



Infrastructure In Brazil

(Part I: TRANSPORT)

Ports

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INTRODUCTION: AN OVERVIEW OF THE SECTOR

With a coastline of 8.5 thousand km, the Brazilian port complex moved, in 2013, 931 million gross tons of cargo, an increase of 2.9% compared to 2012. The port sector alone is responsible for over 90% of the country's exports.

However, Brazilian ports are among the most expensive and the most inefficient in the world. For example, the waiting time for berthing a ship is well above the world average. Yet, the ports in Brazil represent a huge potential for the country's economy. If we consider a ten-year time span (from 2003 to 2013), the cargoes (in tons) handled in Brazilian ports increased by around 60%, while during the same period, the space allocated for cargoes only increased by 5%.

The World Economic Forum has rated the quality of Brazilian port infrastructure 2.7 out of 7.0. In this category, Brazil has been ranked 131st out of 148 world economies examined.¹

These figures well demonstrate the disproportion existing between demand and supply in the market. The increased efficiency and technology in the port sector is not sufficient to close the gap: new equipment and handling techniques cannot be exploited fully if the physical space is insufficient.

¹ Source: World Economic Forum Competitiveness Report 2013-2014 available at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.



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In the port sector, lack of infrastructure translates into limitations to maritime and terrestrial access (via roads and rail). In general, the managerial system of the port administration is outdated.

With the aim of better exploiting national ports, the federal government adopted in 2013 a new regulatory framework on ports dealing with the direct and indirect exploitation of ports and port installations as well as the activities carried out by port operators.

These highly anticipated legal texts aim at setting up a framework that should attract private investment in coming years, thus increasing the competitiveness and development of both the sector and the country. The government's objective is to invest 50 billion Brazilian reais to (i) modernize port infrastructure and (ii) increase cargo handling by reducing costs. The idea is to organize bids for new concessions and leases, attributing them via the most efficient criterion. In fact, the new rules must also increase legal certainty, a factor intrinsically linked to a trustworthy environment, which is, without a doubt, essential to attracting the investments of private players.

By reorganizing the port sector, the new regulatory framework also intends to bring some clarity to the institutional structure and allow for better integrated planning of the sector in line with the **National Logistics Planning (Planejamento Logístico Nacional)**. The increased flexibility of the investments should also have a positive impact on other areas of transport, thus allowing an increase in intermodal transport. Similarly, improved efficiency should also generate positive spillover effects in other areas of port operations, such as piloting services.

In this chapter, we outline the legal framework applicable to the port sector with a particular focus on recently adopted provisions (2.1.), identifying the main actors involved





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accordingly (2.2.).² We conclude by referring to the most recent (aborted) government actions promoting concessions in the sector (2.3.).

2.1. Legal framework

Brazilian ports are owned by the Union, which may exploit them directly or delegate this exploitation to private companies.

The Brazilian Constitution (Article 21, XII, f) attributes the competence to exploit, directly or indirectly, the sea, rivers and lake ports. Forms of indirect exploitation are: (i) concession, (ii) permission and (iii) authorization.

The new Brazilian Port Model consists of Law No. 12.815/2013³ and Decree No. 8.033/2013⁴, repealing and substituting the former Law on Ports.⁵ The recently adopted rules apply both to cargo and passenger transport.

Public ports can be exploited: (i) directly by the Union through the Dock companies; (ii) by the states and municipalities that signed delegation agreements with the Union;⁶ or indirectly through (iii) concession or lease to a private company.⁷

2.1.1. Indirect exploitation of ports

Article 1 of Law No. 12.815 differentiates between indirect exploitation of the port and port installations (i) within the area of the “organized port” and (ii) outside this area. This distinction is relevant for determining whether the port is public or private. A public port is the

² This chapter presents the new port model and it refers to the former one only where necessary.

³ Law No. 12.815/2013 of 5 June 2013.

⁴ Decree No. 8.033/2013 of 27 June 2013.

⁵ Law No. 8.630/93 of 25 February 2003.

⁶ As provided by Law No. 9.277/96 of 10 May 1996.

⁷ In Brazil, there are currently 37 public ports, 17 of which are administered by seven Dock companies. These are mixed joint-stock companies controlled by the federal government.



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one located within the area of the so-called “organized port”. This area is defined by an act of Executive Power delimiting the “Port Polygonal”.

2.1.1.1. Exploitation “within” the area of the organized port: public ports (concession regime / leasing regime)

If a private investor decides to exploit an area located within the organized port, this will involve a heavier burden in terms of work and financial investment, but it will also involve, as a counterpart, more stable contractual conditions.

The indirect exploitation within the area of the organized port can take two forms: via (i) concession (for the port) or (ii) leasing of public land / goods (for port installations).



The attribution of the contract will always be preceded by a bidding process in which the winner will be selected on the basis of an efficiency criterion, solely or jointly: (i) the largest handling capacity; (ii) the minor tariff; or (iii) the minor duration of cargo handling. Other criteria that the bid invitation might foresee – combined with one or more of the preceding ones – are (iv) the highest investment value; (v) the minor economic consideration for the grantor; or (vi) the best technical proposal according to objective criteria established by the grantor.⁸

The concession or leasing contracts will have duration of maximum 25 years, renewable only once for the same period of time. At the end of the period, the assets will revert to the public administration.

⁸ Article 8 of Decree No. 8.033/2013.



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ANTAQ, the National Agency for Waterway Transportation (Agência Nacional de Transportes Aquaviários), is the authority responsible for organizing the bid and drafting the bid invitation, following the guidelines and directives established by the government.⁹

2.1.1.2. Exploitation “outside” the area of the organized port: private ports (authorization regime)

The modalities of port exploitation outside the area of the organized port are the following: (i) terminal of private use (the so-called “*terminais de uso privado*” – TUP); (ii) transshipment cargo station; (iii) small public port facility; and (iv) touristic port facility.

Private ports, known as terminals of private use (terminal de uso privado – TUPs¹⁰), are exploited under the regime of authorization.¹¹

The new law on ports has abolished the restriction foreseen by the former law, imposing on private terminals the obligation to give priority to their own cargo. There will not be a distinction anymore between “own cargo” and “cargo of a third party.” With the previous system, if a private party had to manage the port activity in a mixed form, i.e. handling third party cargoes, it had to create a consortium to involve other interested undertakings, but handling its “own cargo” had to be predominant. This was not an easy task, and it constituted



⁹ See *infra*.

¹⁰ Under the former legal framework, they were known as “terminal de uso privativo”.

¹¹ In Brazil, there are currently 146 private terminals.



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a considerable obstacle to private investment.

If the exploitation of the port is outside the area of the organized port, then a system of authorization applies, formalized by a subscription contract, the duration of which can go up to 25 years and is renewable for successive periods, provided that: (i) the port activity is maintained; and (ii) the authorized party promotes the investments that are necessary for the expansion and modernization of the port facilities. If the port activity will be interrupted, at the initiative or under the responsibility of the authorized party, then the area and the interlinked assets will revert to the State.

Stakeholders interested in obtaining an authorization to exploit shall make the request to the National Agency for Waterway Transportation (ANTAQ),¹² which will widely and immediately advertise the request (public announcement).¹³ It will also be responsible for organizing a public call in order to identify other interested parties. Finally, the agency will ensure that the investments foreseen by the authorization are made. In case of default, it can apply penalties or revoke the authorization. ANTAQ will furthermore be responsible for regulating the conditions of access to the port facilities by any interested party, provided that the holder of the authorization receives an adequate remuneration.¹⁴

Besides a request from an interest party, the government may, at any time and in accordance with the planning guidelines of the port sector, open a process of public call to identify the existence of interested stakeholders in obtaining an authorization of the port installation.

Once the process of public announcement / call is closed, the government shall examine the viability of the proposals regarding the location, as well as their conformity with the planning guidelines and the port sector policy. The authorization will be granted immediately (i) in case there is only one interested party to the call or public announcement process, or (ii) in case

¹² The role of ANTAQ is described *infra*.

¹³ The opening of the public announcement process shall last 30 days. Its purpose is to identify other interested parties in obtaining the authorization of port installation in the same region and with similar characteristics.

¹⁴ The same rule applies to concessions and leases.



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there is more than one proposal, if there are no obstacles regarding the location for concurrent establishment.

If there is more than one proposal without possibility of concurrent establishment, then ANTAQ shall promote the public selection process, under which the assignment criteria – separately or in combination – will be: (i) the greater handling capacity; (ii) the lesser tariff; (iii) the lesser duration of cargo handling; or (iv) any other criteria established in the bid invitation.

2.2. Institutional players involved

The recently adopted law on ports also extensively describes the institutional framework surrounding the port sector. It brings greater clarity in comparison to the previous system and attributes new competences to some of the executive bodies involved.

2.2.1. At the federal level

Since 2007, the Ministry of Transport is no longer responsible for the port sector at the federal level. This competence has been attributed to the **Port Secretariat of the Presidency (Secretaria de Portos da Presidência da República – SEP/PR)**, which is placed directly under the Presidency of the Republic.

The Port Secretariat coordinates the integrated action of public bodies and entities in the organized ports and port facilities in order to ensure the efficiency and quality of their activities.¹⁵ It shall: (i) define the guidelines of sectoral planning in line with the policies and guidelines of integrated logistics; (ii) define the guidelines of the bidding procedure; (iii) sign the concession and leasing contracts and award authorizations for port installations;

¹⁵ Article 22 of the Law No. 12.815/2013.



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(iv) define the norms, guidelines and procedures for the prequalification of port operators.¹⁶ It is also responsible for policy formulation and the implementation of measures, programs and projects supporting the development of infrastructure of seaports. Furthermore, it participates in the strategic planning and approval of concession plans in view of ensuring the safety and efficiency of cargo and passengers' maritime transport.

The sector regulatory agency is the **National Agency for Waterway Transportation (Agência Nacional de Transportes Aquaviários – ANTAQ)**,¹⁷ which is part of the indirect federal administration under the special autarchic regime. It has legal personality under public law, administrative independence, financial and functional autonomy. It is linked to the Port Secretariat of the Presidency of the Republic. Its headquarters are in Brasília, with the possibility of installing regional administrative units. It shall: (i) implement, within its sphere of action, the policies formulated by the Ministry of Transport and the **National Council for Integration of Transport Policies (Conselho Nacional de Integração de Políticas de Transporte - CONIT)**,¹⁸ according to the principles and guidelines set forth by Law No. 10.233/2001; and (ii) regulate, supervise and monitor the activities of providing water transport services and operation of port and waterway infrastructure, carried out by third parties with a view to ensuring the movement of people and goods in compliance with the standards of efficiency, safety, comfort, regularity, punctuality and affordability in freight costs and tariffs.

2.2.2. In the ports

The **Port Authority** is responsible for the administration of the organized port. This function will be exercised by the Union, the designated entity or the *concessionaire*.¹⁹ It must also

¹⁶ Article 16 of the Law No. 12.815/2013 and Articles 1 and 2 of Decree No. 8.033/2013.

¹⁷ It was created by Law No. 10.233/2001 of 5 June 2001.

¹⁸ CONIT is an advisory body to the Presidency of the Republic, established by Law No. 10.233/2001 and regulated by Decree No 6.550/2008. It is currently composed by ten Ministers of States, its President being the Minister for Transport. It must assess the integration of the activities performed by the various sectors linked to the air, waterway and land transportation, drafting the annual report of the situation and perspectives, to be submitted to the President of the Republic.

¹⁹ Articles 17 to 22 of the Law No. 12.815/2013.



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draft the “Port Development and Zoning Plan” to be submitted for approval to the Port Secretariat of the Presidency of Republic.

In each organized port, a **Council of the Port Authority (Conselho de autoridade portuária – CAP)** with advisory functions will be constituted. It will be composed of representatives of entrepreneurs, port workers and the public authority.

In each port, there will also be a **Port Operator** responsible for port operations, such as stowage, storage, luggage handling, etc. It can be a public or private entity and will be selected by the port administration. Its activities will be regulated by ANTAQ.²⁰

In each organized port, port operators shall constitute a **Management Body for Port Labor (Órgão Gestor de Mão-de-Obra - OGMO)** responsible for contracting and allocating port workers and temporary workers.²¹



²⁰ Articles 25 to 31 of the Law No. 12.815/2013.

²¹ Articles 32 to 44 of the Law No. 12.815/2013.



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2.3. New investment opportunities?

The recently adopted regulatory framework for the port sector has been designed to enhance investments by reducing logistical costs and increasing efficiency with the ultimate goal of developing a competitive sector.

The government has foreseen a Public Port Concession Plan including the concession of 159 areas within public ports divided into four groups. New opportunities should also arise from the authorizations for Terminals of Private Use, as well as from the bids for dredging works to be performed in more than 20 ports in the country by the end of 2014.²²

In this regard, Law No. 12.815/2013, dedicates a chapter to the **National Port and Waterway Dredging Program (Programa Nacional de Dragagem Portuária e Hidroviária II)**,²³ which runs projects including dredging works to maintain or improve port areas. This program is run concurrently by the Port Secretariat of the Presidency of Republic and the Ministry of Transport. Contracts regarding dredging are awarded following an international bid or via the RDC, the Differentiated Regime of Public Procurement (Regime Diferenciado de Contratações Públicas),²⁴ for a period of up to ten years, not renewable. Dredging contracts can include more than one port and foresee an obligation of result by the contracted party.

Notwithstanding the very optimistic expectations of the Brazilian government, up to now, the bidding procedures for ports have been a failure. For example, early in April 2014, the bidding procedure for the dredging of the major Brazilian (and Latin American) port of Santos was canceled due to the fact that the prices contained in the five offers presented were higher than what the government had established in the bid invitation.

²² As publicly announced by the Minister of the Port Secretariat, Antonio Henrique Silveira, at the Latin America World Economic Forum (Panama, 1-3 April 2014).

²³ The first one was launched in 2007, by the Law No 11.610/97, now repealed.

²⁴ Law No. 12.462/2011 of 4 August 2011.



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In the same vein, the bidding procedures for various other ports that the government planned to initiate before the end of 2013 have been delayed following an opinion delivered by the Federal Court of Accounts (Tribunal de Contas da União - TCU), which considered the studies presented by ANTAQ in support of the bidding process insufficient. ANTAQ announced in early March 2014 that it will start the public audience procedure again. This will impact the initial timeline and considerably delay the new concessions of ports in Brazil.

Against this background, it is reasonable to wonder if the new regulatory framework is sufficient to create new opportunities, or if it needs to be reinforced by other measures and incentives to attract potential investors to develop much-needed infrastructure.