LEGAL OPINION

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Port Competition: Provision of Port Services. Integration of Latin America

SÃO PAULO (SP)

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This opinion is based on data from port authorities, governments and concessionaires. It is structured in 4 parts: I) Scope of Survey; II) Port Systems in Latin America and the Caribbean and their Regulation; III) Competitive Aspects for Ports and Aggregate Services; IV) Perspectives for Latin American and Caribbean Ports – Proposals for Regional Integration.

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PART I - SCOPE OF SURVEY

The main objective of this study is to analyze Latin American and Caribbean port competitiveness, with a view to the process of regional integration observed from the point of view of port activity regulation, mainly in the verification of how different countries deal with aspects of competition, an important element for Fair Trade implementation. The aim is to prepare a study to assist in the harmonization of regional legislation for the improvement of trade among the countries of the region.

It is necessary to emphasize that the ports cannot be observed in an isolated way, essentially when the object of the analysis is its competitiveness. Ports are an effective part of a logistic-productive chain, so its correct market insertion is even more complex than other activities. More than adequacy and modernity of the activity itself, the port has to guarantee its connection with other modes, ease of access and the proximity of productive centers.

Based on this premise, competition issues are even more relevant, since concentrations in any part of the logistics chain can directly affect the port sector, effectively isolating a particular port or guaranteeing impossible possibilities to the others. In this regard, the regulation of port activity is extremely relevant.

Regarding regional integration, although this is a natural process and resulting from international trade itself, since the port receive foreign vessels, cargoes originating and destined to other countries. However, given the current stage of development of Community Law and the understanding of fair trade as an objective of development, effective regional integration must take place through public policies planned and consistent with contemporary International Law.

It is not about state interference in an activity that may be deprived in certain legal systems, but rather the use of the state apparatus as an instrument for planning and achieving international goals and measures that reflect national development. We should also add that the state should not be excluded from port activity, since it is a point of border permeability, essentially related to security and sovereignty.

Therefore, promoting integration through state mechanisms combined with private capital is a measure not only possible but also beneficial to all those involved in the logistic-productive chain.

For the purposes of this study, the 10 largest ports of Latin America and the Caribbean were selected based on the handling of TEUs[2], according to the ECLAC study[3]. Methodologically, this cut offers adequate comparative possibilities, since ports in 9 countries will be analyzed. In this way, we can verify the stage of evolution and regulation of the port activity, as well as to present a propositional panorama with a view to regional integration. In descending order of handling, the following ports will be evaluated: Colon (Republic of Panama); Santos (Federative Republic of Brazil); Balboa (Republic of Panama); Manzanillo (United Mexican States); Cartagena (Republic of Colombia); Callao (Republic of Peru); Guayaquil (Republic of Ecuador); Kingston (Jamaica); Buenos Aires (Argentina); and San Antonio (Republic of Chile).

Next, two schematic tables help the systemic understanding of the fundamental objects of this research, i.e., it elucidates the legal dispositions applicable to port regulation.

SCHEMATIC TABLE 1 – PRESENCE OF THE PORT SECTOR IN THE CONSTITUTIONS

Country	Year	Scope
Argentina[4]	1853, amended in 1994	CAPITULO CUARTO Atribuciones del Congreso 10.- Reglamentar la libre navegación de los ríos interiores, habilitar los puertos que considere convenientes, y crear o suprimir aduanas.
Brazil[5]	1988, amended in 2004	Article 21. The Union shall: [...] XII – operate, directly or through authorization, concession or permission:

[2] TEU – Twenty-foot Equivalent Unit – is a 20-foot unit of measure that translates the volume of a standard, 20-feet long, 8-feet wide and 8-feet high container.
[3] https://www.cepal.org/en/infographics/ports-ranking-top-20-latin-america-and-caribbean-2017
[4] Available at: http://www.acnur.org/fileadmin/Documentos/BDL/2001/0039.pdf
[5] Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm

		a) sound and image broadcasting services and other telecommunications services; *b)* The electric energy services and installations and the energetic utilization of the water courses, in articulation with the States where the hydropower potential is located; *c)* Air navigation, aerospace and airport infrastructure; *d)* Rail wand water transport services between Brazilian ports and national borders, or that transpose the limits of State or Territory; *e)* Interstate and international road passenger transport services; *f)* Sea, river and lake ports. Article 22. It is the sole responsibility of the Union to legislate on: [...] X – port regime, lake, river sea, air and aerospace navigation;
Chile[6]	1980	-
Colombia[7]	1991, amended in 2016	Artículo 361. Acto Legislativo 05 de 2011, artículo 2. El artículo 361 de la Constitución Política quedará así: Los ingresos del Sistema General de Regalías se destinarán al financiamiento de proyectos para el desarrollo social, económico y ambiental de las entidades territoriales; al ahorro para su pasivo pensional; para inversiones físicas en educación, para inversiones en ciencia, tecnología e innovación; para la generación de ahorro público; para la fiscalización de la exploración y explotación de los yacimientos y conocimiento y cartografía geológica del subsuelo; y para aumentar la competitividad general de la economía buscando mejorar las condiciones sociales de la población. Los departamentos, municipios y distritos en cuyo territorio se adelanten explotaciones de recursos naturales no renovables, así como los municipios y distritos con puertos marítimos y fluviales por donde se transporten dichos recursos o productos

[6] Available at: https://www.camara.cl/camara/media/docs/constitucion_politica.pdf
[7] Available at: http://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf

		derivados de los mismos, tendrán derecho a participar en las regalías y compensaciones, así como a ejecutar directamente estos recursos.
Ecuador[8]	2008	Art. 261.- El Estado central tendrá competencias exclusivas sobre: [...] 10. El espectro radioeléctrico y el régimen general de comunicaciones y telecomunicaciones; puertos y aeropuertos.
Jamaica[9]	1962	-
Mexico[10]	1917, amended in 2017	Artículo 89. Las facultades y obligaciones del Presidente, son las siguientes [...] XIII. Habilitar toda clase de puertos, establecer aduanas marítimas y fronterizas, y designar su ubicación. Artículo 118. Tampoco pueden, sin consentimiento del Congreso de la Unión: I. Establecer derechos de tonelaje, ni otro alguno de puertos, ni imponer contribuciones o derechos sobre importaciones o exportaciones.
Panama[11]	1972, amended in 2004	ARTICULO 258. Pertenecen al Estado y son de uso público y, por consiguiente, no pueden ser objeto de apropiación privada: 1. El mar territorial y las aguas lacustres y fluviales, las playas y riberas de las mismas y de los ríos navegables, y los puertos y esteros. Todos estos bienes son de aprovechamiento libre y común, sujetos a la reglamentación que establezca la Ley. ARTICULO 316. Se crea una persona jurídica autónoma de Derecho Público, que se denominará Autoridad del Canal de Panamá, a la que corresponderá privativamente la administración, funcionamiento, conservación, mantenimiento y modernización del Canal de Panamá y sus actividades conexas, con arreglo a las normas constitucionales y legales vigentes, a fin de que funcione de manera segura, continua, eficiente y rentable. Tendrá patrimonio propio y derecho de administrarlo. A la Autoridad del Canal de Panamá corresponde la responsabilidad por la administración, mantenimiento, uso y conservación de los recursos

[8] Available at: https://www.asambleanacional.gob.ec/sites/default/files/documents/old/constitucion_de_bolsillo.pdf
[9] Available at: http://moj.gov.jm/sites/default/files/laws/Ja%20%28Constitution%29%20Order%20in%20Council%201962.pdf
[10] Available at: http://www.sct.gob.mx/JURE/doc/cpeum.pdf
[11] Available at: http://www.asamblea.gob.pa/cep/const_constitucion1941.pdf

		hídricos de la cuenca hidrográfica del Canal de Panamá, constituidos por el agua de los lagos y sus corrientes tributarias, en coordinación con los organismos estatales que la Ley determine. Los planes de construcción, uso de las aguas, utilización, expansión, desarrollo de los puertos y de cualquiera otra obra o construcción en las riberas del Canal de Panamá, requerirán la aprobación previa de la Autoridad del Canal de Panamá.
Peru[12]	1993	-

SCHEMATIC TABLE 2 – SPECIFIC PORT REGULATION LAWS

Country	Year	Scope
Argentina[13]	1993	ACTIVIDADES PORTUARIAS LEY 24.093 Ambito de aplicación. Habilitación,. Administración y operatoria portuaria. Jurisdicción y control. Autoridad de aplicación. Reglamentación. Consideraciones finales
Brazil[14]	2013	LEI Nº 12.815, DE 5 DE JUNHO DE 2013.
Chile[15]	1997	Ley 19542 (19-DIC-1997) Moderniza el sector portuario estatal.
Colombia[16]	1991	LEY No. 01 DE 1991 (10 de enero de 1991) Por la cual se expide el Estatuto de Puertos Marítimos y se dictan otras disposiciones
Ecuador[17]	1976	LEY GENERAL DE PUERTOS (Decreto Supremo No. 289)
Jamaica[18]	1972	Port Authority Act - 1972

[12] Available at: http://www4.congreso.gob.pe/ntley/Imagenes/Constitu/Cons1993.pdf
[13] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/492/norma.htm
[14] Available at: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12815.htm
[15] Available at: https://www.leychile.cl/Navegar?idNorma=82866
[16] Available at: https://www.mintransporte.gov.co/descargar.php?idFile=96
[17] Available at: http://extwprlegs1.fao.org/docs/pdf/ecu160399.pdf
[18] Available at: http://moj.gov.jm/sites/default/files/laws/Port%20Authority%20Act.pdf

Mexico[19]	1993	LEY DE PUERTOS Nueva Ley publicada en el Diario Oficial de la Federación el 19 de julio de 1993 TEXTO VIGENTE Última reforma publicada DOF 19-12-2016
Panama[20]	2008	LEY 56 De 6 de agosto de 2008
Peru[21]	2003	LEY Nº 27943 LEY DEL SISTEMA PORTUARIO NACIONAL

PART II - PORT SYSTEMS IN LATIN AMERICA AND THE CARIBBEAN AND ITS REGULATION

This topic will specifically assess the structure of ports and their regulatory regime, to enable a comparative and propositional study.

2.1 – REPUBLIC OF PANAMA

The largest and third largest container handling port in Latin America and the Caribbean are in Panama. These numbers are undoubtedly directly influenced by the Panama Canal, making the region an important transshipment hub.

Panama has one of the most recent port activity regulatory acts. As of 2008, Ley 56 basically seeks to establish general features for port activity. From a hermeneutical point of view, it can be said that it deals with a non-exhaustive norm that seeks to promote port development mainly by the concession regime, clearly establishing the counterparts to the State.

This law establishes the Port Maritime Authority (AMP), which is responsible for the management of ports and services rendered therein. It is important to note that the law does not apply to the Panama Canal Authority, which is governed by a different regime. The law includes the AMP of administration and supervision of a port system focused on competitiveness, transparency and efficiency. It is important

[19] Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/65_191216.pdf
[20] Available at: https://panama.eregulations.org/media/ley%2056%20del%206%20de%20agosto%20de%202008%20-%20ley%20general%20de%20puertos.pdf
[21] Available at: http://www.enapu.com.pe/web/content/upload/files/LeyPuertos_1(2).pdf

to note that Panama establishes strategic maritime plans every 5 years, and these plans are guiding law enforcement.

In accordance with article 7, the AMP will promote the development of port activity based on free and fair competition between port operators and service providers as a mean of promoting maritime activity. It should be noted that port operators cannot adopt discriminatory tariffs or tariffs that infringe free competition. In these cases, according to article 73 of the port law, the AMP may increase prices. Thus, in addition to regulatory competence, AMP has a competition price competence. The law does not provide for market concentration.

It is interesting to note that the *Autoridad de Protección al Consumidor y Defensa de la Competencia* (ACODECO) also has competences in the port sector regarding the aspects of competition. The state public entity has autonomy in the internal regime and functional independence and its objective is the defense of free competition, preventing monopoly practices and any other type of market restriction. There is no standard dealing with concurrent competence between the AMP and ACODECO. However, it was also not possible to identify negative conflicts of this overlap of competences in this survey. It should be noted that the organs have their original competence derived from different legal texts, but in short they are part of the same legal system, having to act in an integrated way to reach objectives intrinsic to the Rule of Law.

In practical terms, ACODECO has already considered the case of a monopoly in the transport sector. In 2009, ACODECO[22] has initiated a legal action against *Asociación de Transporte de Carga de Colón, Corporación de Empresarios de Transporte de Carga de Colón, Cooperativa de Servicios Múltiples Serafín Niño R. L., Sindicato de Propietarios de Transporte de Carga Independiente de Colón and Sindicato de Camioneros de Chiriquí* by reason of fixing, manipulating or imposing prices or tariffs for container freight services on the route between the Atlantic ports and the Colon Free Zone, and between the ports of Atlantic and Panama City, with

[22] The full application is available at: http://www.acodeco.gob.pa/acodeco/uploads/pdf/nuestra_labor/Transporte_CargaPanama-Colon.02_16_2011_01_03_09_p.m.pdf

principal request for that the practice be declared unlawful based on Ley 45 of October 31, 2007.

Although this is not a case of strict port competition, this demand called the attention of the Panamanian authorities to an important aggregated service for the operation of port activities, as freight must arrive and leave the port and production centers. In other words, land transportation is essential for the port to receive cargo from the production centers and also for imported cargoes to reach the consumption centers. A logistic bottleneck and possible anticompetitive practice can affect port performance.

2.1.1 – PORT OF COLON

The largest handling port in Latin America is made up of 3 independent terminals. The observation of these three terminals as a single port is an ECLAC position and stems from the geographical proximity between the terminals. However, for competition purposes, it is possible to interpret them as directly competing.

The port complex of Colon is made up of the following terminals:

> **Puerto Cristobal – Panama Ports Company**: the operation of the terminal is by concession regime, resulting from Ley 5 del 16 de enero de 1997, with duration of 25 years, extendable if the contractor fulfills its obligations[23]. Previously it was a public terminal. Considerations in favor of the State are based on: a) handling fee – currently US$ 12.00 per handling and should be updated in 2018 – in addition to US$ 3.00 if the ship is destined for Panama due to income tax; b) *muellaje* fee; c) *fondeco* fee; and d) *faros y boyas* fee. The port has a maximum depth of 13.5 meters. The concession is in favor of Hutchison Ports, the world's largest container operator, part of the CK

[23] Due to the General Ports Act, of 2008, the extension shall be a maximum of 20 years.

Hutchison Holdings Limited group, which is registered in the Cayman Islands and administered in Hong Kong.

Cólon Container Terminal: the operation takes place through a concession system, in which case the construction of the terminal was also due to the same agreement, in view of the project approved by Ley 12 of January 3, 1996, with duration of 20 years, automatically extendable in case of fulfillment of obligations. Construction took place after the nationalization of an area formerly occupied by the United States of America. Considerations in favor of the State are based on: a) handling fee – currently US$ 12.00 per handling and should be updated in 2018 – in addition to US$ 3.00 if the ship is destined for Panama due to income tax; b) *muellaje* fee; c) *fondeco* fee; and d) *faros y boyas* fee. The port has a maximum depth of 16.5 meters. The concession is in favor of a company controlled by the Evergreen group, from Taiwan.

Manzanillo International Terminal: operated by concession regime for construction and administration approved by Ley 31 of December 21, 1993, with a duration of 20 years, extendable for equal periods. Considerations in favor of the State are based on: a) handling fee – currently US$ 12.00 per handling and should be updated in 2018 – in addition to US$ 3.00 if the ship is destined for Panama due to income tax; b) *muellaje* fee; c) *fondeco* fee; and d) *faros y boyas* fee. The port has a maximum depth of 16 meters. The concession is in favor of a U.S.-Panamanian private capital enterprise affiliated with U.S.-based company Carrix.

2.1.2 – PORT OF BALBOA

It is a single terminal port; therefore, alone it is the terminal with greater operation in Latin America. The operation of the terminal is by concession regime,

resulting from Ley 5 del 16 de enero de 1997, with duration of 25 years, extendable if the contractor fulfills its obligations[24]. Its contract is the same as the Port of Cristobal, so the regency law is also the same, since the concession for Panama Ports Company is of the two port terminals together.

Considerations in favor of the State are based on: a) handling fee – currently US$ 12.00 per handling and should be updated in 2018 – in addition to US$ 3.00 if the ship is destined for Panama due to income tax; b) *muellaje* fee; c) *fondeco* fee; and d) *faros y boyas* fee. The port has a maximum depth of 15.7 meters. The concession is in favor of Hutchison Ports, the world's largest container operator, part of the CK Hutchison Holdings Limited group, which is registered in the Cayman Islands and administered in Hong Kong.

2.2 – FEDERATIVE REPUBLIC OF BRAZIL

The second largest port in Latin America and the Caribbean in container handling is located in the country with the latest legal regulations on the matter. The Port of Santos is one of the largest in the area and has an extremely complex organization: 55 sea and bonded terminals, which manage 72 berths, of which 18 belong to the private terminals, distributed in two banks, destined to transport vehicles (1); containers (18); fertilizers (5); chemicals (6); citrus fruits (2); solids of vegetable origin (10); salt (1); passengers (2); products of forest origin (2); petroleum derivatives (1); wheat (3); steel products (5); general (9) and multipurpose (1) cargo – bulk citrus, roll-on/roll-off, vehicles and container – and offshore cargo handling (4).

The local administration of the Port is exercised by Companhia Docas do Estado de São Paulo. The regulations are set forth in decisions and resolutions of National Agency for Waterway Transportation (ANTAQ in its acronym in Portuguese) based mainly on Law No. 12.815 of 2013. Currently the loading and unloading operations are carried out through private companies whose condition of

[24] Due to the General Ports Act, of 2008, the extension shall be a maximum of 20 years.

concessionaires was obtained through public procurement carried out by ANTAQ. Although concessionary, the services provided continue to be understood as public.

Law 12.815/2013 does not raise specific questions about port competition, but is places as a guideline the moderateness of tariffs and prices with its prior publicity as well as the stimulus to competition. Currently, ANTAQ is responsible for approving, ratifying and setting tariffs based on Law 9.069/1995, which establishes that the prices and tariffs of public services, including port services, shall be governed by acts established by the Ministry of Finance. This competence is also based on Law 10.233/2001, article 27, section VII (Drafting provided by Law No. 12.815, dated 06/05/2013) that incurs ANTAQ the promotion of revisions and readjustments of port fees, providing prior notice of at least fifteen business days in advance, to the granting authority and the Ministry of Finance.

In Brazil, the Administrative Council for Economic Defense (Cade) is par excellence the authority responsible for the defense of free competition, acting in accordance with Law 12.529/2011, ensuring free market competition. Nevertheless, Law 10.233/2011 also attributes to ANTAQ the task of ensuring competition in the scope of its activities. There is no standard or legal text that governs the limits of the competence of Cade and ANTAQ with regard to port competition regulation. In other words, at least in the legal aspect, there is an overlapping of jurisdiction in the port area, since the ANTAQ Law does not limit its action in an objective way nor does it condition it to Cade.

In this regard, seeking to promote articulation between the respective actions, Cade and ANTAQ signed a memorandum of understanding in May 2018, in the form of a Technical Cooperation Agreement, seeking to establish technical cooperation in the fight against violations to the economic order.

It should be noted that Cade has already worked in the port sector, especially in Administrative Proceeding 080012.007443/1999-17[25]., where it found abuse of dominance by port operators in the increase of bonded enclosure costs.

[25] Available through the Electronic Information System at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcT5kD7elswaslV8jhGPE3S_J-rCKax9D6QFsJB51jxZW

Currently, in the Brazilian competition aspect, the main discussion is about THC2, which in general terms is a segregation and delivery rate of the cargo unit to the Bonded/Dry Dock Terminal. In short, users and customs terminals external to the port claim that there is double charge, since the withdrawal of the container during the import process is also considered as port handling, which is, therefore, paid in the THC.

The issue of THC2 has not yet been settled, and so far authorities such as the Federal Court of Auditors, the São Paulo Court of Justice, CODESP, Cade, ANTAQ, among others, have already expressed their position about its value and whether or not the tariff is legal, so everyone is establishing screening criteria for market regulation. While the representation of so many bodies on the protection of free competition is commendable, it is important that the discussion be centralized and technical in order to avoid conflicting views of decisions that do not represent the state of the art of competition. In this regard, it is imperative that the other agencies align their actions in the form of the understanding prospered by Cade, a legitimate Brazilian competition authority, which stated the tariff is illegal.

2.3 – UNITED MEXICAN STATES

The fourth largest port of Latin America in handling of TEUs is located in Mexico. The Port of Manzanillo is also the main Mexican port for loading cargo destine for foreign trade[26]. Located in the Pacific, its area of influence is not only national but regional.

Its activities date back to 1971, initiated by the federal government, however, since 1995 the port has started its privatization and concessions regime and currently all services are provided by private companies, providing healthy competition and reduction of tariffs. Nevertheless, the Integral Port Administration remains responsible for the administration and attraction of public and private investments for the maintenance and evolution of port administration.

[26] According to information from the Integral Port Administration of Manzanillo (2015).

The port currently has 23 berths, of which 2 are exclusively destined to cruises, divided in three polygons and operated by 13 companies, all of private capital. It is worth mentioning a specific port issue, which is the sharing of some berths by several operators, which means a certain berth can be operated by a plurality of operators. This is a relevant difference, since in most concession schemes the berths are exclusively granted to a particular contractor.

Still about the concession regime to private entities, it is important to note that at no moment is there a transfer of ownership, which remains with the Federal Government.

In the tariff aspect, the port of Manzanillo is inserted in the context of extensive Mexican regulation. The main objective of the tariff regulation of port services and operations in accordance with the Ports Act of 1993 is to avoid excessive charges where there is no reasonable environment for competition. It is a paradigm of regulation and must be adopted in its interpretation, since other nations have as fundamental premise of their regulations to avoid very low values that lead to unfair competition.

In short, prices will be freely regulated, however, they must be competitive at national and international level, as they must be registered with the General Directorate of Ports before its application. Therefore, although prices are freely established, their prior publicity and registration are a requirement that favors competitiveness. The Communications and Transportation Secretariat will only establish prices if there is no reasonable competitive environment in line with Chapter VII of the Ports Act. The regulatory milestones were detailed in the annex published in the Federal Official Gazette on December 22, 1999[27].

Under Article 16 of the Ports Act, reasonable competition is not present where there is only one terminal dedicated to a particular type of cargo or only one provider of a particular service. In such cases, the Communications and

[27] Intutulado "REGULACION Tarifaria a los títulos de concesión de las administraciones portuarias integrales que se indican."

Transportation Secretariat may consult the Federal Commission for Economic Competition for tariff regulation.

Exception to the concept of reasonable competition applies to the case of piloting, a service in which there is tariff regulation regardless of the number of providers. The regulation will continue until the modification of the current conditions of competition.

The Mexican Ports Law addresses the competition issue in several points in a clear and precise way, especially in Articles 59, 60 and 62. This is an important regulatory framework for the port sector, since although almost all countries have competitive aspects in their legal systems, the direct and lawful application to the port context often does not exist. This creates a greater ease and effectiveness of regulation, with the application of a certain norm as opposed to a combination of rules, as occurs when the law determining port activity does not have competitive aspects.

In Mexico, operators and providers of port services are subject to competition regulations. Prices can and should be set in scenarios that do not have effective competition on a temporary basis, and once the market competitiveness is established, there should be the free regulation conditioned by the adequacy with national and international markets.

The participation of the Federal Commission for Economic Competition is so pressing that it is worth mentioning Article 62 of the Ports Act:

ARTICULO 62.- Cuando los sujetos a regulación de precios o tarifaria consideren que no se cumplen las condiciones señaladas en el artículo anterior, podrán solicitar a la Comisión Federal de Competencia Económica un dictamen sobre el particular. Si dicha Comisión dictamina que las condiciones de competencia hacen improcedente la regulación en todo o en parte se deberá suprimir o modificar en el sentido correspondiente, dentro de los treinta días siguientes a la expedición de la resolución.

As we can see, there is an interrelationship between the port management bodies and economic competition, including the linkage of their decisions, an important framework for management compliance.

This management, both on the part of the tenants and on the part of the integral administration, should be guided by the national development plan, whose 2013-2018 cycle provides for the improvement of road and rail connectivity to ports and stimulation of sectorial competitiveness.

2.4 – REPUBLIC OF COLOMBIA

The port area of Cartagena is the main one of the Republic of Colombia and one of the main ones of Latin America and the Caribbean. It is a port area made up of public and private berths, the operation of which in 2009 was carried out by 19 terminal operators subject to the concession regime for operation, according to the latest official information released by the administration.

Interestingly enough, the private terminals are only allowed to export cargo whose owners are part of their economic groups. However, as the Superintendence of Ports and Transport points out, these terminals acquire public function by being responsible for handling most of the cargo when the analysis is at the national level.

Until the edition of Law 1 of 1991, the Port Act, the port activity was exercised directly by the Federal Government, through the company Portos de Colombia – COLPUERTOS. As a result of administrative and operational difficulties, since 1991 the ports have been governed by a temporary concession regime, under the supervision of the Ports Department of the Superintendence of Ports and Transport, governed by the general rules of public contracts. It should be noted that at the time of its publication, the Ports Act was subject to unconstitutionality[28], but in the 1994 ruling, the Constitutional Court affirmed its constitutionality and adequacy to the constitutional text.

Regarding the aspect of tariff regulation, the Ports Act brings important notes. The concessionaire in Colombia is subject to two sets of obligations to maintain its contract: the first refers to main obligations such as the execution of the service and investment in the port area, the second are ancillary obligations, which are translated into business models, not affecting directly the relation with the State,

[28] Sentencia No. C-474/94

but the economic and political order. Among these obligations is the failure to carry out any practice that has the objective of delimiting competition.

Therefore, concessionaires cannot perform acts that result in an undue competition, such as charging extremely low values and not covering the actual costs of the operation. The prices are public and are available for consultation at the Ports Office as a way to avoid this practice.

The Ports Act also means that the State cannot compel port companies to charge prices that do not adequately cover expenses or do not allow adequate remuneration to their shareholders. On the other hand, companies should avoid privileges and discrimination among users, refraining from engaging in unfair competition or creating restrictions of competition, being civilly liable for the damages resulting from their practices. Article 22 describes the restrictions:

ARTICULO 22º. Restricciones indebidas a la competencia. Se prohibe realizar cualquier acto o contratos que tenga (sic) la capacidad, el propósito, o el resultado, de restringir en forma indebida la competencia entre las sociedades portuarias. Se entiende por restricciones indebidas a la competencia, entre otras, las siguientes: 22.1. El cobro de tarifas que no cubra (sic) los gastos de operación de una sociedad u operador portuario; 22.2. La prestación gratuita o a precios o tarifas inferiores al costo, de servicios adicionales a los que contempla la tarifa; 22.3. Los acuerdos para repartirse cuotas o clases de carga, o para establecer tarifas; 22.4. Las que describe el título V del libro 1 del Decreto 410 de 1971 (Código de Comercio) sobre competencia desleal, y las normas que lo complementen o sustituyan.

Concerning the freedom of tariffs, Article 20 of the Ports Act has clear provisions. Port companies will be allowed to freely set their prices only when the government, through a Port Expansion Plan, realizes that the number of terminals and service offerings is broad enough to do so. Currently, tariff setting is limited only by competition rules.

In the context of natural monopolies, the Superintendence of Ports and Transports may directly determine tariffs, but only when it is proven that the tariffs applied are discriminatory and harm users, or even affect the competition, according to article 21.

Also noteworthy is the work of the *Superintendencia de Industria y Comercio* (SIC), which has been executing and presenting studies[29] on the Colombian port sector since 2016 with a view to conducting an analysis of regulation and competition in the port market. SIC concluded that the port sector is affected by a high level of concentration, few agents involved and monopoly risk. Studies such as these are extremely relevant to public policy making.

2.5 – REPUBLIC OF PERU

The Port of Callao is the sixth largest port in handling of TEUs in Latin America and the Caribbean. It has 11 terminals, one of which is destined for the Navy, while the other are concessions, of which two are in favor of state-owned companies under the private law regime conceived as joint stock companies, PetroPeru and ENAPU.

The administration of concessions is the responsibility of the National Port Authority, responsible for the administration of 7 granted port areas, totaling 81 facilities, of which only 26 are for public use. The concessions are governed by the 2003 Port System Law and the 2004 National Port System Regulation. They are guided by the principle of free and fair competition, in order to foster logistical and competitive improvement, pursuant to Article 62 of the Regulation and Article 3 of Ports Act.

In this context, it should be pointed out that Article 3 of the Ports Act has as a fundamental objective of port regulation the creation of a scenario that allows Peruvian ports to effectively enter the international logistics chain, through physical and competitive conditions.

In the Regulation there are precise provisions on competition between ports of public use and ports of private use. The ports of private use must inform in the first days of the year its handling of the previous year, classifying it in its own cargo,

[29] The studies are available at: http://www.sic.gov.co/sites/default/files/files/Proteccion_Competencia/Estudios_Economicos/Documentos_elaborados_Grupo_Estudios_Economicos/Puertos_en_Colombia_18-05-2017.pdf e http://www.sic.gov.co/recursos_user/documentos/Formato_lanzamiento_estudio_puertos31-08-2016.pdf

cargo of bound third parties and in cargo of unrelated third parties. In cases where the unrelated third party cargo exceeds 75% of the annual turnover, the National Institute of Defense and Protection of Intellectual Property (INDECOPI in its acronym in Espanish), through the Free Competition Commission will be prompted to issue technical opinion. If competition is found, the prices of the ports of public use will be deregulated and if deregulation does not occur, the terminal of private use will not be able to charge prices higher than those charged by the terminal of public use[30]. This is a clear provision to protect users of port services.

Regarding the exclusivity of services, the granting of the concessions will depend on the Port Authority and will be lined to the technical opinion of INDECOPI on the impact of this exclusivity on the competition in the provision of these services, according to Article 54 of the Regulation.

Regarding competition aspects, Article 22 of the Ports Act binds port competition to decisions of INDECOPI, which is competent to evaluate infractions as well as to adopt precautionary measures when proven by the National or Regional Port Authority. The precautionary measures must be pronounced within 10 days, while the final decision may occur within 60 days.

2.6 – REPUBLIC OF ECUADOR

Although it is the seventh largest port in the handling of TEUs in Latin America and the Caribbean, the Port of Guayaquil has some deficiencies such as a

[30] Artículo 20.- Los Administradores Portuarios de puertos de titularidad pública o priva deberán comunicar a la Autoridad Portuaria Nacional dentro de los 15 (quince) días hábiles del mes de enero de cada año, el volumen anual de carga movilizada en sus instalaciones portuarias en el ejercicio anterior, disgregando el porcentaje que corresponda al administrador portuario y terceros vinculados de aquel que corresponda a terceros no vinculados. En los casos que en un puerto o terminal portuario de uso privado el porcentaje de servicios portuarios prestados a terceros no vinculados supere el 75% del volumen anual de carga movilizada en las instalaciones portuarias, la Autoridad Portuaria Nacional solicitará a la Comisión de Libre Competencia de INDECOPI, opinión técnica respecto a la existencia de competencia entre los servicios prestados por los puertos de uso público y los puertos de uso privado en la zona de influencia comercial. De verificarse la existencia de competencia se determinará la desregulación de los servicios prestados en los puertos de uso público durante el resto del ejercicio; en caso contrario, el administrador portuario del puerto de uso privado no podrá durante el resto del ejercicio cobrar por los servicios que preste a terceros, precios mayores a aquellos e establedos para servicios portuarios en puertos de uso público en su zona de influencia comercial.

depth of only 10 meters. It is a port under a concession regime administered by the Port Authority of Guayaquil. Established in 1999, with a contractual duration of 25 years, the first concession was the bulk and general cargo terminal, with Andipuerto Guayaquil S.A.

In 2007 the second concession was granted, with duration of 20 years. In this case the concessionaire Contecon Guayaquil S.A., controlled by the Philippine company of global scope ICTSI, was obliged to comply with an investment and development plan for the terminal. It is important to note that there is explicit legal provision for the concessionaire to be an Ecuadorian company, which can be observed from different legal perspectives.

Regarding the market barriers for participation of foreign companies in port activities there are two understandings. Jurists of constitutionalist bias believe that the measure is justified because the ports are inherent to public interest and security. On the other hand, those of internationalist root see it as a barrier that prevents the exercise of the free market and the participation of companies that own certain technologies. In turn, the business market has solved the issued by creating national companies controlled by foreign investment funds.

In the competition aspect, there is little specific regulation. The Ports Act, Decree 289, does not at any time address the basis of fair competition or price policies.

The General Regulation of Port Activity, Decree 467, establishes the principle of minimum cost for the user as fundamental for port activity, and must also be included in a concession agreement, being an activity delegated to the port entity to establish the control of such compliance, including maximum prices. The regulation further determines that it is the responsibility of the National Council of Merchant Navy and Ports to approve the maximum prices for services rendered, mainly to avoid dominant market positions, ascertained by independent technical professionals, with a view to protecting users. It should be noted that the National Council of Merchant Navy and Ports was abolished by executive decree 1087, however, all its powers and attributions were transferred to the Secretariat for Ports and Maritime and River Transport.

Fair competition is present as the twenty-seventh allocation of the Subsecretariat of Ports and Maritime and River Transport which provides for the monitoring of compliance with the principles set forth in national legislation. There is no specific or targeted allocation to port services.

In turn, Article 335 of the Constitution of the Republic imposes on the state obligations of control, regulation and intervention, including establishing prices and sanction mechanisms to avoid any monopoly or oligopoly, or abuse of position of dominance or any other practice that affects fair competition. As for the tariff structure for commercial ports, it is set by resolution 33/06 which does not point to methods or guidelines to facilitate free competition.

Notwithstanding these regulations, it is possible to check concessionaires' dissatisfaction with competitive policies. Several news articles and interviews point to a dissatisfaction of terminals with internal and domestic competitive aspects. At this point it is important to emphasize the process of building a new port structure of greater depth as a concern of the current concessionaires, since the current pots cannot receive large vessels because they have extremely low depths, less than 10 meters in various sections.

Contecon's general manager, José Contretas, has even given interviews saying that since 2016 the competition has gone beyond the legal limits, forcing its concessionaire to invest 30% more than planned to try to avoid the leakage of cargo that still occurs. News articles also show that there is ongoing renegotiation by the Subsecretariat with the CONTECON Concession, which among several points deals with pricing to assist the export market.

The port competition problem in Ecuador is so latent that a draft of the 2012 Ports Act[31] even has a chapter on the issue. The draft bill is still pending approval,

[31] PROYECTO DE LEY GENERAL DE PUERTOS 2012
Artículo 60. Libre competencia en los servicios portuarios en los puertos comerciales. 1. En los puertos de uso público, la actividad portuaria de los operadores portuarios y empresas de servicios complementarios se desarrollará en un marco de libre y leal competencia. 2. Se reconoce la libertad de acceso a la prestación de servicios y al desarrollo de actividades económicas en los puertos comerciales estatales, en los términos establecidos en la presente Ley. Artículo 61. Prestación de los servicios portuarios. La prestación de los servicios portuarios estará regulada reglamentariamente, con la finalidad de garantizar condiciones de seguridad, eficiencia, responsabilidad, universalidad, accesibilidad, continuidad, calidad, respeto al ambiente y precios adecuados. CAPITULO 7. Normas de resguardo de la leal competencia Artículo 62.

Restricciones a la leal competencia. 1. Se prohíbe expresamente realizar actos que limiten o restrinjan la libre competencia entre puertos y entre operadores portuarios. Para estos efectos, se entenderán como restricciones a la leal competencia, las siguientes: a. El cobro de precios que no cubran los costos de operación correspondientes, por parte de un puerto o un operador portuario. b. Los acuerdos de cualquier naturaleza para repartirse cuotas de servicios o suministros a naves o cargas o para establecer niveles de precios interrelacionados. c. Los acuerdos escritos o verbales, formales o informales, entre empresas competidoras, con el objeto de fijar precios u otros términos comerciales. d. Todas las transacciones, con sus precios, rebajas o descuentos, que no se contemplen en una factura oficial. e. Todas aquellas que se contemplen en las normas generales sobre libre competencia vigentes en el país y las determinadas en las Regulaciones de la Competencia en las Actividades Portuarias, emitidas por el Consejo Nacional de Marina Mercante y Puertos. f. Se considerará práctica contra la leal competencia opuesta a los objetivos prioritarios de la Política Portuaria Nacional, cualquier monopolio u oligopolio que exista o se constituya, en materia de prestación de servicios o suministros portuarios en cualquiera de sus modalidades, partes o actividades. 2. La práctica de actos que limiten o restrinjan la libre competencia antes nombrados, debidamente comprobada por la Autoridad Portuaria correspondiente, deberá ser puesta en conocimiento de la Dirección General de la Marina Mercante y Guardacostas, quien en caso de confirmar dicha práctica, sancionará de acuerdo con lo establecido en la presente Ley. Artículo 63. Funciones de los organismos públicos portuarios en la libre competencia. 1. Con el fin de salvaguardar la competencia efectiva en el mercado de los servicios portuarios, el Consejo Nacional de Marina Mercante y Puertos ejercerá, sin perjuicio de las competencias de otros organismos, las siguientes funciones: a. Desarrollar normas que protejan la libre competencia. Dichas normas se aplicarán sin perjuicio de lo establecido en los contratos de concesión vigentes. b. Promover la competencia efectiva y defender el funcionamiento del mercado de servicios portuarios. c. Controlar los efectos distorsionantes provocados por situaciones en las que existen “posiciones de dominio” en el mercado o funcionamiento deficiente del mismo, estableciendo mecanismos preventivos, correctivos y sancionadores de mayor o menor alcance. d. Proteger los intereses y expectativas básicas de los usuarios, particularmente respecto a las variables “calidad” y “precio” de los servicios prestados. 2. Corresponderá a la Dirección General de la Marina Mercante y Guardacostas: a. Elaborar informes periódicos al Consejo Nacional de Marina Mercante y Puertos sobre la situación de la competencia en este sector. b. Autorizar y controlar los servicios portuarios que excepcionalmente sean prestados subsidiariamente por las Autoridades Portuarias, de acuerdo con esta Ley. c. Controlar el cumplimiento en los Terminales Portuarios privados de las normas de Regulación de la Competencia en las Actividades Portuarias d. Mantener el Registro General de los operadores portuarios y empresas de servicios complementarios. e. Mediar en los conflictos que puedan surgir entre operadores portuarios de servicios, a solicitud de éstos, cuando trasciendan la jurisdicción de una Autoridad Portuaria y, en su caso, entre dos Autoridades Portuarias o entre estas y los Terminales Privados, por razón de los servicios prestados en cada una de ellas o entre ellas. 3. Las Autoridades Portuarias velarán por la libre competencia en su jurisdicción, a cuyo fin ejercerán, sin perjuicio de las facultades de otros organismos, las siguientes funciones: a. Aprobar los precios máximos para los servicios portuarios abiertos al uso general de los usuarios del puerto. b. Controlar la transparencia de los conceptos y los precios que se facturen. c. Adoptar las medidas necesarias para evitar prácticas contrarias a la libre competencia. d. Aplicar las Normas de Regulación de la Competencia en las Actividades Portuarias. e. Informar a la Dirección General de la Marina Mercante y Guardacostas sobre los actos, acuerdos, pactos o conductas de las que pudiera tener noticia en el ejercicio de sus atribuciones y que presenten indicios contrarios a la normativa de defensa de la competencia. f. Mediar en los conflictos que puedan surgir entre los operadores portuarios en su zona de jurisdicción, a solicitud de éstos, g. Presentar informes periódicos a la Dirección General de la Marina Mercante y Guardacostas sobre la competencia en su zona de jurisdicción

but its available version brings specific and relevant milestones to boost port activity with the premise of equitable and fair competition. However, although there is a competition agency in Ecuador, Superintendencia de Control del Poder de Mercado (SCPM), it has no powers on the ports bill and it is not even publicly known if the SCPM was invited to analyze the draft.

Although there is no constitutional provision that requires the SCPM to revise the project, it is important that it participate in the elaboration of a legal framework, especially regarding competition aspects, so evident in Ecuador. Integration among government agencies is essential for effective regulatory compliance, the drafting of laws that are realistic and technically just.

2.7 – JAMAICA

Kingston Port is one of the main Latin American and Caribbean ports mainly due to its favored location and favorable geographic formation. It is also one of the oldest ports in the region.

Its management regime is governed by the Port Authority of Jamaica, established by the Port Authority Act of 1972. Currently all berths are operated by companies. In the port there are 10 private berths, operated by 10 private terminals. The 16 public berths are operated by two companies, Kingston Wharves Ltd operates 9 berths and other 7 are operated by the Kingston Container Terminal. The pilotage service is mandatory and provided directly by the Port Authority of Jamaica.

There is no provision in the Port Authority Act on price and competition regulation. Nor does the Port Authority of Jamaica disclose any such act.

However, competition and regulation is no longer an object of analysis. The Fair Trading Commission is preparing a study on port services in Jamaica to identify competitive impediments. The objective of the study is the elaboration of a port work and development plan, based on local economic principles and legal policies. In the surveys conducted in this study it was not possible to identify a public version of the study.

2.8 – REPUBLIC OF ARGENTINA

The Port of Buenos Aires is among the largest in the Latin American and the Caribbean region based on the handling of containers. It is located in the country that experienced the greatest transformation in the port sector in the region regarding the transmission of the execution of services from public initiative to the private initiative. Until 1991 all the Argentine ports were administered, operated, controlled, centralized and monopolized by the State through the General Administration of Ports.

However, the possibility of private ports dates from the 1970s, when laws 22.080 and 22.108 were enacted. From them on, there was the possibility of specific terminals and the elevators of grains were able act privately. However, the intensification of process of privatization, concession and deregulation would only deepen in 1990 with law 23.696 on the reform of the state. By decree 817/1991 the Administration of Ports was dissolved and pilotage and hauling were privatized.

In 1992, law 24.093 of port activities takes effect, inspiring several other countries. Under this law, the owners or operators of each port must offer their own dredging, pilotage, hauling and handling services. It also made it possible for people and companies to build and operate ports freely, classifying them as public or private according to the cargo they would like to handle. However, the development of port activity has to respect free competition in both the admission of users and pricing.

In this regard, the Port of Buenos Aires now has its operation under the supervision of the *Administracion General de Puertos Sociedad del Estado* and has its terminals operated by 4 private companies.

In the Ports Act there are no objective price assumptions, only if the regime of free competition is determined. However, 2018 will surely bring new contours to port activity in Argentina, since the New Competition Law creates a local authority called the National Authority of Competition, with a court for judgment, a secretariat for anti-competitive measures and a secretariat for economic concentrations.

The major change from the current Argentina competition defense regime to the new law is the objective establishment of some behaviors as noncompetitive,

while the previous law depended on the observation of potential losses to the economic interest. Other changes such as the deadline for notifying mergers and strengthening legal activities also extend the functionality of the law.

2.9 – REPUBLIC OF CHILE

The tenth largest port in Latin America and the Caribbean in handling of TEUs is the Port of San Antonio, in Chile. It is a state-owned port administered by Empresa Portuária San Antonio (EPSA), created by force of law in 1997.

Under the scope of Law 19.542, there are concessions and leases in force in the port. There are 4 terminals, 3 with concession for exploration and administration: 1) San Antonio Terminal Internacional, presented as the most efficient in South America by EPSA; 2) Puerto Central; and 3) Puerto Panul. Site 9, here understood as the fourth terminal, is administered directly by EPSA and is operated by means of grants of use to various agents.

The coordination at national level is under the control of the Department of Maritime, River and Lake Transport. The Ports Act is the law 19.542 and its main objective is the modernization of the state port sector. It determines public tariffs without arbitrary discrimination, governed by free competition in Article 21.

The bidding processes must be conditioned to provide for free competition and conditions of fairness between the concessionaires of public and private ports in accordance with Article 51 of the Ports Act.

Currently the Ministry of Development has study groups aimed at increasing the port's international competitiveness.

PART III - COMPETITIVE ASPECTS OF PORTS AND AGGREGATED SERVICES

Competition in ports services and infrastructure is a complex subject, whose analysis demands the verification of diverse levels of integration and access, and it is necessary to observe multiple but connected aspects. Analyzing the port as an isolated commercial activity prevents the perception of its complexity.

Ports are an important part of a logistics chain directly affected by globalization and its new technologies. In this way the port activity is essential for the vitalization of the industry and commerce worldwide. Currently, although there are higher and lower levels, international trade is a necessary activity for the economic and social viability of the vast majority of nations.

3.1. – INTRA-PORT AND INTER-PORT COMPETITION

In Latin America and the Caribbean there is a global trend in the concession of terminals and port services to private companies. Although ports continue to be present even in constitutional texts because of their importance, the direct execution of services by States is diminishing.

It is important to differentiate the port concession regime from privatizations of other activities. In some cases, the state sells to the private initiative a given asset, and the buyer is free to exercise the activity, governed only by general laws on economic activities. This situation does not occur in the port sector, since ports are a fundamental instrument of national interest and national security. The permeability of a country's border is not only a question of economic balance, but also of public health and safety.

Thus, as can be seen from the reading of the Constitutions, countries continue to provide for a special regime for ports, where there is no transfer of ownership, only concession for private companies to run a public service, bringing more importance to the regulatory aspect, as will be seen below.

However, these notes are important because it is from this concession regime that the two different levels of competition emerge: intra-port competition and inter-port competition. Intra-port competition only exists because of the plurality of agents that administer terminals and services; it is a competition within the same port, different from inter-port competition that occurs between different ports, spatially distant, therefore, subject to different access conditions.

In the intra-port context, the main difference is the technology used to reduce the loading and unloading time, and the value charged for services, since the intrinsic aspects of maritime and land access are common to different competitors.

It also creates increasing specialization, thus enabling terminals to specialize in a certain type of cargo and become more agile. An example is the Port of San Antonio, Chile, where each terminal is dedicated to a specific type of cargo, while in Colombia, in Cartagena, there are still no specialized berths. Specialized terminals directly reflect the reduction of the time of operations and the availability of better equipment. This is a typical aspect of competition within the same port area, however, it is also necessary to consider competition aspects between ports, mainly located in different nations.

An important factor in determining international port competitiveness in Lain America and the Caribbean is the depth of the Panama Canal, one of the most important navigational stretches in the world today, responsible for connecting two large oceans and several extremely relevant markets. This also justifies the great handling by Panamanian ports, being the only country to have two ports among the 10 busiest.

3.2 – LOGISTICAL CHALLENGES FOR MARITIME ACCESS

The depth issue is central to the competitiveness of ports when considering maritime access. A clear example is the reception of a steadily increasing number of deep draft vessels, which are only dedicated to stretches that involve Latin America and the Caribbean when they are already in process of being replaced in the European and Asian markets. Let us explain.

In Europe and Asia the evolution of ports' depth is an essential prerequisite for the increase of the draft of the ships, since if there is no port capable of receiving the ships they lose their primary function. That is, a vessel is only built to operate if there is a port capable of receiving it. So the European and Asian ports in their natural stage of development are evolving in depth as an important commercial attraction.

In Latin America and the Caribbean, the process is the reverse. There is pressure from shipping companies to increase the depth of ports to be able to receive vessels already in operation in other markets. Thus, ports need in short intervals to extend their depth to receive more modern vessels and consequently to

handle more cargo. In Brazil, for example, there are vessels that cannot reach the Port of Santos because of their draft and were directed to the Port of Itaqui, in São Luís, where the depth is higher. At other times, the ports no longer receive important shipping lines because the ships of these lines have a draft higher than that supported by port operation.

Therefore, competition is impaired by the temporary or permanent impossibility of receiving large vessels, as it may generate the need for transshipment in another port hub, increasing the cost of freight, or reducing the number of available shipping lines.

However, receiving vessels that handle more cargo represents a positive and negative aspect for ports. A positive aspect is that the terminals increase their capacity of handling, being able to export and import more. One negative aspect is that incomes are affected, since the vast majority of port services are charged per vessel. The State, if there is tax based on calculation per vessel, also earns less.

Larger vessels also affect the frequency of loading, and it is necessary to adapt the storage in the port region, since there is more volume shipped and landed at one time. As a direct consequence, land access also had to be adapted as will be seen below.

New vessels and technologies also affect the employment of personnel, since they are increasingly automated, dispensing manual labor. Although the substitution of activities that are harmful or potentially harmful to workers' health is important, those who previously exercised them in a few cases are relocated to equipment operating positions, most of them due to the lack of technical knowledge, generating a large number of employees without professional allocation.

Large vessels are also usually operated by mergers or carrier partners, which directly affects port competition. In the vast majority of cases, carriers enter into long- and medium-term contracts with a given terminal, thus, the fewer carriers in the market, the lower the number of contracts signed and the number of terminals contracted.The contracts are usually signed in Europe with a confidentiality clause, which prevents a more detailed analysis. However, it is imperative that carriers seek to concentrate their activities on as few terminals as possible to even make the

operation more convenient for their customers, thus, if there are fewer carriers in the market, even with more operation, fewer terminals are contracted.

Typical port competition is directly hampered by major mergers in recent years. However, the terminals have been working on their specialization as a means of guaranteeing their market position. The vast majority of the terminals have announced the acquisition of equipment and specialization, mainly in the loading of containers, as a means of differentiating themselves and winning new contracts.

Terminals are contracted in two ways in general: the first is long- and medium-term contracts signed with carriers operating on-line, in which case the specialization, facilities and uptime are more important. The second way is the contracts per operation, signed in the *trump* market, i.e., ships without constant line, for which the biggest differential is the price and the facility of contracting.

Thus, there is a need to behave effectively for both types of contracting, and the factors that drive competition will be observed differently.

Among the services provided in the ports, one of the most controversial is the pilotage[32] service, which is essential for navigation safety. In all ports covered in this study the pilotage service is mandatory, i.e., the boats must have a pilot on board to enter the berths. However, different countries have handled the pilotage service differently.

In Jamaica the pilot is contracted directly with the port authority, in Argentina the pilot may be affiliated with the terminal, in Brazil the pilot associations have pre-delimited geographic coverage. In general it is a supply with little or no competition, and several are the complaints about the price charged. Especially in Brazil there is a complaint about the values that for many are extremely high, motivating bills to regulate the price. Consequently these prices generate dissatisfaction on the part of the pilot associations, whose claim is that the service has the price proportional to the responsibility and knowledge employed. In Mexico

[32] As defined by OCTAVIANO MARTINS, E. M. Curso de Direito Marítimo. Manole: Barueri, 2013. Page 532-533: *Marine or maritime pilotage and marine towage services are navigational activities that strongly influence operational and logistical costs and consequently impact the development and competitiveness of the shipping industry and of foreign trade […] In general, the practice of pilotage involves different types of actions related to nautical maneuvers: sailing, mooring, unmooring, anchoring, among others.*

the pilotage service has the price regulated seeking to give greater competitiveness and access to the ports.

In this context, for international competitiveness between ports located in different countries, but with little geographic distance, the value of services such as pilotage can be an important factor in the choice of carriers.

Maritime access also depends on dredging services. The maintenance and expansion of ports' depth is essential for their competitiveness and insertion in the international logistics context. In canals shared by different terminals, from various economic groups, aligning investments is a complex activity, so often the dredging service depends solely on the port authorities.

3.3 – LOGISTICAL CHALLENGES FOR LAND ACCESS

Land access is as important for a port's competitiveness as maritime access. However, the management and technology of highways, railways, trucks and trains is not under the control of port concessionaires, thus emphasizing the importance of the elaboration of public policies by the States to guarantee the evolution of the logistic chain.

Whether in import or export operations, cargo never has the port as final destination or productive unit, so integration with the production and distribution centers is essential. No matter how modern a terminal is, if it is not correctly integrated into other transport modes, its activity remains basically impaired.

With the increase in the average volume transported by vessel, there is also an increased need of outlet in terminals. Often, port cities are not properly considered in public port management and become a barrier to access to terminals, since often the roads do not accommodate so many trucks or there is a lack of truck maintenance and supply structure.

In general, Latin America and the Caribbean do not have such developed railway networks. The Brazilian case is emblematic; there are few railway lines and in addition the rails are incapable of receiving various types and compositions. Often the concession of railways also favors groups that control specific terminals, without them having an interest in expanding their services to other terminals.

Public management, therefore, should draw up comprehensive development plans, thinking of the entire logistics chain. Countries such as Mexico, Ecuador and Peru have development plans in this regard, demonstrating the importance of a planned and integrated development.

Land access, as well as maritime access, must be efficient, adapted and integrated. Efficient logistics management is important, especially for fossil fuel economy and sustainable development.

The integration of modalities represents a reduction in transport costs, considering the possibility of contracting multimodal transport, reducing costs and modal transfer risk.

In addition, by creating effective load-flow channels, the countries become centers of attraction for the displacement of production centers, a movement begun in the 1990s and still existing, representing the installation of processing companies near the raw material regions, such as Latin America.

3.4 – TECHNOLOGICAL CHALLENGES

By adopting the port issue in Latin America and the Caribbean as an object, it becomes even more urgent to verify the conditions of technological connectivity. In advance, it is possible to define the countries of Latin America and the Caribbean as importing countries of navigation technology and port services. This means that the countries that are the object of this research are not centers for the creation and development of vessels, equipment and techniques, and it is necessary to adopt perceived and planned innovations in markets such as European and Asian.

In this way, Latin American and Caribbean ports are not considered in their peculiarities in the development of new vessels and equipment, forcing the terminals to adapt to a different reality in order to stay in business. The equipment is mostly imported from Asia with very high average cost. In this sense, tax incentive programs for the modernization of port structures and the purchase of equipment prove to be efficient and necessary. In Brazil, the special REPORTO regime brings exemptions and tax reductions for the modernization of ports.

The acquisition of equipment is essential for the performance of terminals and port services, such as hauling and handling of containers. The training of personnel is also an essential requirement for the maintenance and operation of port equipment. Latin America and the Caribbean are experiencing port automation, and nowadays a change in the profile of the port worker is taking place. Technical and operational expertise has become more important than physical strength.

3.5 – ECONOMIC ASPECTS

From the economic point of view the ports have to be analyzed on their operational costs and the prices passed on to the users. Port structures require high-value investments, whose recovery is long-term; at the same time, because they are public utilities, they have to be modest in collection. The participation of the public entity to stimulate and manage investments is therefore essential.

UNCTAD[33] figures indicate that Latin America and the Caribbean is the area that receives the largest private participation. It is justified not only as an important consumer market but also as a supplier of raw materials. It is also worth noting the concentration in the concession of terminals throughout Latin America and the Caribbean. The same economic group operates terminals in several countries and in various legal systems there is no limitation for foreign companies. In contrast, systems such as Ecuador require a company established in the country, but even so a concentration of international capital is observed in the control of these companies.

Most port terminal and port operator companies belong to economic groups operating in other facets of foreign trade, whether in maritime transport or even in the production of products or the exploitation of natural resources. Even investor participation in ports began with private terminals, where they built structures tailored to their needs at a time when only state investment in public terminals could not provide sufficient competitiveness.

[33] UNCTAD. Review of Maritime Transport. 2017. Page 75.

In the economic aspect, the legal regimes of the countries present general rules of concessions. However, it is important that the contracts signed establish target plans to ensure economic investments in the port regions and regulate competition in the pre-contractual phase, ensuring a fair competition for the terminals.

With regard to consumer prices, it is important that state regulation exist in order to guarantee adequate prices, both for the minimum value, avoiding unfair competition, and for the maximum value, avoiding the impossibility of contracting or the formation of cartels.

In the economic aspect, the intervention of the economic defense agencies in the evaluation of prices, formation of alliances and societies is extremely relevant, guaranteeing the realization of fair trade and fair competition, important instruments of regional development.

3.6 – LEGAL ASPECTS

In all activities performed, the legal regulation is important, however, in the port scenario its relevance is even more pronounced, since it is an activity almost always performed internationally. Whether it is the origin and destination of the cargo, the flag of the vessel, the captain's nationality, the place of the contract, among other. The arrival of a ship to the port can always be analyzed from a perspective of different legal systems.

However, in spite of its importance, the regulation of port activity must offer legal certainty and not represent a cost. A clear and well-founded legal system, with well-established rules and in line with the international agreements signed by that country, is imperative for the proper performance of Foreign Trade.

All the countries that are the object of this study have their own laws for port activity, however, there are great differences in approach and detail of situations. In some cases, like the Jamaican, the law is very old and addresses few situations. On the other hand Mexican Law brings a series of very precise situations and addresses important issues such as competition and its control.

Another key aspect for port competitiveness is the customs issues, which are essential for the integration of markets in international trade, and the consequent use of their ports. International traders are attracted not only by countries where taxes are lower, but especially by those in which there is effective legal certainty, i.e., the customs law of countries need to be easily understood by contractors. Regional integration is also an important factor for overcoming customs barriers and consequent stimulation of port activity with cargo handling not only for European and Asian Market, but also intracontinental. Sometimes Latin American and Caribbean countries buy products from outside the continent, with production in the region.

Three are the relevant blocks in the region: Mercosur, CARICOM and CAN.

Mercosur is an integration block that targets the customs union, including establishing a common external tariff, with no pretensions of economic union. It is important to document the Mercosur Common Customs Code, drafted in 2010 and still in the process of being implemented, the main objective of which is to avoid double taxation and facilitate the handling of goods.

In turn, CARICOM aims at custom and economic union, without having been able to affect the last and the CAN also seeks to promote customs union. For the time being, all these blocks have had difficulties in consolidating comprehensive customs regulations that increase the competitiveness of Latin America and the Caribbean vis-à-vis other markets. Efforts are now more in the framework of policy discussions and agreements to avoid double taxation. With the exception of the MERCOSUR Customs Code, not yet in force, it is not possible to identify other legal agreements that seek to standardize the treatment given to the port sector, influencing regional competition.

It is important that the blocks in meeting their goals not only establish joint policies but also verify the compatibility of legal systems, as a possible regulatory conflict may prevent the consolidation of regional policies.

Regarding legal aspects, it is also important that other services, not only those provided directly by the terminals, have their competition guaranteed. Examples are

hauling, sea management, ship cleaning, among others, whose correct and effective exercise is necessary to the success of the port operation.

3.7 – ENVIRONMENTAL ASPECTS

Currently, adopting the Sustainable Development Objectives as a paradigm, it is of the utmost importance for its competitiveness that the ports and related services adapt their activities to the highest standards of environmental protection, exercising a true compliance.

The conservation of the environment and the promotion of fair and socially inclusive development policies represent an important aspect for fair competition and regional integration. Even if the foreground looks like distorted themes, their connection is objective. Nations in which there is greater income distribution and quality of life mainly through the conservation of the environment, tend to consume more products and present more advanced education systems, forming professionals capable of promoting improvements in Latin American and Caribbean port logistics.

In this area, the provision of services such as shipping agency is very relevant. The supply of inputs and the management of ship waste is a service with global impact, influencing both the health of the crew and the population of the port region.

Sustainable logistics is a global trend, however, so far there is no incentive for green development in Latin America and the Caribbean in a systemic and integrated way.

PART IV - PERSPECTIVES FOR THE LATIN AMERICAN AND CARIBBEAN PORTS – PROPOSALS FOR REGIONAL INTEGRATION

Although it is possible to verify several challenges for Latin American and Caribbean ports, the prospects are promising and point to a regional development even in times of economic crisis in most of the countries of the region. Nowadays, with the intensification of the flow of information and goods, ports have become the

main means of international transport, essential for the realization of fair international trade, an important factor for the development and balance of the trade balance.

Latin America and the Caribbean are effectively connected to international trade, with the ports surveyed receiving lines reaching all regions of the globe. In this way, the perspectives of evolution and regional integration are more concrete, being mainly related to the employment of new technologies and productivity.

The region already provides a large volume of port services, however, the development of a common policy and the exchange of experiences can maximize not only the potential for service, but also the profit margin.

In reflecting the question, it is possible to divide perspectives and suggestions into three broad groups: 1) relationship between States; 2) relationship between States and Companies; 3) relationship between Companies. These groups allow the identification and construction of action plans through the relationship of the most important subjects in the port organization.

4.1 – RELATIONSHIP BETWEEN STATES

Although the provision of services is essentially carried out by private companies, ports remain a central theme of national interest, and strategic planning for the elaboration of a regional integration plan depends on state action.

It is necessary to adopt goals and development plans, as Mexico and Ecuador already do, in addition to Peru, whose plan specifically addresses the issue of regional integration. The multi-year plans establish a set of objectives, transforming them into a multilevel government project. In addition, its own elaboration requires a complex study of the port scenario, which is very relevant, since many nations do not have the exact size of their ports.

It is imperative to note that throughout this research, the main obstacle to its elaboration was the lack of systematized reports of ports and port services. The vast majority of the data is presented by the concessionaires themselves, being difficult to delimit if they are scientific information or public report.

In this context, it is necessary for States to prepare and periodically update studies of their terminals and related service providers, observing mainly competitive aspects. In the legislations examined, few address the competitive aspect in a detailed and specific way in the port context. Mexico and Peru are positive examples of legislation affecting competition.

Nevertheless, there are port laws that do not even address competition or price regulation. Although there are competition issues in the legal systems, it is necessary to establish a normative standard for such a specific port activity.

In this area, one can observe that by establishing the regulation of tariffs the legal systems have different recipients for the protection by the standard. Let us explain. The legal norms protect a value and seek to repress or encourage certain conduct aimed at a particular target audience of that standard. The objective of protection and the holder of that right will not always be expressly stated in the legal text, but the analysis of the legal text allows, through hermeneutical criteria, to understand the question.

Thus, there are two distinct trends in tariff regulation. One of the trends is the imposition of price regulation in order to avoid very high tariffs, thus protecting the user from the port, guaranteeing or seeking to ensure fair tariffs, often imposing an advertising regime and prohibiting discrimination. On the other hand, there are also systems whose regulation is aimed at protecting the other concessionaires and service providers, imposing a fair competitive regime mainly by preventing extremely low prices.

With regard to relations with other governments, it is important to exchange information and develop joint development plans, seeking the sharing of technologies and objectives, especially in terms of management to enable Latin American and Caribbean ports to benefit from a supranational work system.

The development of common regulations extends regional legal certainty and possible multilateral agreements facilitate the internal circulation of goods and also the transit of foreign goods between hubs and secondary ports. Uniform aspects in the treatment of goods and labor and environmental requirements facilitate the right-cost and stimulate the regional transit of vessels.

Nonetheless, intergovernmental alignment allows the development of common investment plans and the formation of study centers, encouraging regional integration as well as exchange with other regions.

An example of this situation is the European Union, with the specificities of being an unparalleled regional economic integration block. Within the EU, port integration is considered a priority through constant elaboration of development plans. The most enlightening example of possible implementation in the regional integration blocks is the new rules approved in 2016 by the Permanent Council to increase transparency in the port sector, creating adequate conditions of trade and competition[34]. The reform seeks to make resource management more efficient and transparent, especially the incentives received from public agencies, as well as to pacify and expand conditions of access to the port services market. The standard takes into account the specificities of the countries of the block, establishing a minimum standard and that countries can expand the requirements to respect internal peculiarities related to compliance with social and labor legislation. There are also different security, protection and sustainability standards, which extends the possibility of a similar norm in Latin America and the Caribbean by recognizing the differences among the countries of the region.

In short, the active Participation of States in the elaboration of common plans is an essential prerequisite for regional cooperation that respects the self-determination of peoples and fosters the economy, employing new technologies and supplying legal and economic contradictions between nations.

4.2 – RELATIONSHIP BETWEEN STATES AND COMPANIES

The relationship between States and companies is also essential for regional integration and competitive development of ports. As seen, UNCTAD points out that Latin America and the Caribbean receive the largest private investments in port development. Establishing fair, long-term and well-regulated relationships between

[34] Available at: http://www.consilium.europa.eu/media/24295/st10579-re01en16.pdf

states and companies fosters development and brings security for companies to invest in the region.

The participation of States in international arbitration chambers dedicated to investments brings security to international investors regarding the legal security of their investments.

It is also important to include companies in the preparation of regional reports in order to identify common problems and solutions that can be shared. Understanding the needs and possibilities of cooperation of the private initiative to develop development plans makes them more capable of complete, fulfillment, as well as promoting environmental compliance policies that are already a trend in the European market.

Moreover, many companies operating in Latin America and the Caribbean have adopted environmental and managerial standards compatible with the laws of their countries of origin, even though they represent greater demands than the receiving countries in Latin American and the Caribbean. It is possible to exemplify the actions of Carrefour, whose own acts and hiring third parties are appropriate to environmental and economic management policies imposed in France and superior to regional legislation.

Establishing clear regional requirements and systems of public competition brings reliability to regional governments as well as complying with the publicity of government acts required in almost all constitutions of the region. The adoption of transparent policies in the Latin American and Caribbean context is an important sign of overcoming governments with paternalistic tendencies and linked to inadequate incentives.

In this context, the elaboration of concession agreements is extremely relevant. The adoption of well drafted clauses, in line with international investment and competition law trends, encourages the reception of new businesses and technologies. The elaboration of investment plans between States and companies guarantees the social exploitation of the port structures.

Also regarding the relationship between States and companies, legal security is a vital pillar for the economic development of public policies. However, a very

relevant issue draws attention and represents a scenario of legal insecurity, both for law enforcement and for business owners. Almost all countries covered here have port regulatory agencies and agencies of economic competition, however, with the exception of Mexico, port laws do not provide for the performance of competition agencies, nor is there a rule that deals with the interaction of the regulatory and competition dialogue.

In this sense, the establishment of clear criteria of interaction in addition to avoiding conflicts of competence, will ensure a more effective and adequate compliance of competition issues in the port sector. Communication and alignment between agencies is essential for the establishment of a uniform and combative policy towards investors, entrepreneurs, users and the market as a whole.

4.3 – RELATIONSHIP BETWEEN COMPANIES

Relationships between companies at the level of a State and also at regional level represent an important possibility for the consolidation of an adequate logistics system. Due to the impossibility of developing the port in isolation, partnerships with companies from different sectors guarantee the approximation of consumer markets and production sources, facilitating port access and cargo management.

Market loyalty, especially in the context of major mergers of shipping companies, seeking the inclusion of more countries and facilitating transshipment operations reduces costs and increases regional effectiveness.

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CONCLUSION

Throughout this study it was possible to identify that the Latin American and Caribbean ports are receiving successive investments and the foreign trade reality is becoming more adequate. Undoubtedly, the change in regulatory frameworks in the 1990s and the presence of private enterprise have made port administration more effective.

The correct insertion of Latin America and the Caribbean into the freight transfer axis brings positive regional results to countries that do not have direct access to the sea and also to those that do not have their ports among those studied here. Fairer purchase and sale operations due to the economy with port operations and services reflect almost directly in the region, including helping to achieve the objectives of the regional integration blocks.

As a whole, the region still lacks legal mechanisms to ensure integration. Despite a series of bilateral and multilateral agreements, the Latin American and Caribbean legal systems still have little developed mechanisms for the implementation and enforcement of these treaties and agreements. It is important to observe Law as an important instrument in the implementation of political agreements. Latin America and the Caribbean must rely on these mechanisms for public policies to be understood as State rather than government.

Historically, because it is a region of presidential tradition, the non-continuity of some public policies is common, because of the change of party in power. In this regard, seeking to also value regional integration, it is important that the states adopt mechanisms that ensure the continuity of the policies adopted in the port sector. Policy maintenance is also important within the regional blocs, as they ensure legal certainty.

In this area, the adoption of both regulatory and competence agencies, with a technical character and functional independence, helps in the establishment of long-term and adequate management plans. Combined with the study of Comparative Law and international logistics practices, the work of the agencies can present a transformation in the paradigm of regulation and port competition.

However, there is much to be done. It is crucial to make the agencies' measures more publicized, so that they are widely disseminated, both for the establishment of state partnerships, and for guiding the activities of private entities. Throughout this study, it became clear that advertising should be improved, as well as the solutions adopted against anti-competitive and restrictive market practices. It was not possible to identify cases in full or at least descriptions in most agencies.

The communication of agencies with the community, obviously with some exceptions, still poses a challenge. Regulation and competition have the vital objective of developing and guaranteeing user rights; in this context, publicity and dialogue with the community give greater stability to decisions.

The preparation of a comparative technical study focused on the physical conditions of port terminals is also essential for regional strategic planning. Certainly, the region will evolve more with the adoption of regional policies rather than understanding neighboring countries only as competitors. The international community is often divided between transporter and transported countries. Few carriers are established in Latin America and the Caribbean, and none of the larger ones has its center of activity in the region – although they do list some vessels for economic reasons.

Because it is a transported region, it is important having regional integration mechanisms that help reduce the costs of providing port services, whose collection reflects directly in the final consumer market. Based on the Sustainable Development Goals, it is necessary to adopt policies aimed at improving the living conditions of the population, from the economic and environmental perspective. In this way, greater purchasing power and a less polluted environment are essential factors and directly influenced by port management policies.

Finally, Latin America and the Caribbean is an extremely privileged region with natural, cultural and geographical wealth. In short, the product is available in abundance and territorial conditions as well; what is needed is the establishment of adequate management and control policies for the broad development, not only economic, but also cultural, educational and environmental.

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