UNCTAD MONOGRAPHS ON PORT MANAGEMENT

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Evolution of Brazilian Port Legislation

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A series of monographs prepared for UNCTAD in collaboration with the International Association of Ports and Harbors (IAPH)

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Evolution of Brazilian Port Legislation

by

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NOTE

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INTRODUCTION TO THE SERIES

UNCTAD has been cooperating with the International Association of Ports and Harbors (IAPH) for some years, in fields that include the production, translation and distribution throughout the world of technical studies in the form of **Monographs.** Through these, it helps to develop the management skills needed for the efficient port operation in developing countries.

One important outcome of the ninth United Nations Conference on Trade and Development (UNCTAD IX) was a new work programme for UNCTAD in the transport field. It is important to stress that the original aim of improving the efficiency of ports which spawned the idea of the UNCTAD/IAPH monograph scheme was reaffirmed.

The UNCTAD Division for Services Infrastructure for Development and Trade Efficiency is thus pleased to be able to continue to cooperate with IAPH, presenting the practical experience gained by a specific port or professionals for the benefit of the international port community.

This cooperation supplements other research, training and technical cooperation activities carried out by the UNCTAD Division for Services Infrastructure for Development and Trade Efficiency that seek in particular to encourage the development of competitive international maritime transport services, reinforce trade structures and promote international cooperation and exchanges of expertise. We would like to thank the authors for their contribution to these monographs, all of which have been made on a voluntary basis.

Jean Gurunlian
Director
Division for Services Infrastructure
for Development and Trade Efficiency

FOREWORD

When UNCTAD first decided to seek the cooperation of the International Association of Ports and Harbors in producing monographs on port management, the idea was enthusiastically welcomed as a further step forward in the provision of information to managers from ports in developing countries. The preparation of monographs through the IAPH Committee on International Port Development has drawn on the resources of IAPH member ports to record, for the benefit of others, the experience and lessons learnt in reaching current levels of port technology and management. In addition, valuable assistance has been given by senior management in ports of developing countries in assessing the value of the monographs at the drafting stage.

I am confident that the UNCTAD monograph series will be of value to managers from ports in developing countries in providing indicators towards decision-making for improvements, technological advance and optimum use of existing resources.

The International Association of Ports and Harbors looks forward to continued cooperation with UNCTAD in the preparation of many more papers in the monograph series and expresses the hope that the series will fill a gap in the information currently available to port managers.

Goon Kok Loon
Chairman
Human Resources Committee
IAPH

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INTRODUCTION

1. Port legislation is a fascinating subject that encompasses several specialized branches of law: public, private, administrative, constitutional, labour, taxation, investment and so forth. At an informal meeting held at UNCTAD headquarters in Geneva, in 1991, a group of legal experts on port matters from 14 countries recommended the establishment of an association with the aim of developing a unified view of the subjects covered by these specialized branches of law.

2. Port legislation, however, is also important to other port professionals, notably to port managers. Indeed, it has an important and lasting impact on port management and on the efficiency of ports to serve trade. It is therefore of particular interest to ports that wish to succeed in this era of globalization where legislative changes are often required to adapt to the new realities of trade.

3. This short review of Brazilian port legislation, made after the enactment of Act No. 8630/93, highlights the major legal instruments that have guided the development and operation of ports in the country since the nineteenth century. It is hoped that this will help port managers to understand the relevance of the legislation and make meaningful comparisons with their own situation.

Chapter I

TRADITIONAL PORT LEGISLATION

4. The recorded history of Brazilian ports starts at the time of the discovery of the country by the Portuguese, on 21 April 1500, when the first vessels arrived at a place they called Porto Seguro (Safe Port), today a minor port in the State of Bahia. During the three centuries of colonial rule, Brazilian ports were used solely to supply Portugal with raw materials such as red dyewood (*pau-brasil*, which gave its name to the country), cotton, tobacco, sugar, coffee and cocoa. During the eighteenth century, the valuable commodities of gold and diamonds were also exported. Imports came exclusively from Portugal and provided the colonists with manufactured goods, cloths, furniture, wine, olive oil, salted fish, and the like.

5. Economic activity was concentrated in the north of the country, roughly around the present State of Bahia, having its centre at the present port of Salvador. Other European powers, notably the Dutch and the French, invaded this region but were defeated by the colonists. Brazil's economic development was then left to major trading companies (Maranhão, Pernambuco and Para), which enjoyed trade monopolies in large areas further north.

6. Trade was undertaken only in Portuguese vessels and, from the mid-seventeenth century, the British were first allowed to introduce some vessels into the Portuguese fleets and were then given preference.[1] The system was maintained, even at the time of the gold rush of the mid-eighteenth century in the present State of Minas Gerais. This discovery moved the weight of economic activity to the south and focused trade on the port of Rio de Janeiro, the outlet for gold exports. During this period there was no significant investment in port facilities.

7. The opening of Brazilian ports to all vessels was a result of the Napoleonic Wars. In effect, the long-standing commercial association of Portugal with England, reinforced by the Treaty of Methuen in 1703, put the Portuguese royal family in a dilemma. It had to refuse the entry of British vessels into Portuguese ports although the country was heavily indebted to Britain. The threat of an imminent French invasion resulted in the royal family's decision to move to Brazil using the British Navy.

8. Soon after arriving in Brazil, King John VI issued a Royal Charter, dated 28 January 1808, opening Brazilian ports to vessels of friendly nations for engaging in import and export activities[2] on equal terms with the Portuguese. This was the foundation stone of Brazilian port legislation. In practice, and due to the Trade Treaty of 1810, it allowed the free entry of British vessels and traders to Brazilian ports. The opening was maintained after the declaration of independence and the creation of the Empire in 1822. In the 1840s, the Government raised customs duties to discourage imports.

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[1] Roberto C. Simonsen, *História Económica do Brasil*, Volume II, 1937, pp. 178-180.

[2] Hélio Vianna, *História do Brasil*, 15th edition, 1992, pp.374-375.

9. During the Empire, economic development was pursued by fostering private investment. For instance, the law of 29 August 1838 authorized private companies to undertake public works for the betterment of river navigation, opening of canals and construction of roads, bridges and aqueducts. At this time, no mention was made of port development. However, as demonstrated by the railways undertakings begun in the 1850s, it was necessary to provide adequate incentives to the investors.[3] Probably it was the lack of such incentives that explained the failure of the first concession granted to build the port of Ceará in 1866.

10. The introduction of modern steamships in the mid-nineteenth century created pressure for the development of adequate navigational and berthing facilities along the Brazilian coast. The first regular liner service between Brazil and England was established in 1851,[4] and by 1852 navigation up the Amazon River was deemed necessary to exploit the rain forest, most of which is now in Amazonas State.

11. Basic studies to improve navigation were entrusted to officers of the armed forces, complemented by foreign engineers, until the establishment of the Ministry of Agriculture, Commerce and Public Works in 1861.[5] Moreover, the first Brazilian engineers specialized in hydrography[6] become acquainted with port technology and, later on, in 1874, contributed to the establishment of a chair on seaports at the Polytechnic School of Rio de Janeiro.

12. As the need for adequate port facilities increased, the Government leaned towards private investors, in part due to the considerable expense and debt incurred in the Paraguayan War (1864–1870). The result was to enact the Law of Concessions, Act No.1746 of 13 October 1869. This law followed the English approach of "self-support" for the execution of port development and its commercial exploitation.

13. Under that law, the concessionaire was required to:[7]

a) Request approval for the construction project and its budget;

b) Request approval to modify the amount of capital invested;

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[3] Guaranteed bonds for up to 5% of the amount invested were authorized for railway contractors. Vianna, p. 506.

[4] The M/V Teviot arrived in Rio de Janeiro on 7 February and was back in Southampton on 10 March. See J.C. Rossini, *Rota de Ouro e Prata*, 1995.

[5] Some of the distinguished naval officers were Giacomo Raja Gabaglia, Barão de Teffé, Leite Lobo, Costa Azevedo, Calheiros da Graça and Vital de Oliveira. Army officers included Jorge Brito, Moraes Ancona, Gomes Jardim. The foreign, mainly European, engineers were Vauthier, Fournier, Berthot, Charles Neate, H. Lau and John Hawkshaw. A towering figure was Admiral Mouchez, who for many years covered the whole length of the Brazilian coast with the arduous task of charting the hydrographical maps, which even today are a precious source for consultation.

[6] Among them Andre Rebouças, Borja Castro, Horácio Bicalho, Francisco Bicalho, Adolpho Del-Vecchio, Ewbank Camara, Alfredo Lisboa, Domingos Sérgio de Sabóia, Benjamin Weinschenk and Manuel Carneiro de Souza Bandeira.

[7] Hélio Siqueira Silveira, A concessão de portos no Brasil, in *Portos e Navios*, March 1984 pp. 30–33.

c) Have the right to expropriate land and other assets of third parties, as required by the project;

d) Set up a sinking fund to recoup the capital invested by the end of the concession. Credits to this fund should come from the annual operating surplus and should start 10 years after commissioning the works, at the latest;

e) Request approval for the charges to apply to port users;

f) Be granted all customs privileges for its warehouses, namely, the privilege to issue "warrants" for the goods stored; and

g) Name a local legal representative, in the case of foreigners, with full powers to decide on any problem regarding to the concession.

14. The law made the Government responsible for:

a) Fixing the duration of the concession, keeping in mind the importance of the construction but not to have it exceed 90 years;

b) Making a tariff revision every five years and reducing charges to users when the annual surplus of the concessionaire is equivalent to a rent of more than 12 per cent on the capital invested;

c) Authorizing the concessionaire to provide cargo handling and warehousing services to port users;

d) Ending the concession after 10 years of the commissioning of the works, by paying the concessionaire a rent of 8 per cent on the capital invested after deduction of debts; and

e) Taking over all assets at the end of the concession.

This law was used in several ports: in Rio de Janeiro and Santos in 1870; Salvador and Macaé in 1871; Paranaguá and Imbituba in 1872; Maranhão, Aracajú, Vitória and Laguna, in 1890; Manaus in 1900; and Belem in 1902. However, due to technical and financial difficulties several concessionaires failed, and few material improvements worthy of note were made by the turn of the century. A major problem was the lack of guarantee to recover the private capital invested which was so essential for executing port works. To overcome this difficulty the Government guaranteed, by Special Budget Act No. 3314 of 16 October 1886, interest on the sinking fund by establishing special "ad-valorem taxes" on imports and exports. This encouraged investors and a third concessionaire was able to complete the port works in Santos, in 1892. In Manaus, a second concessionaire was successful in 1902.[8]

15. The financial incentives continued after the demise of the Empire in 1889. Engineer Francisco Bicalho suggested undertaking the construction work on credits that would be

[8] Port of Manaos, in *Ports and Harbors*, May 1978, p. 38.

backed by taxes to be collected after commissioning the facilities. Budget Act No. 957 of 30 December 1902 authorized the Government to undertake such credit operations, and Decree No. 4859 of 8 June 1903 established a fund for each port. The difficulty of financing small ports soon became apparent because taxes would not be sufficient to recoup the cost of construction. The solution was Decree No. 6368 of 14 February 1907, which established a special fund for ports (Caixa Especial), in which all revenues from taxes collected for port improvements were deposited. Notable among those tax revenues was the 2 per cent *ad-valorem* gold tax on the official value of imports passing through all the country's ports. This gold tax soon became one of the principal sources of income for the fund, with the rental of port assets being another. Several regulations were imposed on this fund in 1913, 1916 and 1921 until its abolition in 1923.

16. The port works of Rio de Janeiro, completed in 1910, benefited from the fund. The port of Vitória, which was a simple wooden quay in 1889, grew to serve coastal vessels plying north, to Bahia, and south, to Rio de Janeiro, due to the expansion of the coffee trade, and benefited from it as well.

Chapter II

CONSOLIDATION OF BRAZILIAN PORT LEGISLATION

17. In contrast with the previous period, the period beginning in 1934, a time of increased powers for the Federal Government was one of flourishing port legislation. This legislation covered the traditional issue of financing port development as well as issues related to the actual functioning of the ports. Afterwards, and following the demand for specialized bulk terminals in the 1950s and 1960s, the legislation made it possible to have parallel public and private ports systems.

18. The establishment of an institutional framework to deal with port matters was the most significant development of the period. It started with the merger of two inspectorates, dealing with ports and navigation respectively, into a new Department of Ports and Navigation (Departamento Nacional de Portos e Navegação or DNPN).

19. The origin of the port inspectorate was the fiscal and administrative commission set up for conducting port works in Rio de Janeiro, at that time the capital of the country. This commission had been transformed into an Inspectorate (Inspetoria Federal de Portos, Rios e Canais) through Decree No. 9078 of 3 November 1891 and given powers to plan, execute and supervise any work concerning the improvement of ports, rivers and canals in Brazil. It then underwent various changes, broadening its duties until its merger in June 1934 with the inspectorate in charge of navigation (Inspetoria Federal de Navegação).

20. DNPN was subsequently changed into the National Department of Ports, Rivers and Channels (Departamento Nacional de Portos, Rios e Canais or DNPRC), within the then-Ministry of Public Works. A major shortcoming of DNPRC was the need to have direct approval from the Minister to incur any expense which, coupled with the prescribed public sector procedures and deadlines for budget approvals and disbursements, effectively delayed port modernization.

21. This was the underlying reason for the establishment of Act No. 4213 of 14 February 1963, of the National Department of Ports and Navigable Waterways (Departamento Nacional de Portos e Vias Navegáveis, or DNPVN). DNPVN was a public autonomous body (*autarquía* is the legal term in Portuguese), fully owned by the Federal Government but having a separate legal personality and assets. It also was administratively separated from the Federal Administration. The aim was to decentralize the public service, adapting it to the demands made by port users.

22. The creation of the DNPVN solved the major problem of delays in the disbursement of public funds. It also contributed to remedying the lack of specialized human resources by training workers from the public port sector. DNPVN prepared national port development plans, none of which attained their target. These plans included:

- A progressive plan to increase the capacity of the port system of the country;
- Studies, projects, new works and the procurement of new port equipment;

- Improvement of the fiscal policy for the concessionaires; and
- The progressive improvement of the inland waterway system.

A. Main legislation before the 1960s

23. In 1934 four important decrees[9] were enacted. Three addressed issues raised by the administration of ports. It was felt that international maritime transport required adequate services, notably a reduction of the delays in ports, which stemmed from conflict of powers amongst several government departments.

24. These decrees were:

- Decree No. 24447 of 21 June 1934:
  This defined the rights and duties of the various Ministries (Transport, Economy, Navy, Health, Agriculture, Justice, and Labour) in the public ports and harmonized laws and regulations to coordinate their port activities.

- Decree No. 24508 of 29 June 1934:
  This defined the services rendered by the public ports, standardized dues and tariffs (i.e. structure, denomination, units of measure, etc.) and established who was liable for their payment.

- Decree No. 24511 of 29 June 1934:
  This regulated the utilization of the public port facilities.

25. In all these decrees, there was a clear distinction between public ports — those having facilities and services for international shipping and cargoes and representatives of those ministries dealing with international trade — and rudimentary port facilities.

26. The fourth decree replaced the "concession law" of the nineteenth century and took a new approach to the problem of funding port development. Apparently the "concession law" was effective in ports of high commercial activity where a reasonable return on capital was possible and left other ports, located in underdeveloped areas, at a disadvantage. Decree No. 24599 of 6 July 1934 addressed the problem with the following provisions:

a) It authorized the concession of ports to States of the Union;

b) It limited the duration of the concession to 70 years;

c) It forbade the establishment of private warehouses;

d) It split the capital of the concessionaire in two: the initial capital — invested in the first 10 years of the concession — and the additional capital, invested afterwards;

[9] Hélio Siqueira Silveira, Tarifa portuaria no Brasil, in *Portos e Navios*, April 1979.

e) It reduced the authorized yield on capital invested from 12 per cent to 10 per cent, and called for a reduction in tariffs after only two years;

f) It split the sinking fund into two parts to compensate the initial and the additional capital, respectively;

g) It exempted concessionaires from customs duties for materials and equipment required for the construction and provision of services to users.

27. This decree opened the way for the contribution of public funds in port development. In effect, Decree No. 24343 of 5 June 1934, which sanctioned an additional 10 per cent on customs duties to replace the 2 per cent gold, *ad-valorem* tax on imported merchandise, provided the Federal Government with funds which were then channelled into ports under State concessions.

28. This contribution of public funds to port development was strengthened by Decree-Law No. 8311 of 6 December 1945, which established an emergency tax, and by Act No. 3421 of 10 July 1958, which replaced that tax by a new one, the port improvement tax, and established a national port fund. The latter also established the requirement to draw up a national port plan to use these funds.

B. Legislation during the 1960s

29. During the 1960s the need for the efficient functioning of ports shifted the focus from the development of facilities to cargo handling activities. Another concern was to address the need for building modern bulk terminals, for which contribution from the private sector was sought. In the period 1964–1967 the following legislation was enacted:

- Decree-Law No. 54295 of 23 September 1964:[10]
  This Decree-Law set up the economic and financial regime for ports and updated the structure and definition of tariffs.

- Decree-Law No. 05 of 5 April 1966:[11]
  This Decree-Law established a new regime for economic recovery of the merchant marine, national ports and federal railway companies. In relation to ports it allowed shipowners, or their agents, freedom to engage workers; authorized the creation of stevedoring companies; and allowed the merging of casual stevedores and permanent dock-workers (*capatazia*, those working on the quay side and transit shed) into a single category.

[10] Hélio Siqueira Silveira, Tarifa portuaria no Brasil, in *Portos e Navios*, April 1979, pp. 74–77.

[11] Fernado Margarinos de Souza Leao, Estrutura jurídico-administrativa dos terminais ou embarcadouros privativos na legislacao portuária brasileira, in *Portos e Navios*, April 1983, pp. 76–77, and Ezequiel S. Martins, O papel da iniciativa privada na estrutura portuária brasileira, in *Portos e Navios*, January 1984, pp. 70–71.

It also built on Decree-Law No. 6460 of 2 May 1944 and authorized the private sector to build and operate private terminals as dedicated facilities attached to specific bulk trades. These concessions build on the concept of basic port facilities. Further, it authorized the leasing of facilities to the private sector within the public ports.

- Decree-Law No. 83 of 26 December 1966:
  This law established, for the public port, concepts and definitions of the "port area", port administration and jurisdiction over the port area. It also established tariff levels for goods handled through private marine terminals and allowed their participation in joint ventures to manage the neighbouring public ports.

- Decree-Law No. 127 of 31 January 1967:
  This law addressed loading and unloading operations in developed ports. It was the most controversial rule because it forced the merging of stevedores and dockworkers into a single category. Moreover, it established that loading and unloading operations could be performed only by the:

  - port administration;
  - shipping company;
  - specialized cargo handling company (port operators or stevedoring companies).

  For the first time, the law allowed the creation of companies having full-time employed stevedores, tally clerks, dock workers, etc. It also introduced some significant reductions in manning levels. However, several long strikes occurred in the ports and the disobedience was so widespread that this law is known in ports as the one that never entered into force.[12] Act No. 5480/68 revoked it and also revoked part of Decree-Law No. 05/66 (articles nos. 14, 17, 18 and 21). The port sector maintained its status quo.

C. The era of Portobras

30. In 1975, the Brazilian National Congress, by Act No. 6222 of 10 July, authorized the Government to create a holding company called "Empresa de Portos do Brasil S.A." (Portobras) to succeed DNPVN in the Transportation Ministry. This company started operations on 2 January 1976 with the clear aim of taking a leading position in the port sector.

31. One factor leading to the establishment of Portobras was the dissatisfaction with the institutional set-up of the ports. It was believed that the different arrangements to be found in ports, notably the public ones, were responsible for the substandard functioning of the sector. Moreover,

[12] In Portuguese: "A Lei que não colou".

the investments needed to cope with the country's increased trade, technological progress in maritime transport and tapping of the potential of undeveloped regions should be given priority.

32. There were some ports, such as Manaus, which were directly managed by the Federal Government — the DNPVN — because of the concessionaire's failure in 1967. This situation was deemed unhealthy for the day-to-day functioning of the ports and resulted in lack of motivation for good performance as the surplus, if any, was channelled back and not reinvested in the port.

33. There were other ports under concession either to the private sector, such as Santos and Imbituba, or to the States. In the latter case, some ports were under direct State management, such as São Francisco do Sul and Paranaguá, while others were managed by public autonomous bodies (*autarquias*) like Vitória and Recife. During the debates in Congress one senator stated that the creation of "Portobras" would avoid more diversification of the ports' institutional arrangements and make the administrative system less cumbersome.

34. There had been attempts to improve the situation. The law establishing DNPVN in addition to the above modalities for port management also mentioned joint ventures (*sociedade de economia mixta*, in Portuguese), in which the Federal Government would participate with no less than 51 per cent. Further, Decree-Law No. 54046/64 reorganizing the port system laid down guidelines to that end, as well as for standardization of the labour schemes. However, since 1967 it had not been possible to implement this modality.

35. Accordingly, the mission of Portobras was to establish state dock companies in which investments from the National Port Fund and, hopefully, from the private sector were to be made. The companies were set up after private and State concessions expired. Thus in 1980 after the private concession for Santos ended, the Dock Company of São Paulo (Companhia Docas do Estado de São Paulo, Codesp) was established. By 1983 eight of these companies were functioning.

36. Portobras made many important investments, especially at the beginning of the containerization age in Brazil, where the terminals of Santos, Rio Grande and Rio de Janeiro were built. Bulk terminals were also built in Paranaguá, Vitória, Santos and Rio Grande. New ports were built in Suape (Pernambuco State). In the State of Espírito Santo, the ports of Barra do Riacho and Praia Mole, the latter close to Tubarão, were also completed. This was made possible by raising the port improvement tax from 2 per cent to 3 per cent in December 1976.[13] Nonetheless, in the late 1980s the additional port tariff (ATP) levy was created by Act No. 7700/88 to increase the funds for development.

37. The main idea was to create an integrated port system under a single legal framework coordinated by a holding company with headquarters in the capital — Brasilia. This company would be in charge of supervising the technical, administrative and financial aspects of the companies under its jurisdiction.

38. The activity of Portobras in relation to the improvement of the functioning of the ports focused on the supervision of the technical, administrative and financial fields of the dock state

[13] Adelina Capper, Portobras, its work and objectives, in *Portos e Navios*, December 1978, pp. 50–56.

companies. The programme to eliminate red tape (*programa de desburocraticação*) was followed by increased user participation through the Users' Councils.

39. There were, however, a number of failures attributed to Portobras activity. Investments went often to politically important States. Also it was too remote from ports; Brasilia is about 1,500 kilometres from the coast. Other complaints referred to the lack of transparency in handling large procurements encompassing all ports, the large number of politically appointed officers and the lack of competition between state dock companies. However, Portobras' major shortcomings were its failure to attract private investment in ports which, by the late 1980s, resulted in serious under investment and small progress in improving port efficiency, notably by delaying the needed upgrading of labour laws.

40. Thus, article no. 4 of Act No. 8029 of 12 April 1990 disbanded Portobras and all its activities were turned over to a department within the Ministry of Transport.

Chapter III

ACT NO. 8630 OF 25 FEBRUARY 1993

A. The Brazilian port system in the 1990s

41. The Brazilian port system is made up of 35 public ports along the seacoast and inland waterways. They are indicated in table 1 by region. In addition there are about 500 private terminals and a number of rudimentary port facilities.

42. These public ports are administered by eight dock state companies, in which the Federal Government is majority shareholder, and by concessions to either the private sector (Imbituba) or the States (Rio Grande, Pelotas, Porto Alegre, São Francisco do Sul, Paranaguá, Antonina, São Sebastião and Suape). The private terminals are managed by private and public companies for their own captive traffics, such as oil and ores, and were forbidden to move cargoes belonging to third parties. Some large companies like Petrobras (national oil company) and CVRD (Companhia do Vale do Rio Doce, a large mining company privatized in the mid-1990s) manage these terminals, which had to pay the public ports fees (known as "tables") unrelated to any services.

43. In 1992 the port system moved 340.5 million tons, of which 270.0 million tons, mainly dry and liquid bulks, were moved by the private terminals, with the remaining tonnage handled through the public ports. This volume of port traffic placed Brazil in fourth place after Japan, Singapore and the United States in terms of tonnage handled.

Table 1

List of ports

Northern region (5 ports):
Macapá, Santarém, Manaus, Vila do Conde, Belém
North-east region (12 ports):
Itaqui, Fortaleza, Areia Branca, Natal, Cabedelo, Recife, Suape, Maceió, Aracajú, Salvador, Aratú, Ilhéus.
South-east region (9 ports):
Praia Mole, Vitória, Forno, Niterói, Rio de Janeiro, Sepetiba, Angra dos Reis, São Sebastião, Santos
Southern region (9 ports):
Antonina, Paranaguá, São Francisco do Sul, Itajai, Imbituba, Laguna, Porto Alegre, Pelotas, Rio Grande

44. After the disbanding of Portobras in 1990, responsibility for the national ports policy was vested in the National Department of Waterway Transport (Departamento Nacional de Transportes Aquaviários, DNTA). The same approach continued after the DNTA was changed into the Department of Ports and Waterways (Departamento de Portos e Hidrovias, DPH), linked to the re-created Ministry of Transport in 1992. As table 2 indicates, the period 1990–1992 was one of rapid changes in the transport sector.

Table 2

Ministries responsible for the transport sector

Until 1990	Ministry of Transport
Act No. 8028 of 12 April 1990	Ministry of Infrastructure
Act No. 8422 of 13 May 1992	Ministry of Transport and Communications
Act No. 8490 of 19 November 1992	Ministry of Transport

B. The process leading to the law

45. In March 1990, port users met with senior officials at the Ministry of Transport to express their dissatisfaction with the present state of public ports and their legal system. Meetings followed with other governmental bodies until a meeting was held with the President of Brazil in July of the same year. The outcome was the preparation of a "provisional measure" (*medida provisória*)[14] containing the new port rules. Also in July, 52 representatives of the industrial, commercial, agricultural, shipping and private marine sectors created the "integrated entrepreneur plan" (Ação Empresarial Integrada, or AEI) to achieve the following objectives:

- To phase out the workers' monopoly of the port sector;
- To give more freedom to the functioning of private marine terminals; and
- To allow the privatization of services within the public ports.

46. In February 1991, the Government submitted a bill to the National Congress. It contained 11 articles,[15] but after protracted discussions in both Chambers and furious lobbying from the interested parties it resulted, two years later, in a text with 76 articles. The bill was passed by

[14] Provisional measure (*medida provisoria* or MP): a legal instrument called for by article 62 of the new Brazilian Constitution. MP is the responsibility of the Executive, and they are valid for only 30 days. During this period, the National Congress has to approve or refuse them. Once approved, the MP becomes law. Otherwise, there will be further discussion in the National Congress until some agreement about the subject is reached. In the meantime the Executive has to reissue the MP.

[15] A draft prepared in the mid-1980s had 15 articles.

Congress on 25 February 1993 as Act No. 8630, entitled "On the juridical regime of the exploitation of the main public ports and port facilities and related subjects".[16]

47. The law is structured into articles (i.e. Art. 20), paragraphs (i.e. §3º), items (i.e. I) and subitems (i.e. c). Article 4 provides a good example as its paragraph 2 has items I) and II), and within the latter, subitems a) and b). The articles are grouped into the following chapters and sections:

I. - On the exploitation of ports and port operations (arts. 1 to 3)
II. - On port facilities (arts. 4 to 7)
III. - On the port operator (arts. 8 to 17)
IV. - On management of the casual workers (arts. 18 to 25)
V. - On port work (arts. 26 to 29)
VI. - On the administration of the public port (arts. 30 to 36)
  Section I - The port authority Council (arts. 30 to 32)
  Section II - Administration of the public port (arts. 33 and 34)
  Section III - Customs administration in the organized ports (arts. 35 and 36)
VII. - On infractions and fines (arts 37 to 44)
VIII. - Last provisions (art. 45)
IX. - Transitional measures (arts. 46 to 76)

48. Not all articles contained text because the President vetoed four of them. They were:

Article 7: dealing with the application of special tariffs to private marine terminals. In brief, the proposed text said that the public port would receive no monies unless there was effective utilization of facilities. The rationale was to abolish the fees known as "tables". The President found the article redundant and unnecessary.

Article 46: dealing with the dredging responsibilities of the Federal Government. The President's veto was justified in that this proviso would have raised federal expenditure dramatically and could have been considered as a form of subsidization of ports.

Item II of paragraph 1 of article 67: This item would have allowed the port improvement fund (ATP) to raise loans in the financial market in case of need, with backing from the Federal Government.

Article 72: This article would have attached permanent dockworkers to the dock companies, thereby increasing their financial problems.

C. The main provisions

49. The law deals with the organization of labour (chapters IV and V), the establishment of the port operator as a central figure in cargo handling services (chapter III), the reorganization of the port

[16] Lei nº 8630. Dispõe sobre o Regime Jurídico da Exploração dos Portos Organizados e das Instalações Portuárias e dá Outras Próvidências.

administration (chapter VI) and the development of private terminals located inside or outside the boundaries of the public port (chapter II).

1. The organization of labour: OGMO

50. A major change has been the allocation of two major categories of workers: casual stevedores and permanent dockworkers to a non-profit body called OGMO. The stevedores, together with the dockworkers and lesser categories and subcategories of casual and non-casual workers, will therefore be managed in a unified and coherent way. However, the different categories and subcategories of workers will not disappear, but will remain as before. The management body, OGMO, will be set up by the employers — the port operators.

51. The result is that the previous split between on-board and quayside work will be replaced by an integrated approach in accordance with the requirements of new technologies (i.e. unitized and bulk cargoes and containers). The previous system, which had continued almost unchanged since 1934, had created monopolistic and restrictive practices that resulted in bloated registers and excessive manning levels. There were about 45,000 workers spread over the 35 state ports.

52. The main tasks for OGMOs are spelled out in article 18 as follows:

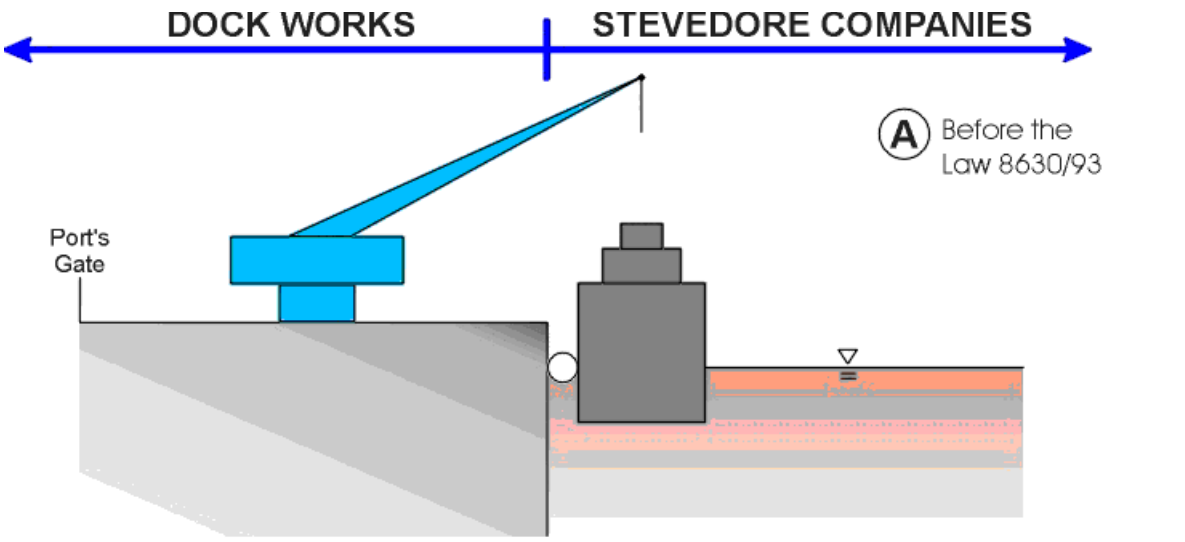
- To manage the supply of casual and non-casual port workers;
- To maintain the exclusive register of casual and non-casual port workers;
- To promote the training and professional skill-building of port workers;
- To select and register casual port workers;
- To determine the size of the register and the procedure for registering casual workers;
- To issue identification documents to port workers; and
- To collect and transfer to the beneficiaries monies owed by port operators for salaries, taxes and fringe benefits.

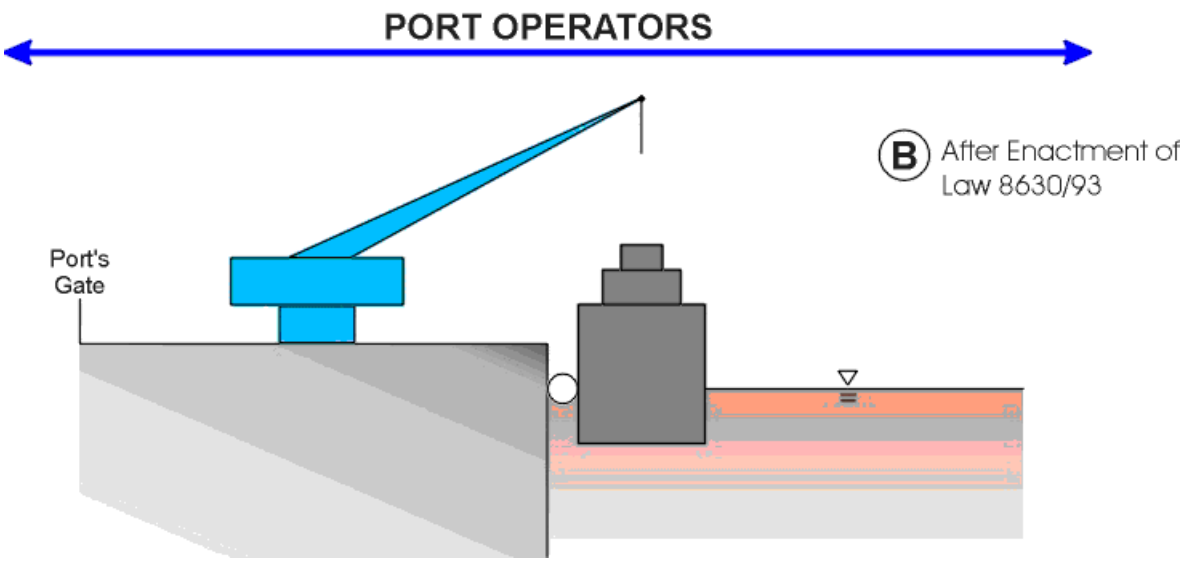
53. This part of the law underwent considerable negotiation. This explains the provision inserted in the same article stating that an OGMO will be established only if a collective work agreement between the trade unions and the employers and port users cannot be agreed upon. Moreover, to encourage the parties to reach such an agreement, article 47, in the chapter on transitory measures, set a deadline of 90 days following enactment of the law in which to do so.

54. However, after several meetings and exhaustive discussions, no agreements were reached in the ports. The Federal Government was forced to issue a provisional measure allowing an additional 60 days in which to set up an OGMO. In practice these bodies have started to be established in the ports, but at a snail's pace.

2. Port operators

55. The law established a new and important player in the port field — the port operator. This player is in charge of the cargo handling activities within the limits of the public port. The operator will be licensed by the port administration after assessment of its technical and financial capacity and a reply given within 30 days of the request. The port operator will request workers from the OGMO and will be liable for duty on the goods while they are in its custody. The area over which the port operator is responsible is indicated in the figure below.


DOCK WORKS
STEVEDORE COMPANIES
A Before the Law 8630/93
Port's Gate


PORT OPERATORS
B After Enactment of Law 8630/93
Port's Gate

3. Port Administration and Port Authority Council

56. The law covers the subject of port administration in three sections that deal with the Port Authority Council (CAP), the administration of public ports and the customs administration of the public ports. The inconsistency implied in having a Port Authority Council in each port with no port authority, but rather port administrations with several different names (i.e. state dock companies), may also be attributed to intense lobbying in the Congress.

57. The CAP is the rule-making body for each port and has the following tasks, defined in article 30:

- To issue regulations for the use of port facilities by private companies, users and port operators;
- To approve working hours of the port;
- To give advice on the port budget;
- To rationalize the use of port facilities;
- To promote the industrial and commercial activity of the port;
- To control implementation of rules to protect competition;
- To establish mechanisms for attracting cargo;
- To approve port tariffs;
- To give advice on programmes for port development and procurements;
- To approve the zoning and development port plan;
- To promote studies that co ordinate port development with transport plans of Federal and State Governments;
- To control implementation of rules to protect the environment;
- To promote competition; and
- To nominate the employers and employees' representatives to the body in charge of the port administration.

58. The membership of the CAP is set out in article 31 as follows:

Block One — The block of the public power having:
- one representative of the Federal Government, who will be the president of the CAP;
- one representative of the State Government where the port is located; and
- one representative of the municipality in which the port is located.

Block Two — The block of the port employers having:
- one representative of the port administration;
- one representative of the shipowners;
- one representative of the private ports located in the public port facilities; and
- one representative of the other port operators.

Block Three - The block of the port employees having:
- two representatives of the stevedores; and
- two representatives of other port workers.

Block Four —the block of the port users having:

- two representatives of exporters/importers;
- two representatives of the local Chamber of Commerce; and
- one representative of the off-dock port terminals.

59. In summary, the CAP is the port-wide normative body with responsibilities to deliberate on and promote issues of interest to those working and doing business in the port. The day-to-day activities of the ports are conducted by the port administrations that are in charge of the provision of new facilities and their maintenance, the procurement of equipment, and the general improvement of the infrastructure.

4. Other changes

60. In addition to abolishing the practice of compulsory payments to public ports, the law authorized private terminals to handle cargoes belonging to third parties (art. 4 § 2).

D. Implementation of the law

61. Implementation of the law has not been easy and has exposed the ambiguities in the text. The trade unions went so far as to question its constitutionality, but the Supreme Court rejected their appeal. Almost eight months after enactment of the law, the conservative forces continued to work against it in the hope that the status quo could be maintained.

62. Some of the difficulties stem from linkages. For instance, 180 days following its enactment, the law revokes the old labour legislation provided that the OGMO is in place. There is a 90-day limit to establish the OGMO, but the port operators, which are in charge of creating it, need to be pre-qualified and licensed by the CAP, and for this there is no deadline. Another ambiguity concerns the rules to allocate port development funds, such as ATP, which could involve large sums of money. Considering that the law seeks to promote competition between ports, this is a matter that needs to be reviewed.

63. Another obscure point is the boundary of the public port. The law is not specific on this matter which can lead to controversy. In fact, in some ports the boundary has been changed by subsidiary legislation and resulted in private terminals being relocated outside the public port and, therefore, not liable to use workers from the OGMO for the port's operations.[17]

64. The awareness of the need for additional coordination and negotiation to implement the law led to the passage of subsidiary legislation proposed by the Ministry of Transport, setting intermediate targets and deadlines to be met by parties. However, some of the CAP's members did not have previous exposure to the industry and this contributed to the delays in the effective implementation of the law.

[17] In April 1997 a strike hit Santos because of a dispute of this type.

65. With the above-mentioned shortcomings, implementation of the law was slow and at a pace commensurate with the prevailing social and economic conditions of each State and port. To accelerate the process new legislation dealing with the concession of public services, including port services, was passed. Act No. 8987 of 13 February 1995 regulated the concessions of public services in line with article 175 of the Constitution. Act No. 9074 of 7 July 1995 established the rules for granting and extending concessions of public services. Finally, Act No. 9277 of 10 May 1996 delegated the management of infrastructure to regional and local Governments and was further clarified by Decree No. 2184 of 24 March 1997, in connection to ports.

66. In this way, the privatization of the public port sector was carried out. Terminals were tendered to interested port operators, some of them being auctioned on the stock exchange. Successful bidders would make the necessary investments to upgrade facilities in accordance with the needs of the trade. The concessions require a progressive reduction in tariffs to users.

Chapter IV

CONCLUSIONS

67. The evolution of port legislation in Brazil has been guided by a central concern over the long period reviewed in this monograph, namely, the need to finance the necessary new facilities and the attempts to do so by using private and public funds. After an interlude in which public money was the main source of funds, Act No. 8630/93 again relies on the private sector for financing. As in the past, only the main ports and terminals are of interest to the private sector, and this raises the question of financing port development in less advanced areas of the country.

68. The removal of government from daily activities of port management is being accomplished. Public sector port administrations are now becoming the landlord type, similar to those seen in many ports in developed countries around the world. The labour reform, with the establishment of full-fledged OGMOs, is now under way and will probably increase productivity by eliminating restrictive labour practices. Moreover, the initial rush to set up many port operators has now been tempered by the understanding that large investments are needed in a now capital-intensive industry, and a consolidation process into a few and powerful port operators is well under way. Competition between these operators should develop and involve terminals located inside and outside the public ports.