proinversion or the private investment promoting entities in regional or local governments.

For instance, the government is presently evaluating private proposals for operating the ports of Salaverry, Ilo and Chimbote, which

are now administrated by ENAPU. These three ports will probably be granted in concession in 2018 to the companies that manifested their original interest. However, if there are more proposals to each port afterwards, a public process for granting a concession will have to be launched by Proinversion.

Joint venture and concession criteria

- 17 | What criteria are considered when awarding award port concessions and port joint venture agreements?

Concessions have a self-sustaining nature, so the basic criteria for the awarding of port concessions and joint ventures are that they comply with the terms and conditions of the public tender.

Generally, the rules of a public tender are focused on the infrastructure design, the shape of the construction, financing, and the operation of infrastructure and port equipment.

Model agreement

- 18 | Is there a model PPP agreement that is used for port projects? To what extent can the public body deviate from its terms?

According to the Public Contracting Law and its regulations, a PPP is construed as a concession agreement.

Supreme Decree No. 410-2015-EF, which derogated Supreme Decree No. 059-96-PCM, and the Text of Concessions provide that the state cannot deviate from the duties agreed in the concession contract. In case of disputes, an arbitration clause is always set out in the agreement.

In connection with the above, Law No. 28,933 regulates the system of coordination and response of the state in international investment disputes. The main objective is to establish compensations for the investor in case of breach of obligations or fines or compulsory acts, or even to put an end to the concession if necessary.

Approval

- 19 | What government approvals are required for the implementation of a port PPP agreement in your jurisdiction? Must any specific law be passed in your jurisdiction for this?

The APN is the entity that promotes the participation of the private sector regarding investment in the infrastructure's development and port equipment, and has the support of Proinversion.

In this regard, the APN is responsible for coordinating the promotion processes for private investment in national port infrastructure and equipment, and proposed cooperation agreements with Proinversion.

No specific law must be passed. The concession enters into force once the agreement is duly signed by the state and the private investor.

Projects

- 20 | On what basis are port projects in your jurisdiction typically implemented?

Port projects in our jurisdiction are typically implemented as design-finance-build-operate-transfer (DFBOT).

Term length

- 21 | Is there a minimum or maximum term for port PPPs in your jurisdiction? What is the average term?

Article 19 of Legislative Decree No. 1,224 does not establish a minimum term for concession agreements for the private sector in public works of

infrastructure and services in general, but requires that the term should not exceed 60 years.

The average term of concession contracts for infrastructure development is 30 years.

22 | On what basis can the term be extended?

The extension of the concession is determined only by the clauses incorporated into the agreement.

Fee structures

23 | What fee structures are used in your jurisdiction? Are they subject to indexation?

In Peru, the port concession is self-sustaining and the fee structure is based on a percentage of revenue shares.

The concession agreement includes a scheme of price realignment through economic formulas that are set out in that contract.

Exclusivity

24 | Does the government provide guarantees in relation to port PPPs or grant the port operator exclusivity?

The government provides guarantees with regard to compliance with the obligations agreed under concession agreements. Regulation establishes that the state provides investors with legal certainty in the context of free competition, nondiscrimination and equality before the law, neutrality and price transfer prohibition.

Usually, the formal tender sets clauses exclusively in favour of the party to whom the concession has been granted (the concessionaire).

To improve a project's risk profile and promote private investment, the government may establish the following types of guarantee:

- financial guarantees: unconditional, immediately executable guarantees given by the government to support the obligations of the private sector and derived from loans or bonds issued to finance PPP projects or support the government's payment obligations; and
- non-financial guarantees: guarantees established in the contract, derived from risks inherent to a PPP project.

Other incentives

25 | Does the government or the port authority provide any other incentives to investors in ports?

Any incentive depends on what is agreed in the concession agreement. It is common for this agreement to include a tax stability agreement in order to ensure some market predictability.

PORT DEVELOPMENT AND CONSTRUCTION

Approval

26 | What government approvals are required for a port operator to commence construction at the relevant port? How long does it typically take to obtain approvals?

To begin the construction of a port, authorisation is required from national and local entities, specifically from the APN, DICAPI and the district municipality's homeport.

The estimated time for obtaining permits, licences and authorisations is approximately three months from the date of filing the application.

Port construction

27 | Does the government or relevant port authority typically undertake any part of the port construction?

No, the Peruvian government does not undertake any part of the construction of the port. The development of port infrastructure and equipment is the obligation of the concessionaire in accordance with the clauses established in the concession agreement, as governed by Peruvian law.

28 | Does the port operator have to adhere to any specific construction standards, and may it engage any contractor it wishes?

The port operator or concessionaire must comply with the terms and references established in the bases of the public tender, which are part of the concession agreement.

The port operator may engage the services of any contractor they wish.

29 | What remedies are available for delays and defects in the construction of the port?

The remedy available for delays and defects in the construction of the port is the execution of the penalties laid down in the concession agreement and, additionally, in the provisions of the Peruvian Civil Code.

In the concession agreement, the parties should establish the penalties for breach of obligations. The penalties may vary according to the clause breached by the port operator.

PORT OPERATIONS

Approval

30 | What government approvals are required in your jurisdiction for a port operator to commence operations following construction? How long does it typically take to obtain approvals?

The agencies responsible for granting permits for port operators are the APN and DICAPI. The permits that should be obtained are as follows:

- a permit for temporary use of the water area or coastal land for port entitlements;
- the granting of a port concession;
- an inspection request for a percentage of work completion and the corresponding certificate; and
- an inspection request for work completion (100 per cent) and the corresponding certificate.

The process for obtaining these permits usually takes around 60 days, according to the Text of Administrative Proceedings of the APN. However, owing to the usual administrative burden, these proceedings may take about 90 days.

Typical services

31 | What services does a port operator and what services does the port authority typically provide in your jurisdiction? Do the port authorities typically charge the port operator for any services?

A port operator and the port authority can provide the following services:

- basic port services: fuelling, storage, docking and undocking of ships, supplies, diving, piloting, waste collection, towing, passenger transport, loading and discharge of cargo; and

- general port services: port traffic control, cleaning, sweeping, lighting, signalling, safety and security.

Apart from these services, where the state may cooperate with the private investor, the government may make the following commitments:

Definitive commitments

These are the payment obligations assumed by the government as a consideration of the activities established in a PPP contract. They include the payment of:

- periodical instalments to compensate for the investments incurred by the private sector. In practice, they are called 'annual payment for works' or 'retribution for investments'; and
- periodical investments intended to compensate for operation and preservation costs incurred by the private sector for the provision of the service. In practice, they are called 'annual payment for maintenance and operation' or 'retribution for maintenance and operation'.

Contingent commitments

These are the potential payment obligations of the government to the private sector for the financial and non-financial guarantees that the latter may have issued.

Definitive and contingent commitments are usually included in concession contracts, to cover the risks inherent to the project.

However, the APN can charge the port operator for the basic port services, as long as this has been agreed in the concession contract.

Access to hinterland

32 | Does the government or relevant port authority typically give any commitments in relation to access to the hinterland? To what extent does it require the operator to finance development of access routes or interconnections?

No, the government and the APN rarely grant commitments in relation to access to the hinterland. In most cases, the APN and the Ministry of Transport and Communications do not include a section regarding finance development of access routes or interconnections in the concession agreement.

Suspension

33 | How do port authorities in your jurisdiction oversee terminal operations and in what circumstances may a port authority require the operator to suspend them?

In Peru, the authority that oversees the operations at port terminals is the APN.

As established in Supreme Decree No. 410-2015-EF, which regulates the delivery of concessions to the private sector in public infrastructure and public services, the concessionaire can be suspended for the following reasons:

- foreign war, civil war or force majeure preventing the implementation of the work or service;
- partial destruction of the work or its elements, so that it is impossible to use it as stated in the contract;
- any cause agreed in the concession contract;
- fundamental contractual breach by the state; or
- unilateral termination by the state due to public interest.

The suspension extends the term of the concession for the period of the suspension cause.

Port access and control

34 | In what circumstances may the port authorities in your jurisdiction access the port area or take over port operations?

As established in Supreme Decree No. 410-2015-EF, a port terminal concession will expire on the following grounds:

- by the deadline agreed when the concession was awarded;
- for the fundamental breach of the concessionaire's obligations, which constitute grounds for termination of the contract;
- by agreement between the state and the concessionaire;
- by the complete destruction of the work; or
- for other causes stipulated in the contract.

Failure to operate and maintain

35 | What remedies are available to the port authority or government against a port operator that fails to operate and maintain the port as agreed?

The resource available for the port authority to act against the port operator when they fail in the operation and maintenance of the port, as agreed between the parties in the concession agreement, is the execution of the penalties set out in such agreement and, additionally, in the provisions of the Peruvian Civil Code.

The state may also submit financial controversies arising from concessions to national or international arbitration, in accordance with the provisions of article 69 of the Political Constitution of Peru.

Transferrable assets

36 | What assets must port operators transfer to the relevant port authority on termination of a concession? Must port authorities pay any compensation for transferred assets?

At the end of the concession, port operators must transfer to the state all goods that have become integral parts of the concession and receive compensation for the assets transferred, according to the clauses of the concession contract.

MISCELLANEOUS

Special purpose vehicles

37 | Is a port operator that is to construct or operate a port in your jurisdiction permitted (or required) to do so via a special purpose vehicle (SPV)? Must it be incorporated in your jurisdiction?

The port operator is permitted to use an SPV in DFBOT contracts, as a newly incorporated company or as a subsidiary company. Both types of company should be incorporated in the normal way – under the system of project finance used by a private financier for the PPP.

The DFBOT contracts provide the SPV with the project components to be managed (such as raising funds; paying debts and shareholders; hiring and supervising the builder). Then the SPV should build, operate and transfer the project to the state.

The SPV must be incorporated in the Peruvian jurisdiction.

Transferring ownership interests

38 | Are ownership interests in the port operator freely transferable?

According to the provisions of the law, the concessionaire, with the approval of the state, may transfer the concession, with the same terms and conditions, to another entity.

In other words, the transfer will be complete and all the rights and obligations of the transferor will be passed to the new concessionaire provided that it is authorised by the state.

Granting security

39 | Can the port operator grant security over its rights under the PPP agreement to its project financing banks? Does a port authority in your jurisdiction typically agree to enter into direct agreements with the project financing banks and, if so, what are the key terms?

The port operator cannot mortgage its rights under the PPP agreement.

The port authority does not enter into agreements with the project financing banks.

Agreement variation and termination

40 | In what circumstances may agreements to construct or operate a port facility be varied or terminated?

According to the provisions of the legislation, it is the prerogative of the state to modify the concession contract when necessary, in compliance with the nature of the concession, the economic conditions and the contractual technical agreements, and the financial balance performance by the parties.

Contractual breach

41 | What remedies are available to a government or port authority for contractual breach by a port operator?

If the concessionaire fails to comply with the provisions of the concession agreement, in accordance with the provisions of the law, the state is entitled to terminate the concession for breach of its obligations under the concession agreement and will enforce the penalties established therein.

For example, in the concession agreement the parties can stipulate penalties for the following reasons:

- a delay in presenting the technical file to the APN;
- delays in the initiation of the construction operations of the port;
- delays in remedying technical file observations; and
- delays in the delivery of the concession.

The concession agreement must have a section in which the parties stipulate penalties for the breach of the obligations of the port operator.

Governing law

42 | Must all port PPP agreements be governed by the laws of your jurisdiction?

PPP agreements are governed under the rules of the Peruvian jurisdiction, with respect to the rights and obligations under the contract. The parties may also submit disputes arising from the concession agreement to an arbitration forum, in accordance with the provisions of the law.

PPP agreements must be governed by Legislative Decree No. 1,012, Supreme Decree No. 127-2014-EF, by the specific regulations on concessions and port systems and the provisions of the Peruvian Civil Code.

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Disputes

43 | How are disputes between the government or port authority and the port operator customarily settled?

Disagreements between the parties are commonly resolved by arbitration, under the rules incorporated into the concession contract. If, under the concession contract, the parties agree to solve the disputes of the concession agreement according to Peruvian law, the terms and regulations of Arbitration Law No. 1,071 will apply.

Supreme Decree No. 127-2014-EF, which regulates the Law of PPP, stipulates the disputes that can be resolved by arbitration. Further, in this Law it is stated that the tribunal must be made up of professional experts with a minimum of five years' experience in controversial matters, or a lawyer with experience in regulations or concessions.

UPDATE AND TRENDS

Key developments of the past year

44 | Are there any other current developments or emerging trends that should be noted?

The ports of Chancay – north of Lima – and Pisco – south of Lima – are being constructed at present.

REPSOL in its concession at Ventanilla – north of Lima – has incorporated into the pre-existent multi-buoy terminal a new mono-buoy facility.

LAW STATED DATE

Correct on

45 | Give the date on which the information above is accurate.

September 2019.