Principal International Environmental Law Treaties and Argentine Law

Particular Reference to the

International Ship and Port Facility Security Code (ISPS Code)

by

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PART I.

1. Introduction.

This paper is divided in two parts, being the first a general one where we explain –in Part I- the legal structure of the Argentine system and how the Constitutional reform of 1994 has changed the classical pyramid. Then, we refer to the main aspects of the international environmental agreements adopted by the country.

In Part II we focus, specifically, on the legal problems related to port activities that arose from the ratification of the International Ship and Port Facility Code (ISPS Code) adopted by International Maritime Organization IMO.

2. Principal international environmental agreements.

It is a difficult task to attempt to summarize which are the most principal international environmental agreements. Fortunately, in doing so, the American Society of International Law has prepared the *ASIL Guide to Electronic Resources for International Law* and, regarding the international environmental law, Anne Burnet [1] has authored a chapter of mentioned *Guide* and she clearly stated that there are *"groups of topics"* which cannot be left out the scope.

As she wrote *"until the late 1960s, most international agreements aimed at protecting the environment served narrowly defined utilitarian purposes. Alexandre C. Kiss and Dinah Shelton, International Environmental Law (New York: Transnational Pub., 1991) at p. 1. beginning with the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (linked from http://www.unep.org/Documents/Default.asp?DocumentID=97), however, international agreements came to reflect a desire to limit damages to the environment. These international agreements paralleled national legislation which increasingly sought to preserve the environment. International environmental law encompasses a diverse group of topics"*. Those main topics are: sustainable development, biodiversity, transfrontier pollution, marine pollution, endangered species, hazardous materials and activities, cultural preservation, desertification, uses of the seas and climate change.

As we all know, each one of these *groups of topics* is governed by an international agreement (treaty or convention).

3. The argentine legal system.

Our country's legal system is based on the National Constitution which was originally adopted in 1853 and last amended in 1994, when many clauses

[1] See: http://www.asil.org/resource/env1.htm.

were introduced among which there is the so called *environmental clause* (in article 41 of the National Constitution [2]).

It should be noted that the 1994 amendment also included other matters where international law is very concerned, as it happens with the international treaties regarding Human Rights: they acquired constitutional hierarchy as set forth by article 75, paragraph 22 of the Supreme Law [3].

The international treaties hierarchy is stated under articles 31 and 27 of the National Constitution. The first one refers to the regulations appeal priority establishing that *"This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation..."* and then determines that each province is bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions.

Article 27, establishes that *"The Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the principles of public law laid down by this Constitution"*. As it was clearly said [4] the amendments that arose from the 1994

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[2] Article 41 of the National Constitution establishes: *"All inhabitants are entitled to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law. The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education. The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions.*

The entry into the national territory of present or potential dangerous wastes, and of radioactive ones, is forbidden".

[3] Article 75, paragraph 22 of the National Constitution reads as follows: *"(75) Congress is empowered: ... (22) To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each house, after their approval by Congress".*

4 See http://www.nyulawglobal.org/globalex/Argentina.htm, where the author also explains the following: *special hierarchy was reserved for certain treaties on human rights. The constituent has followed a tendency observed in compared constitutional rights aimed at the internationalization of*

amendment state in the constitutional text an evolution that is also observed in jurisprudence. The priority order of regulations is changed, as well as the current reality of government structures aimed at creating large supranational spaces through integration of nations.

4. Status of the general agreements (treaties and conventions).

The argentine legal structure was modified in 1994 because the hierarchy of some international treaties has changed. That change is reflected in the texts of two subsections of article 75 devoted to the legislative power scope.

In fact, a first prescription establishes the general principle in this matter when states that *"Treaties and concordats have a higher hierarchy than laws"* [5].

5. Argentine Republic: principal international environmental agreements in force [6].

The Argentine Republic has signed, among others, the following agreements and treaties regarding important environmental subjects:

The United Nations Framework Convention on Climate Change (UNFCCC), was approved by Law Nº 24.295. Argentina presented to the Third Conference of Parties (COP 3) the Greenhouse Effect Gases Inventory and –even though the information is not updated- it be reached trough the web [7].

human rights. Section 75, subsection 22 continues with a list of two declarations and nine international conventions, all of them related to human rights. Among others, we find The American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the International Pact on Economic, Social and Cultural Rights, etc. All of them have "Constitutional hierarchy". The second part of the above mentioned subsection refers to the approval and denouncement regime of this kind of treaties. Regarding the approval, it distinguishes the treaties signed with Latin American States from the ones signed with other nations. For the first case, approval "shall require the absolute majority of all the members of each House". For the second case, "the National Congress, with the absolute majority of the members present of each House, shall declare the advisability of the approval of the treaty which shall only be approved with the vote of the absolute majority of all the members of each House, one hundred and twenty days after said declaration of advisability". Beyond the validity of the herein stated casuistry, it is believed that the second type of treaty produces uncertainty over those signed among countries from the first and second areas. The entry of Argentina into NAFTA reflects this particular case since the organization includes countries from both geographical areas. Finally, it is required for the denouncement of this kind of treaties "the prior approval of the absolute majority of all the members of each House". This is a logical demand since it perfectly complies with the approval system for this kind of international agreements.

[5] See footnote 4.

[6] Some useful links are: http://www.legislaw.com.ar/legis/ambi.htm;http://www.medioambiente.gov.ar; http://www.ecoportal.net; http://www.cedha.org.ar; http://www.prodiversitas.bioetica.org

[7] See the related link, Secretary of Environment and Sustainable Development, *Climate Change* http://www.ambiente.gov.ar/archivos/web/UCC/File/inventario%20de%20gases%20en%20la%20argentina%201997.pdf

The National Congress ratified Kyoto Protocol in 2001. Further regulation was approved in order to allow the country to take part of the Clean Development Mechanism market [8].

There is also the Convention on Biological Diversity which was approved by Law Nº 24.375. As a consequence of it, regulations were approved at national and provincial levels.

The production, utilization, trade and export of transgenic seeds are some of the main topics for Argentine governors and agricultural producers, especially since the *Cartagena Protocol on Biosafety* was signed.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed in 1973. Argentina is Party of it and the treaty was ratified by Law Nº 22.344.

The Basel Convention regulates the control of transboundary movements of hazardous wastes (Law Nº 23.922).

Regarding the Ozone Layer, the Montreal Protocol was signed by or country in 1987 in order to support the international system set by the Vienna Convention and to contribute to the decrease of substances that deplete that layer. The Argentine Republic has also legally reflected the Helsinki, London and Copenhagen amendments.

6. Recent updates on the environmental legal framework in Argentina.

The National Government is entitled to sanction the minimum budget for environmental protection without affecting local (it means *"provincial"* and *"municipal"* or *"county"*) jurisdictions. The National Congress has the faculty of legislating on environmental matters through the civil, commercial, criminal, mining, labor and social security codes it is entitled to sanction. Local courts are in charge of applying those national rules to the things or people under their jurisdictions.

The National Environmental Authority (*"Secretary of Environment and Sustainable Development"*) has recently issued some new rules enacting the obligation to be covered by an environmental insurance set forth by article 22 of the General Law on the Environment (Nº 25.675).

These new rules are [9]:

1) Resolution Nº 177/2007, by the Secretary of Environment and Sustainable Development.
2) Joint Resolution Nº 178/2007 by the Secretary of Environment and Sustainable Development, and Nº 12/2007 by the Secretary of Finances and;
3) Resolution Nº 303/Nº by the Secretary of Environment and Sustainable Development, which amends Resolution Nº

[8] The Secretary of Environment and Sustainable Development has approved a National Carbon Fund, whose information is reachable at: http://www.ambiente.gov.ar/?idseccion=111.

[9] The official and complete text of mentioned binding rules may be reached at: http://www.ambiente.gov.ar/archivos/web/DNorAmb/File/Pdf%20BO%20SEGUROS.pdf.

177/2007 by the Secretary of Environment and Sustainable Development.

To enhance mentioned environmental rights, the National Constitution recognizes *summary proceedings* that may be filed by an *"affected"* party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms. This action shall be carried out provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by the National Constitution, treaties or laws.

PART II.

1. Introduction.

Deep changes from both economic and legal aspects have taken place in the Republic of Argentina fifteen years from now. They started at the very beginning of the last decade and still today the legal and economic rules are being revised or changed, particularly those that are connected with the liberalization of the economy as will be later commented. Important changes can be seen in these days because all regulations approved are aimed to establish more State control on the economic activities developed in the country.

In this second part we focus specifically on port activities pointing out some legal aspects related to the International Ship and Port Facility Code (hereinafter, the ISPS Code) approved by the International Maritime Organization (IMO) on December 2002, and its implementation on port and port facilities which was intended to be carried out almost simultaneously by two national authorities, with important consequences from the legal and practical point of view.

2. General background and principal aspects regarding port activities in Argentina. A brief story of port activities in the country.

Following the National Constitution, the Argentine Republic is politically organized as a representative, democratic and federal republic geographically located in the southern part of the South American continent, having a large maritime coast –with an approximate length of 5.000 kilometers, without considering the ocean islands- and long rivers connecting the inland territory and its economies with the Atlantic Ocean, being particularly important the Paraná River which forms part of the *Paraná - Paraguay Waterway*.

As the country is not an *industrialized* one, its economy and national gross product is based mostly on the commercialization of its natural resources products thru *commodities*. That is why -from the point of view of the international

maritime commerce and shipping activities- Argentina is not a country of *maritime carriers* but a country of *maritime loaders*, particularly *in bulk* solid or liquid.

In that context, the most important is the Buenos Aires Port [10] but, obviously, not the only one given that an important number of ports existed from the very beginning of the history of the country. During decades they were all organized as public ports, which means that it is under the national jurisdiction [11] and commercially managed by the General Ports Administration (hereinafter GPA), a legal entity which originally was (and still today is) constituted as a national state corporation.

From the second half of the past century on, some international corporations began to establish and operate their own private ports and port facilities (particularly, alongside the Paraná River), and these ports and port have facilities co-existed with the public ports.

From the point of view of its legal situation, the authorization and commercial operation of private ports was not forbidden and they were generally operated under the legal figure of *precarious* leases.

The uncertainty of that situation changed completely from the beginning of the past decade, when the national economy was broadly opened to foreign capitals and investments. That was the so-called *privatization decade in Argentina* [12] during which important legal measures and the *Port Activities Law Nº 24093* and many other connected rules became effective.

One of those legal measures was Decree Nº 817 (dated as of 1992) which deeply changed not only the regime of port activities, but also the maritime and river transportation activities and also left without effect some trade union agreements applicable to ports liberalizing also activities connected -as *pilotage*- in strong accordance with the economic policies established by the national government of those years.

3. The privatization of Argentine ports.

[10] Actually Port of Buenos Aires has increased its commercial traffic which last year had a flood similar to the handled volumes that the port had reached in 1995 (a peak during the privatization period). Source: Anuario Portuario y Marítimo 2003, XXIII Edition, 2003, p. 19.

[11] As it was stated before in this article, the country is politically divided into three Jurisdictional levels: national, provincial and local or municipal.

[12] Interesting comments and deep observations regarding the privatization policy in Argentina and its legal effects were made by the Emeritus Professor of the University of Buenos Aires, and ex Vice President of the *Comité Maritime International* Dr. José Domingo Ray in his article *The Port Policy, the Private Ports and the Legal Rules*, published by Editorial La Ley, 1993, C, p. 869 et seq. See also, the chapter on *Port Policy* in his book *Derecho de la Navegación*, Appendix I, 1992, Edited by Abeledo Perrot, p. 724 et seq. where Dr. Ray mentions René Rodière's commentaries related to port management in France, through his *Traité – L'Armament* (1976, nº 234, p. 309). For the so-called port deregulation in Argentina, see also *Reflexiones en Torno a la Desregulación Portuaria*, Edited by La Ley, 1994 – E, p. 969.

The shift from a closed economy to an open one was neither slow nor progressive in the country, so there wasn't a *process* of privatization. The changes came out very quickly and affected ports operations and related investments and commercial activities [13]. For example, vessel owners/operators were allowed to leave the Argentine registry (and so the Argentine flag which entailed the obligation to engage Argentine crewmembers) to carry out *"flags of convenience"* (by Decree Nº 1772 dated as of 1991) [14] and so argentine labor and social security laws and administrative regulations were not applied to them.

Thus, from the year 1991 on, the port activities are ruled by national Law Nº 24093, which is reglamented by Decree Nº 769 dated as of 1993. The privatization of ports is set out through mentioned Act stating that in every province and in the local government of Buenos Aires city (the country's capital) where a port is operating, the national administration should transfer the ownership and the port administration at no cost. Those transfers were made by the GPA in favor of the provinces who, in their turn, transferred the ports or part of its facilities to private operators on *mix consortia* basis formed by businessmen from the private sector and officials form the public one. To fulfill the transference of certain ports [15] one condition was stated: that a corporation or legal entity should be created previously for its direct operation. The transference process has been almost completely fulfilled in the country.

The Buenos Aires Port [16] is the only one under the national jurisdiction and administration of the GPA, and it's facilities are licensed to private port operators.

Law Nº 24093 also establishes that every aspect related to the habilitation, administration and operation of Argentine (existing or to be created) ports are subject to its provisions, and so recognizes different kinds of ports classifying them into three categories which take into account: 1) the ownership of the land (and so comprising *national*, *provincial* and *municipal* ports), 2) the use given to the port (*public* and *private use*) and, 3) its destination without caring who is the owner and/or the port's use (this type includes the so-called *commercial*, *industrial* and *recreational* ports). Military and those ports used (in full of part of them) for the execution of the state's police power are the only cases excluded by the act.

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[13] The author of this paper referred specifically to these matters in his conference given in Ecuador, during a Seminar from 15 to 19 May 1999, organized by the Ecuadorian Association on Ports, and published in the *Anuario Puertos '99, República de Ecuador.* See also *Las Concesiones de Servicios Públicos en la Reforma del Estado*, by Dr. Raúl Oscar Piserchia, published by Editorial La Ley, 1997, B, 1406, and also (more related to the economical and investment aspects) *Las Inversiones en Servicios Públicos Prestados por Empresas Privadas*, by Dr. Juan Bautista Cincunegui, published by Editorial La Ley, 1997, A, 781.

[14] This rule, as most of the national ones, may be reached at http://infoleg.mecon.gov.ar.

[15] The most important ports, after Buenos Aires, are Rosario, Bahía Blanca, Quequén and Santa Fe.

[16] Article 11 of Law Nº 24093 was partially observed: where it stated that the Buenos Aires Port should be transferred to the –then existing- Municipality of Buenos Aires, and actually called *Autonomic Government of the City of Buenos Aires* by its Constitution dated as of 1996 (whose article 8 states that *"the Buenos Aires port belongs to the public domain of the city"*).

This Act establishes the obligation -for every commercial or industrial port engaged in international or inter provincial trade- to obtain a *"License"* or *"Habilitation"* issued by the national government, trough a Decree of the National Executive Power [17].

In order to obtain mentioned License, which is issued by Decree from the President of the country, various aspects have to be completed: the port's *lay out*, a description of its facilities, its classification, aspects regarding national security and defense, foreseen environmental impacts, the port participation in the international trade, health and safety rules, customs and immigration services, navigation policy and port security.

One of the problems solved by Law Nº 24093 arises from the legal situation of private ports and port facilities which were already operative by the time the Act was passed. Article 9 gives alleged *automatic regularization and habilitation* for those already operating private ports having *precarious* permissions or authorizations, obtained before mentioned Law became effective [18].

4. National Authorities: Port Authority and the Maritime Authority.

Another important legal innovation came with Law Nº 24093: it allowed the introduction and creation of the *National Port Authority* (NPA) [19] ruling that the specific National Agency entitled as Applicative Authority of mentioned Law would be appointed later on. Mentioned definition was made by Decree Nº 769 from 1993, stating that the Applicative Authority is the Undersecretary of Ports and Waterways, which depends from the National Secretary of Transportation.

So, the NPA is the competent national authority to: *i)* render advise to the President of the country regarding Habilitations to issue, following the provisions fixed by articles 5 and 9 of the Law [20]; *ii)* control the fulfillment of the provisions stated in mentioned Law and also the reglamentary rules issued according the Act; *iii)* control that the constructive and operative projects be carried out according the statements and purposes originally exposed, being enabled to *"suspend"* and *"cancel"*

[17] Article 4, Law Nº 24093. The cases of historic *Habilitations* issued by the National Congress and the justification of the delegation –made by Law Nº 24093 in favor of the Executive Power- to issue *Port Habilitations* is detailed by Dr. Héctor A. Zucchi in his interesting book *Regimen de las Actividades Portuarias – Ley 24093*, chapter 5, Ediciones Jurídicas 1994.

[18] Article 9 of Law Nº 24093 states that *operating* ports with *precarious licenses will be definitely authorized* by the Executive Power, after having fulfilled the requirements set out by mentioned Law. The extent of this idea had been discussed previously to Law Nº 24093 enactment's, in explained in an interesting *Seminar on Port Policy*, organized by the Buenos Aires Stock Exchange April 15 to 16, 1991.

[19] Art. 22 of Decree Nº 769/1993 states that the Applicative Authority mentioned by Law 24093 is the Undersecretary of Ports and Waterways who will act on its character of *National Port Authority*.

[20] These articles refer to the necessary license to be issued by the President of the country.

the Licenses issued [21]; *iv)* promote the modernization of ports operated by the national government [22]; *v)* promote and facilitate private investment in the administration and operation of port business, *vi)* propose general port and waterway policies to the National Executive Power, *vii)* conclude agreements delimitating responsibilities on dredging matters, *viii)* control, acting on a subsidiary basis, that every national law of regulation be properly fulfilled, *ix)* impose sanctions, as *"Suspension"* and *"Cancellation"* of the License to operate [23].

On the other hand, the Coast Guard appears as the National Maritime Authority (NMA) being legally entitled to control and give license to ships and ship owners, to rule navigational matters, to record judiciary measures on ships and to protect the marine environment, among other functions [24]. Also the NMA acts as the police power to execute those judiciary measures (as seizure and interdiction of departure) adopted by judges during a legal procedure.

A Port Security Regime was established by a national Decree for the NMA to rule security matters in Argentine ports, thanks to which enormous -and very professional- activity was deployed in all ports of the country [25].

A Project of Revised Version –containing *suggestions* not in force- of that Port Security Regime was recently adopted by a Working Group of Specialized Maritime Lawyers representing the NMA and the Argentine Port Council [26].

5. Some practical questions still unresolved.

As it was said, Decree Nº 1772 dated as of 1991 established the national ship owners/operators' right to shift their vessel's Argentine flag to a *"flag of convenience"* and that caused great concern for stevedores and crew members because regulations that established their corporative rights (for instance, those articles that set a minimum number of crew members for ships carrying the argentine flags) were left

[21] Following a strict and literally interpretation, this paragraph shows the following incongruence: a rule of inferior normative status (the NPA issues *"Dispositions"*) could leave without effect another one which is hierarchically superior: a *"Decree"* by the President of the country. Up to present, there was no need to settle this conflict because it did not came out any situation referred to it.

[22] Here again, incongruence appears because it is supposed that no ports, after mentioned Law was enacted, would remain under national control. Moreover, in the transference of them it was established that should a province or local government show no interest in receiving a port, the national government is enabled to keep it under national jurisdiction, transfer it to the private sector or disaffect the port (article 11, Law Nº 24093).

[23] A very important gap may be seen here, because the two sanctions are the extremes that need *a scale of punishment*, and that graduation and –even more important- the procedure to impose them, must be completed taking into account the basic rules established by articles 23 and 24 of Decree Nº 769/93.

[24] The legal competence of the NMA is established by Law Nº 18398.

[25] The so-called *Port Security Regime*, approved by Decree Nº 890/1980. Even though it was approved by national Decree some doubts exist related the congruency between it and the legal competence established by Law Nº 18398.

[26] The complete text of the job with the suggestions proposed by that Working Group, in which took part the author of this paper, may be reached at http://www.consejoportuario.com.ar/legislacion/regiseport.htm..

without effect, and so ship owners / operators became entitled to unilaterally determine the nationality and the quantity of crewmembers to be engaged on board.

Regarding port activities and port authorities control, many problems took place, for example, in cases where stevedores worked on shore and onboard vessels carrying flags of convenience because the officials from the Authority that carried out inspections on labor and social security law matters, saw themselves rejected by the Master of the ships who reported *lack of jurisdiction on foreign vessels*.

Even more recently, by the time this paper is written negotiations are taking place at the National Labor Ministry in order to determine and establish a legal regime applicable to some port workers (stevedores, mechanics, tally men, etc) who work on shore (not on board) and are not *direct* employees of the Port Facility Operator (PFO) because they are engaged under a Temporary Labor Contract signed not with the PFO, but with a third corporation contracted by the PFO to select and provide workers to him.

It is important to note that these practices of *"subcontracting"* workers are not legally forbidden in Argentina. More indeed, there are specific labor rules applicable to them [27] but *on shore port facility workers* argue that some aspects of these actual practices (*i.e.* those regarding wages, labor conditions, security and health matters and the extension of the labor day) are not consistent with the constitutional worker's right to receive *"same pay for same job done"* [28].

Interesting arguments (related to legal capacity to represent trade unions and the determination of these legal entities that have to be present in this negotiation) are still being argued in this process which has got specific rules applicable to it, as recent Law Nº 25877.

6. Other National Agencies with authority in Ports.

Relating environmental matters the Secretary of Environment and Sustainable Development is the national authority enabled to rule and establish the environmental policies in the country and, to carry out national registries for Hazardous and waste transportation companies, operators among others [29].

Also regarding environmental matters but more specifically related waste issued by passenger ships, the National Direction for Border's Sanity has issued rules establishing mandatory procedures that have to be followed with solid wastes that ports receive from passenger ships after they berth. But these rules are not the only ones because the National Coast Guard has passed, for example, a number of Ordinances applicable to wastes even those received by port facilities from vessels [30].

Regarding the people who come in and out of the country through ports, the National Direction for Migrations is the competent authority to establish and carry out controls on them.

[27] Articles 99 and 100, Labor Contract Law Nº 20744.
[28] Article 14 *bis*, of the National Constitution.
[29] See its website http://www.medioambiente.gov.ar.
[30] On its side, actually the GPA is in the process to issue a rule also applicable to these matters.

7. Rules issued by the National Port Authority to implement the ISPS Code.

On the basis of its legal competence to rule ports, port facilities and port activities the NPA issued Disposition Nº 72/03 which sets out a regime for the implementation of the ISPS Code *in ports and port facilities* stating that Security Plans must be under the implementation control and registry of the National Ports Direction (which forms part of NPA organic structure).

In order to put the ISPS Code into practice *on ports and port facilities*, Disposition Nº 72/03 originally established a Procedure (Annex I) and a few rules which constituted guidelines to carry out Port and Port Facility Security Assessments [31].

The original Disposition Nº 72/03 [32] established that it was applicable to Port and Port Facilities serving or having served, during a previous one year period, one or more ships engaged on international maritime transportation, being so included: *i)* those cargo ships having 500 gross tonnage upwards, *ii)* passenger ships that transport 150 or more passengers and, *iii)* mobile offshore drilling units [33].

It also set out the following NPA functions and responsibilities: *i)* to establish Protection Levels from 1-3 in every port and port facility in the country; *ii)* to approve, when suitable, port and Port Facilities Security Plans; *iii)* to issue specific orders aimed to control and diminish damages when a port / port facility operates under Level 3; *iv)* to inform IMO about the progress made on such matters; *v)* to appoint a Port Facility Security Officer on behalf of the NPA and to take note of the designations made by ports / port facilities; *vi)* to coordinate functions and activities with other national agencies entitled to act in ports and; *vii)* to establish Security Zones in ports [34].

But shortly after Disposition Nº 72/03 was passed by the NPA, the national Argentine administration changed and so new authorities assumed the NPA conduction and immediately issued Disposition Nº 02/03 [35] to suspend -for 120 days- the effectiveness of Disposition Nº 72/03. Once those 120 days elapsed, the NPA issued

[31] To have a complete version of the main aspects of the ISPS Code taken into account to set out the structure and rules established by Disposition Nº 72/03, see the conference issued by the author of this paper at the Argentine Catholic University, during the *Seminar on Argentine Maritime Interests Admiral Storni 2003*, organized by the National Navy, on July 14, 2003.

[32] The original version (and the actual text, as amended) may be reached at http://infoleg.mecon.gov.ar.

[33] See the author of this paper article's *Security for a New International Scenario*, published by the weekly transport magazine *Semanario del Comercio Exterior*, Shipping News, July 1/8, 2003.

[34] See the author of this paper's article *New International Code for Maritime Security* published by the national newspaper La Nación, Transportation and International Trade Section, April 8, 2003, searchable through http://www.lanacion.com.ar.

[35] It may be searched through the web site mentioned on footnote 32. As one can see, the numbers of the administrative legal rules starts with the period that begins of each Official in charge of the Administration that issues them.

Disposition Nº 67/03 [36] which put effectively into practice the previous Disposition Nº 72/03 and introduced important amendments to its articles.

Those are important innovations as to introduce, for instance, the definition of *"threat"*, *"port"* and *"port facility"* and even more, one of those amendments is related to the way to obtain approval of the Port and Port Facility Security Plans. Actually these Plans must be approved by the NPA *acting together* with the NMA. This joint approach shows that both Authorities wish to work together, even though it is not specified the legal or administrative procedure to meet that goal.

Another amendment establishes, among the obligations to be met by Operators, Administrators and / or Owners of Port and Port Facilities, (whose lack of fulfillment engages the final responsibility of the Port / Port Facility Owner) to *notify* the PFS Officers appointment to the NPA *and the NMA* .

Regarding the Port and Port Facility Security Assessment, the NPA amendment establishes that the Port / Port Facility owner is responsible for carrying it out under the basis of a *risk management* hypothesis which implies to identify weaknesses on the physical structure, operations and security systems within the Port / Port Facility, and also following the Part B of the ISPS Code.

Finally, a guideline to carry out the Port / Port Facility Security Assessment is also set out. It may be noted that common parameters are similar –but not the same- to those established by Maritime Ordinance Nº 06/03 issued by the NMA.

As it may be seen, the actual regime issued by the NPA establishes the intervention of both Port and Maritime Authorities in order to implement the ISPS Code in Argentina.

8. Rules issued by the National Maritime Authority to implement the ISPS Code on Ports and Port Facilities.

As it was previously said, few days after the NPA suspended Disposition Nº 72/03 the National Coast Guard, *i.e.* the National Maritime Authority (NMA) enacted the Maritime Ordinance Nº 06/03, dated as of July 3rd 2003 [37], so acting *"based on the faculty* (which must be read as *legal power to do something*, or *legal competence* or *jurisdiction to act*) *given to the National Coast Guard by article 5, section a), paragraph 2) of Law Nº 18398"* to issue and adopt that kind of rules [38].

But mentioned article 5, section a) paragraph 2) establishes that the NMA, acting on its legal capacity of Safety Policy Power on navigation matters, is entitled to issue Maritime Ordinances related to shipping and also to propose rules on fines, being the authority entitled to apply them after a due legal procedure.

[36] *Idem* website cited on footnote 24.

[37] This and all rules issued by the National Coast Guard may be searched in its web site (Spanish and English) http://www.prefecturanaval.gov.ar.

[38] This law can be searched through http://infoleg.mecon.gov.ar.

That is why, from a first approach (particularly from a scope from the *administrative law*) mentioned legal ground to give basis to Maritime Ordinance Nº 06/03 was issued lacking the necessary competence, because the legal rule used to sustain the legitimacy of the act is directly aimed to the NMA power to rule vessels and *shipping* matters (which include those related to their navigation on jurisdictional waters) but not *port* matters, *i.e.* those human activities of ports and port facilities.

Moreover, and by Maritime Ordinance Nº 09/03 [39] the NMA adopts rules and establishes requisites to be fulfilled, in order to become a *"Licensed"* and *"Authorized"* Recognized Security Organization (RSO) as mentioned by the ISPS Code. Here again, we find that the legal competence to rule –indirectly- port activities is not clearly established.

Finally, the same objection may be sustained when one analyzes Maritime Ordinance Nº 01/04 [40] which establishes requisites to obtain a license as Port Security Officer (PSO).

Maritime Ordinance Nº 6/03 is conceptually based on a similar rule passed by the US National Coast Guard: the Navigation & Inspection Vessel Circular (NVIC) Nº 9/02 which contains several definitions and technical criteria to measure risks, implement the assessments and the Port and Port Facilities Security Plans.

9. Problems because of the superposition of both regimes.

But fortunately, that situation was then solved when Decree Nº 1241/2003 the power to rule mentioned matters was specifically granted to the NMA.

As one may see, the NPA and the NMA have adopted rules to implement the ISPS Code on ports and port facilities and so they have issued binding rules applicable to them.

As these rules still today co-exist (even though, after Decree Nº 1241/2003 the rules issued by the National Port Authority were left without effect) some problems may come out from that situation, of which these should be considered:

1) That even though the NPA first rule (Disposition Nº 72/03) did not contemplate or even mention any kind of participation from the NMA in the process of certification for the ISPS Code, and that later the NPA mentioned the participation of the NMA, the real situation was (and it still is) that the port facility operator does not exactly know how far does it match with the other rule applicable to him: Maritime Ordinance Nº 06/03.
2) Maritime Ordinance Nº 6/03 gives, no doubt, more specific and technical parameters to be fulfilled than Disposition Nº 72/03 as

[39] See web site mentioned on footnote 37.

[40] *Id.* footnote 37.

amended, but the latter gives more freedom to the Port or Port Facility Operator who must comply with it.

3) Disposition Nº 72/03 as amended, does not establish any kind of *"license"* nor *"habilitation"* to be issued by the NPA to the Port Facility Security Officer (PFSO). It only establishes that the NPA will *"take notice"* of the PFSO designation by the Port / Port Facility operator, while Maritime Ordinance Nº 06/03 rules that the NMA will take the records and *issue licenses* for the PFSO.
4) Disposition Nº 72/03, as amended, allows the Port/Port Facility Security Operator to conduct the Security Assessment. Maritime Ordinance Nº 06/03 does not permit that situation, and states that the Security Assessment must be carried out by the NMA or the Recognized Port Facility Security Organization (PFSO).

10. Conclusions.

As we have seen, amendments and legal measures taken in order to harmonize the legal security regimes applicable to port and port facilities were necessary.

But the aspects taken into account must be analyzed from a technical and political point of view bearing in mind that clear regulations are always needed in a country, because they help to avoid conflicts of interpretation that may derive into a judiciary process to clarify the applicable rules, particularly when huge investments are devoted by local and foreign operators to fulfill them.