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The regulation of the Brazilian National Water Transport Agency of charging for demurrage*

A regulação da Agência Nacional de Transportes Aquaviários na cobrança de demurrage

*Mathias Schneid Tessmann***
*Kércia Tavares da Silva****

ABSTRACT

This article analyzes the regulatory intervention model of the Brazilian National Waterway Transport Agency (Antaq) in the charging of demurrage, in light of economic doctrine. Demurrage refers to the period in which a container begins to generate additional costs for the carrier due to its failure to be returned within the contracted free time. Failure to comply with this deadline and the conditions established in the contract results in the application of overstay charges, globally known as demurrage.

In this context, the study examines the main controversies in the maritime market regarding the collection of overstay fees, particularly the disputes

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** Doutor em economia. Coordenador, pesquisador e professor no Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP). E-mail: mathias.tessmann@idp.edu.br.

*** Graduanda em direito e em economia no IDP. E-mail: kercia.silva@outlook.com.

between shipowners (carriers) and users, analyzing the existence of possible abusive and improper practices. Furthermore, a literature review was conducted on the main economic theories of regulation, aiming to assess their impact on the position adopted by Antaq. Finally, the research compares this theoretical framework with the agency's actions in topic 2.2 of its Regulatory Agenda for the 2020/21 biennium, in which it proposed developing a methodology to investigate the abusiveness of these charges.

KEYWORDS

economic analysis of law — regulation theories — National Waterway Transportation Agency (Antaq) — demurrage

RESUMO

Este artigo analisa o modelo de intervenção regulatória da Agência Nacional de Transportes Aquaviários (Antaq) na cobrança de *demurrage*, à luz da doutrina econômica. A *demurrage* refere-se ao período em que um contêiner começa a gerar custos adicionais ao transportador devido à sua não devolução dentro do prazo contratado de estadia livre (*free time*). O descumprimento desse prazo e das condições estabelecidas no contrato resulta na aplicação da sobre-estadia, conhecida globalmente como *demurrage*.

Diante disso, o estudo examina as principais controvérsias no mercado marítimo envolvendo a cobrança da sobre-estadia, especialmente os conflitos entre armadores (transportadores) e usuários, analisando a existência de possíveis práticas abusivas e indevidas. Além disso, foi realizada uma revisão de literatura sobre as principais teorias econômicas da regulação, com o objetivo de avaliar seus reflexos na postura adotada pela Antaq. Por fim, a pesquisa compara essa base teórica com a atuação da agência no tópico 2.2 de sua Agenda Regulatória para o biênio 2020/21, no qual propôs o desenvolvimento de uma metodologia para investigar a abusividade da cobrança.

PALAVRAS-CHAVE

análise econômica do direito — teorias de regulação — Agência Nacional de Transportes Aquaviários (Antaq) — sobre-estadia de contêiner

1. Introduction

Maritime transport is part of a vast logistics chain that often remains invisible to most consumers. The movement of cargo through containers, for example, goes unnoticed, despite being an innovative model that offers numerous benefits to global trade. The introduction of intermodal container transport revolutionized trade, expanding it beyond spices and luxury products, given the significant increase in productivity and efficiency compared to bulk cargo (without packaging), the reduction in transport time, and the creation of a direct connection between the manufacturer and the consumer. Determining factors for the phenomena of globalization and the international division of labor.

It is worth noting that containers constitute an intrinsic part of the ship itself, being distinct from the transported merchandise, which is remunerated through freight. As a result, the issue of container demurrage emerged. This charge is not related to delays in the loading and unloading of goods, but rather to the late return of cargo units (container) to the carrier, whether loaded for shipment ("detention") or empty after unloading ("demurrage").

A successful container operation occurs when the quantity of containers that are loaded or unloaded matches the supply and demand for empty containers. This balance is crucial to ensure that operations effectively serve the market. However, recently the trade faced a crisis related to the shortage of containers, which led to an extended Peak Season Surcharge. This is the period in which there is a clear imbalance between high demand and, on the other hand, low supply, which causes an increase in freight prices and deadlines for exporting and importing products, as well as a lack of space in containers and ships.

According to authors Fernanda Martinez Campos Cotecchia, Beatriz Mendonça Costa, Luna Nóvoa Gomes Jaeger et al:

> […] the approximately 25 million containers available worldwide have not been enough to meet global demand. Mainly due to the delay in ports and terminals, whether due to the queue for attraction and unloading process or due to the time taken to release cargo, which directly impacts the entire logistics supply chain.[1]

[1] TAKAFASHI, Flavia; VAZ, Luciana. *Porto mar e comércio internacional por elas*. Vitória: Editora Milfontes, 2022.

Historically, Peak Season occurs on holidays or commemorative dates in some countries, such as Chinese New Year. However, due to the Covid-19 pandemic and the restrictions imposed by Lockdown, many ships and containers were stopped in Asia, which affected the entire chain. As a consequence, shipowners began to charge this peak season fee, as they were operating almost at their full supply capacity and with a disordered demand rhythm between countries.

The situation in Brazilian ports followed a similar narrative and worsened due to the historical retention at customs terminals. This is because containers remain detained while the goods contained within them are subject to inspection and inspection by customs authorities, a process that, in some cases, can last for months or even years. In other words, the container ends up being used as a cargo deposit, given a series of factors that can cause this retention, such as contractual terminations, bankruptcies of importing companies, and bureaucratic issues, among others.

According to the final report published by Antaq in mid-2022,[2] although at the beginning of the pandemic the effects observed were not as impactful in Brazil, an increase in freight prices and the lack of empty containers (supply) soon became noticeable, with the effect cascading to other charges and services, such as demurrage. The observed situation results in delays in the availability of containers in the country, which becomes a critical point, considering that Brazil competes with other more profitable movement routes, such as the United States, Europe, and Asia.

Thus, failure to meet the deadline agreed upon between the parties for the return of containers results in losses for maritime transport, which generates (i) logistical congestion; ii) trading losses; (iii) shortage of products; and (iv) supply crisis.

For Flávia Takafashi and Luciana Vaz Pacheco:

> In practice, when receiving a cargo properly packed in a container, after prior notice of the ship's arrival, the consignee has a predetermined and previously agreed number of days to use the equipment. The period also includes clearance with Customs (possibly other authorities involved, such as Anvisa or Mapa), and other measures, and, in the end, the logistics tool must be returned, duly free and unencumbered, to its owner or representative; and failure to return it within the established deadline and conditions will result in the charge for the demurrage installment corresponding to the excess time.[3]

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[2] NATIONAL WATER TRANSPORT AGENCY. *Working group to monitor the impacts of the Covid-19 pandemic on maritime transport and the port sector*. Report. Brasilia, 2022.

[3] Takafashi e Vaz, *Porto mar e comércio internacional por elas*, *op. cit.*, p. 173.

In this way, the charge represents a liability measure designed to compensate for the damage caused to the shipowner due to late returns, in addition to discouraging practices such as cargo abandonment, which result in the retention of containers. This is a traditional charge that has been widely applied in the maritime market for centuries, although it involves various details and specificities.

Thus, the present work seeks to analyze, in light of regulation theories, how such charges have been regulated within the scope of the National Waterway Transport Agency (Antaq) of Brazil. In particular, considering that users, and cargo owners, allege that there is abusiveness on the part of transporters and their intermediary agents when carrying out the aforementioned charge. To this end, the method used is qualitative, through documentary means, with the collection of data from Research, Resolutions, and Deliberations within the scope of Antaq, as well as bibliographic analysis, exploring the conclusions already highlighted by the literature in the field of economic analysis of law.

The results indicate that Antaq's regulatory action proved to be adequate given the absence of market failures about charging, as well as other causes for the problem, such as the logistical bottlenecks faced in Brazil. These findings are valid for the literature that investigates regulatory adequacy in the country, considering the study of the regulatory framework in force in the country, in the light of a specific case.

In addition to this introduction, the work is structured into three more sections. The second presents the current regulatory framework, the third explains the methodology used and the regulatory theories, the fourth presents the results and, finally, the fifth brings the conclusions.

2. Theoretical framework

2.1 Regulatory framework

It is necessary, first of all, to outline the current historical and regulatory moment, as the new paradigm highlights the importance of regulatory competence, maintaining the presence of the State in the economic scenario, however, no longer as a direct executor of activities. Thus, the State moves from a privileged entrepreneur to the role of impartial guarantor, assuming the responsibility for ensuring impartial compliance with market rules. However, this was not always the case, as it is possible to trace some

paradigms in what is now called state regulation, which Marçal Justen Filho (2023) defines as regulatory waves.[4]

In the liberal paradigm, there was a vision of spontaneous self-regulation of the market, given that production mechanisms would be capable, by themselves and autonomously, of achieving efficiency and social well-being. Thus, if each individual selfishly pursued his private interest, there would, in the end, be an increase in the nation's efficiency and social well-being.

However, this theoretical formulation did not consider the inefficiencies that the market itself can cause, leading to the regulation of specific sectors of society. At an initial stage, regulation was characterized as legitimized state intervention to exclusively address market deficiencies and insufficiencies. A historical milestone is the stock market crash of 1929, as well as all the dense economic theory to deal with its effects.

As Professor Humberto Campos asserts, "Regulation, in a more restrictive view, would exclusively aim to guarantee market balance, curbing distorted practices by economic agents. That is, regulation would aim to correct market failures, ensuring the internal balance of the regulated system".[5]

Subsequently, this conception was the subject of intense review, with the so-called second interventionist wave or social regulation, given that even in the absence of market failures, certain ends are not achieved in their perfect functioning, such as the public/common interest. Thus, the concern of the second regulatory wave was not only economic but also social.

On the other hand, it was realized that such intervention became too much, which even caused several harms to the market, with the imposition of rules that were impossible to comply with and the closure of several markets to the private sector. As Marçal Justen Filho highlights:

> At the beginning of the 1980s, some countries found that the disorderly actions of state intervention had gone beyond what was reasonable. The plurality of contradictory and outdated rules made it difficult to achieve the protected values. The essential purposes sought by the State were frustrated not by its omission, but for opposite reasons. There was excessive regulation, which prevented the best results from being obtained […]

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4 JUSTEN FILHO, Marçal. *Curso de direito administrativo*. Grupo GEN, 2023. *E-book*. ISBN 9786559645770.

5 CAMPOS, Humberto. Falhas de mercado e falhas de governo: uma revisão da literatura sobre regulação econômica. *Prismas*: Dir., Pol. Publ. e Mundial., Brasília, v. 5, n. 2, p. 281-303, 2008. p. 283.

> Each activity was subordinated to a large number of positions, many of them useless, contradictory, or archaic. The expression regulatory cost emerged, indicating the economic effect that compliance with these government positions generated.[6]

In this vein, several countries have undergone a process of economic deregulation, in the words of Paolo Lazzara, "The phenomenon of deregulation is explained not so much as a quantitative decrease in prescriptions, but, above all, in terms of clarity, transparency, and predictability of regulations".[7]

The emergence of this phenomenon triggered a process of reregulation, characterized by the defense of replacing inadequate standards with those more aligned with the new social and technological reality. These new standards, in turn, aim to be less burdensome for society as a whole and are designed based on parameters that promote the active participation of civil society.

In the Brazilian context, there was no divergence from the global trajectory, with the establishment of neoliberalism as the preponderant economic paradigm in capitalist nations during the 1970s. In this scenario, the State redirected its actions, in some sectors, moving from a position of producer and interventionist to that of a regulatory entity, an indirect participant in the economic order.

To ensure that the private sector achieved the purposes established in the Federal Constitution of 1988, the creation of regulatory agencies was conceived, especially in the 90s. Autonomous entities endowed with broad administrative and financial autonomy, the agencies assume the role of instruments through which the State exercises its role as supervisor of economic activity, promoting a balance between the interests of the market and the interests of users.

It is not fortuitous that the 1988 CF,[8] when contemplating in its article 170[9] the principles of free enterprise and free competition explicitly opted for a capitalist economic model. This model relies predominantly on the private sector, reserving exceptional participation for the State, oriented

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6 Justen Filho, *Curso de direito administrativo*, *op. cit.*, p. 514.

7 LAZZARA, Paolo. *Autorità indipendenti e discrezionalità*. Padova: Cedam, 2001.

8 BRAZIL. [Constitution (1988)]. *Constitution of the Federative Republic of Brazil of 1988*. Brasília, DF: Presidency of the Republic, [2023].

9 Art. 170. The economic order, founded on the valorization of human work and free initiative, aims to ensure a dignified existence for everyone, by the dictates of social justice, observing the following principles:

mainly towards regulation and inspection, in line with its primary function of preserving balance and safeguarding the collective interest.

Several studies have investigated the phenomenon of economic regulation, providing significant contributions, such as Stigler,[10] Stone,[11] Baldwin and Cave,[12] Beesley,[13] Kolko,[14] Laffont and Tirole,[15] Posner,[16] Pires and Piccini,[17] Viscusi, Vernon and Harrington,[18] Pinheiro,[19] Rioglon.[20] These findings are useful for this literature that investigates and explains how the regulation process takes place and what are its justifications and strategies.

2.2 The legal nature of charging demurrage

Container demurrage is a result of maritime transport contracts ("bill of lading" or "BL"). Such an instrument is signed with the participation of three characters: the shipper, the maritime transporter and the user's consignee.[21] In effect, the transport contract is the legal basis for the charge, the amount owed by the shipper or consignee of the cargo — jointly — per day of container retention beyond the franchise period (free time) contracted between the parties.

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10 STIGLER, George J. The theory of economic regulation. *Bell Journal of Economics and Management Science*, New York, v. 2, n. 1, p. 1-21, Spring 1971.

11 STONE, Alan. *Regulation and its alternatives*. Washington, DC: Congressional Quarterly Press, 1982.

12 BALDWIN, R.; CAVE, M. *Understanding regulation*: theory, strategy and practice. Oxford: Oxford University Press, 1999.

13 BEESLEY, M. E. *Privation, regulation and deregulation*. 2. ed. New York: Routledge, 1997.

14 KOLKO, G. *Railroads and regulations, 1877-1916*. Princeton, N. J.: Princeton University Press, 1965.

15 LAFFONT, Jacques; TIROLE, Jean. *A theory of procurement and regulation*. Boston: MIT Press, 1993.

16 POSNER, Richard A. Theories of economic regulation. *Bell Journal*, v. 5, n. 2, p. 335-358, Autumm 1974.

17 PIRES, José Cláudio; PICCINI, Maurício Serrão. A regulação dos setores de infraestrutura no Brasil. *In*: GIAMBIAGI, Fabio; MOREIRA, Maurício Mesquita (Org.). *A economia brasileira nos anos 90*. Rio de Janeiro: BNDES, 1999.

18 VISCUSI, W. Kip; VERNON, John M.; HARRINGTON JR., Joseph E. *Economics of regulation and antitrust*. Cambridge: Massachusetts Institute of Technology, 2000.

19 PINHEIRO, Armando Castelar. *Regulatory reform in Brazilian infrastructure*: where do we stand? Rio de Janeiro: Ipea, July 2003.

20 RIGOLON, Francisco José Zagari. Regulação da infraestrutura: a experiência recente no Brasil. Rio de Janeiro, *BNDES*, Rio de Janeiro, v. 4, n. 7, p. [123]-150, jun. 1997.

21 Resolution 62/2021 — Consignee: anyone who removes the merchandise, after carrying out sea transport, upon presentation of the BL, even if they have not contracted this transport.

In the contingency of the import operation, the initiator of the nationalization process, whether the importer or consignee, must present the Bill of Transport or BL to the Federal Revenue Service. However, it is conventional for the shipowner to grant the release of the BL to the consignee by formalizing another instrument called the Container Return Commitment Term (TCDC). At TCDC, the importer or consignee is notified about the free period for unloading and returning the container, as well as the daily charges incurred in cases of demurrage.

One of the main controversies regarding demurrage concerns its legal nature, which brings economic impacts to the charge. This is because, as it is a private relationship, the Brazilian Civil Code (CC) is governed.

Therefore, depending on the classification used, the economic repercussions will be different, as will be demonstrated. However, the purpose of this work is not to analyze which classification would be viable, but to understand the impacts generated by allegations of abusive charging, which directly impacts the purposes sought by this work. As stated by Eliene Martins (2008), "Doctrine and jurisprudence oscillate between framing demurrage as compensation for material damage under contractual civil liability and between highlighting the nature of a fine". Let's see.

Contractual default consists of the lack of due performance or the breach, voluntary or involuntary, of the legal duty by the debtor (whoever owes it). Therefore, when there is a breach of the contractual obligation, the person who broke the legal bond must be held responsible. Contractual non-performance that generates civil liability can be total, partial, or relative. In the words of Professor Maria Helena Diniz:

> O Absolute default will be total, if the obligation is no longer fulfilled in its entirety, and will be partial if the obligation includes, e.g., several objects, only one of which was delivered, because the others perished due to the debtor's fault; and relative default occurs when the obligation is not fulfilled in the due time, place and manner, but it may be done, with benefit, for the creditor, in which case there will be a delay.[22]

Therefore, it will be necessary to establish compensation to compensate for the losses and damages of the creditor (to whom it is owed). It is necessary to emphasize that in the area of contractual liability, the law presumes the

[22] DINIZ, Maria Helena. *Curso de direito civil brasileiro*: responsabilidade civil. 37. rev. ed., atual. São Paulo: Saraiva Jur, 2023. *E-book.* ISBN 9786553627765.

existence of the damage, releasing the injured party from the burden of proving its existence. In other words, it is not necessary to prove the creditor's loss.

Furthermore, it is possible that the parties, when drafting the contract, already set a penalty, that is, what the value will be for non-performance of the contract, whether absolute, partial, or relative, depending on the provisions of articles 408 and 409 of the CC.[23] This is the institute of the penal clause, given that: (i) the creditor does not need to claim loss, and (ii) the limit must be the value of the main obligation as a ceiling for collection.

Therefore, doctrine and jurisprudence have long discussed whether the nature of the demurrage would be compensation pre-fixed in the contract or an agreed penal clause. Based on the above, it becomes clear that transporters tend to argue that the nature of the charge is pre-fixed compensation since there is no limit (established ceiling) for reimbursement to the creditor. On the other hand, users argue that it is a penal clause, with a limit equivalent to the value of the main obligation, which, in the context, is the value of shipping, since, under this logic, any value above the main obligation becomes too onerous and abusive.

2.3 The debate on the abusive nature of container demurrage charges

In this subsection, controversies between shipowners and users regarding alleged abusive charges will be examined. Despite the protection offered, Antaq is urged by companies and associations to investigate allegations of abusiveness on the part of shipowners about charging. The SEI process n. 50300.010899/2020-14.[24] The regulation of demurrage is supported by Normative Resolution No. 62/2021(RN),[25] which outlines the rights and obligations of users, intermediaries, and companies involved in maritime

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[23] Art. 408. The debtor is fully entitled to the penal clause, provided that he fails to comply with the obligation or is in default.
Art. 409. The penal clause stipulated together with the obligation, or in a subsequent act, may refer to the complete non-performance of the obligation, to a special clause or simply to delay.

[24] ANTAQ. Process no. 50300.010899/2020-14. Available at: https://sei.antaq.gov.br. Accessed on: November 20, 2023.

[25] ANTAQ. Resolution no. 62, of November 29, 2021.

and port support navigation, cabotage, and long haul, also establishing administrative infractions.

It is worth highlighting the fact that the current RN 62/2021 — previously known as RN 18/2017 — was designed to improve transparency and predictability in interactions between service providers and service users, dedicating a specific chapter to the approach of this theme. Articles 19 to 21[26] of this standard establish a series of provisions to optimize market efficiency. This includes the imposition of the duty of transparency and publicity, the determination of the time frame for the beginning and end of the free time count, as well as the circumstances that suspend this count. The RN, therefore, contributes to the definition of fundamental concepts, such as free stays and demurrage.

In particular, it guarantees the user access to comprehensive information about the demurrage charge, defines the precise moment for the start of this charge, and stipulates the users' responsibilities regarding the matter. It is noteworthy that, recently, shipowners and users had the opportunity to express their opinions comprehensively before Antaq, through the Regulatory Agenda for the 2020/2021 biennium. Topic 2.2 of this agenda focused on developing a methodology to assess possible abusiveness in container demurrage charges.

On that occasion, several surveys were carried out with Regulatory Impact Analysis (AIR) and public hearings, with the provision of subsidies

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[26] Art. 19. The demurrage rules and values, as well as the number of days the container is free to stay, must be made available until confirmation of the space reservation to the shipper, the consignee, the endorser, and the BL holder.
Art. 20. The container's period of free stay will be counted: I — upon boarding, from the date of removal of the empty container(s) by the shipper at the agreed location; and II — upon unloading of the full container(s), from the following day after delivery of the cargo to the agreed location.
Art. 21. The responsibility of the user, shipper, or consignee for demurrage ends at the moment of due entry of the full container into the port loading facility, or with the return of the empty container to the agreed location, in the state in which it was received, unless natural deterioration due to regular use. § 1º If the shipper decides to postpone the shipment of the container for any reason, or gives rise to the postponement, the demurrage period will only end at the moment of actual boarding. § 2º The counting of the container's free stay period will be suspended as a result of I — fact directly attributable to the maritime carrier itself, the container owner, or the container depot; or II — unforeseeable circumstances or force majeure if you are not responsible for them Resolution 62 (1485420) SEI 50301.001515/2014-14 / pg. 12 expressly. § 3º The counting of demurrage that has already started is not suspended in the event of unforeseeable circumstances or force majeure. § 4º The maritime carrier or the owner of the container must keep available to the shipper, the consignee, the endorser, and the holder of the BL, from the 1st (first) day of counting the demurrage, while it lasts, the identification of the container and the daily demurrage amount to be charged.

and the possibility of broad social participation. The purpose of the RIA is to understand the nature and extent of the regulatory challenge, outline the objectives sought by the Agency, and discern whether intervention is, in fact, an imperative need. Only after this preliminary reflection does the identification and analysis of possible action alternatives begin, to make the most appropriate choice viable. Through a comprehensive analysis of all pertinent information and considerations, AIR may even suggest that non-intervention is the most effective solution. Additionally, it is AIR's responsibility to succinctly outline an implementation strategy for the recommended action, providing insights into how the effects can be meticulously monitored.

In short, AIR was directed by a technical unit of Antaq, the Regulation Superintendence (SRG), with support from the Performance, Development, and Sustainability Superintendency (SDS), to investigate cost-effectiveness and cost-benefit-risk methodologies, backed by mainly in the following aspects: (i) delimitation of the legal, regulatory and jurisprudential scope on the subject, aiming to define the legal nature of the charge (legal aspect); (ii) comparative case analysis between the national scenario and the treatment of the issue at the international level (international benchmark); and (iii) presentation of regulatory alternatives to resolve the controversy.

Well, through the aforementioned public hearing and input, users expressed the need for more proactive action on the part of the agency, so that they would not be at the mercy of the practices of transport service providers. The central argument is based on the perception that the tariffs charged are excessive due to the high concentration in the sector, where a small number of companies dominate, favoring the formation of cartels. This scenario would lead to the imposition of charges and contractual clauses without room for negotiation, which would reinforce the need for proactive intervention by the agency to guarantee a more equitable and favorable environment for consumers.

Furthermore, user associations emphasize their vulnerability to shipowners, who would stipulate deadlines and demurrage amounts in terms of commitment to guarantee the return of containers, requiring the importers' signature. For these reasons, it is argued that there is a market failure, and it is Antaq's responsibility to monitor the prices charged by agents to contain market power and preserve competitiveness in the sector. In this context, users request that charging be moderate, to avoid excessive burdens on companies.

Another point that deserves attention is the exposure of an asymmetry of information, since, in the users' view, the agency appears to be unaware

of the shipowners' bargaining power and the charges that exceed the value of the freight or cargo transported. On the other hand, shipowners argue that demurrage in maritime transport is part of private relations. Therefore, those who opt for this mode of transport are not considered users of a public service, but rather contractors who have converged on a political will.

In this way, although the contract contains pre-established clauses, it allows the parties to deliberate on possible modifications. This includes elements such as the period of free use of containers (free time) and the value of the daily demurrage fee, which would mischaracterize the nature, for example, of an adhesion contract, in which purely contractual freedom does not operate. In this context, they argue that demurrage is a type of "compensation" that reflects market demands, made up of several factors that go beyond the value of the container itself. The setting of the amount charged would be based on the commercial and competitive valuation of the market, taking into account compensatory, inhibitory, and punitive factors.

For this reason, the resulting losses would go far beyond the gross market value of the container. In situations where the fee charged is negligible, it would be more advantageous for users to keep the containers indefinitely, using them as true deposits. They also claim that there is a fallacy about the supposed lack of power of choice and negotiation on the part of users since contractors are not obliged to use containers owned by shipowners. This is because there would be the option of transporting goods in their containers and delivering the equipment with the goods already packaged and ready for transport. However, users choose, of their own free will, to use the carrier's units, which results in having to pay the contracted demurrage in case of delay.

Furthermore, the delay in the return would inhibit the contracting of possible freight, causing serious losses to the carriers' trade. Therefore, any analysis must consider consistency with logistics equipment retention days. It is said that the commercial practice of charging was established over decades, naturally by the market, but the exchange for the mercantile tradition would result in the definition of prices imposed by the government, with unwanted externalities in the logistics and operation of national ports, taking into account given the lack of financial incentive to guarantee the rapid return of containers by maritime transport service contractors. Therefore, for shipowners, contractual freedom is a consequence of private relationships and any excessive regulation by Antaq could result in market distortions, also known as government failures, such as abuse of regulatory power.

2.4 Antaq's appreciation

After holding a public hearing that provided a broad opportunity for expression, along with conducting various research and technical analyses, Antaq's Collegiate Board was faced with three regulatory alternatives: (i) maintain the status quo; (ii) increase transparency; (iii) adopt a reference price; and (iv) develop a procedure for analyzing concrete situations.

It is noteworthy that SRG and the Federal Attorney's Office together with Antaq (PFA), as they understand that the issue represents a case of disharmony and conflict between market agents, suggested the agency's intervention, by defining the legal nature of the collection for a penal moratorium clause, to know how regulatory action should take place.

When considering the case, the Review Director of the case, Dr. Flavia Takafashi, in her vote concluded that no market failures were identified that would justify an incisive action by the agency, especially because the complaints directed to Antaq would not be representative when takes into account the high volume of foreign trade transactions, which are carried out in Brazil every year.

Furthermore, the study prepared by SDS on international parallels in the charging of demurrage stood out, which indicated that there are insufficient results to conclude about the abusiveness of prices in Brazil in comparison with prices practiced globally. Not only that, the average demurrage values after the 14th day of disembarkation show that prices in Brazil are in line with those practiced in other ports around the world, except in Shanghai, where they are lower. Observe the table below used by Director Flavia Takafashi:[27]

Maersk — average import demurrage price in USD (14th DAY)

Country	Harbor	20 DC	40 DC	40 HC	20 REEFER
Brazil	Santos	$26	$49	$49	$62
Argentina	Buenos Aires	$20	$40	$40	$64
Belgium	Antwerp	$47	$62	$62	$93
Netherlands	Rotterdam	$51	$67	$67	$102
Singapore	Singapore	$23	$37	$37	$41
China	Shanghai	$7	$14	$16	$30

Source: Elaborated by authors.

[27] ANTAQ. Process no. 50300.010899/2020-14. Available at: https://sei.antaq.gov.br. Accessed on: November 20, 2023.

Maersk — average export demurrage price in USD (14th DAY)

Country	Harbor	20 DC	40 DC	40 HC	20 REEFER
Brazil	Santos	$0	$0	$0	$29
Argentina	Buenos Aires	$0	-	-	$30
Belgium	Antwerp	$44	$57	$57	$85
Netherlands	Rotterdam	$44	$57	$57	$85
Singapore	Singapore	$17	$30	$30	$67
China	Shanghai	$8	$13	$15	$15

Source: Elaborated by authors.

Thus, its vote was favorable for the alternative of maintaining the status quo, since no relevance was found in Antaq's statement on the legal nature of the collection of demurrage, as well as the definition, ex-ante, of a methodology for defining abusiveness, especially considering the divergences between legal doctrine and the judiciary as to the nature of the indemnity or penalty clause. However, the alternative of increasing the transparency of information on container defrag was also adopted. Here is an excerpt from his vote:

> I emphasize that the economic regulation of the state should interfere in the business relations agreed between private agents only to the extent necessary to protect the public interest and promote economic justice. In other words, the role of the state in regulating economic activities is to balance market freedom and the protection of the rights of consumers, workers, and the environment.
>
> However, the state must not interfere excessively in the relations between private agents, as this can hinder market efficiency and innovation. Over-regulation can lead to additional costs for businesses, which can affect competitiveness and reduce the ability to innovate and grow. Therefore, regulation must be evidence-based and proportionate to the public interest objectives that are intended to be achieved.
>
> It is enough to see, for example, the list of lawsuits filed in this Agency on abusiveness of demurrage collection, attached to item "219" of the AIR 2 Report (SEI No. 1412533). Although this list is limited to a specific time interval, it serves to demonstrate that the complaints addressed to Antaq are not representative when taking into account the high volume of foreign trade transactions that are carried out in Brazil every year.
>
> Furthermore, comparing the study carried out by the Superintendence of Development, Performance, and Sustainability (SEI document No. 1215349), it is noted that the data used in the research proved to be insufficient to conclude about the abusiveness or not of demurrage prices in Brazil, as well as insufficient to point out any distortion, either about prices or terms.

In addition, it was decided to create a database to be organized by the Superintendence of Inspection (SFC) about the demands forwarded to Antaq, to observe and understand how the market behaves over time, providing inputs so that the Agency can reassess the issue later. The other directors present followed the vote of Director Takafashi, and Ruling No. 120/2023 was published in the Official Gazette (DOU) on March 29, 2023.[28]

3. Methodology

The work adopts a qualitative methodological approach, seeking to obtain descriptive data of reality through a direct and deep interaction between the researcher and the object of study. Thus, the research was conducted as a case study, characterized by a detailed examination, aiming to achieve comprehensive knowledge, through the collection of documentary data and analysis of the theoretical framework.

3.1 Data

Data collection was based on a documentary analysis, using the information contained in the Antaq process n. 50300.010899/2020-14, through topic 2.2 of its regulatory agenda, focused on the development of a methodology to assess abusiveness in the aforementioned charge. In this context, the data were extracted from the technical and legal analyses conducted by the regulatory authority. In addition, the contributions raised through the taking of subsidies were incorporated, where social participation was effected through the filling out of forms or sending files. This process, in turn, provided an investigation of Antaq's assessment of the subject, resulting in the final development to date.

At the same time, both Resolution 62/2021 were examined, to understand the current scenario in the sector, and the research undertaken by Antaq, aiming to establish comparisons with the international scenario. Regarding the selection of documents and bibliography, the principle of the "rule of

[28] BRAZIL. JUDGMENT No. 120-2023-ANTAQ. *Official Gazette of the Union*, Brasília, DF, Published on 03/29/2023. Edition: 61. Section: 1. Page: 71. Available at: https://www.in.gov.br/web/dou/-/acordao-n-120-2023-antaq-473400782. Accessed on: November 15, 2023.

relevance" was adopted, with the choice of documents and authors based on their relevance to the research and the object of study. Thus, the chosen bibliographies covered not only the relevance of maritime transport but also the theories of regulation, which will be discussed in detail below.

3.2 Theories of regulation

Given the timeline outlined in the current regulatory framework, it is noteworthy that such paradigms were accompanied by the economic doctrine, with theories that investigate regulation, either by analyzing the fundamental reasons for its existence or by examining its functioning in practice. In subsequent sections, it will be explored how the phenomenon of regulation can be approached from the perspective of Normative Theory and Positive Politics. The objective is to understand how the regulation exercised by Antaq has been.

Although these theories share essentially the same instrument, which involves the analysis of the incentive structure of rational choice, maximizing agents, game theory, and asymmetric information models, it is crucial to note that each of them addresses different structures of action, as will be evidenced in future developments.

3.2.1 Normative Theory

The Normative Theory represents a classic approach in the analysis of state regulation, based on the premise that agents act rationally, guided by the maximization of their interests. Even in healthy environments, market distortions emerge, notably in classic forms such as monopolies, natural oligopolies, information asymmetry, and public goods.

Historically, from a normative perspective, the economic literature indicates, from the perspective of the common good, two reasons that would underlie state regulatory intervention in the economy: one is associated with the theory of market inefficiencies, and the other concerns social issues, such as the redistribution of wealth and the allocation of resources to achieve the public interest.

It is worth the definition of market failures conceived by Professor Manoel Gustavo Neubarth Trindade:

> Thus, initially, it should be clarified that market failure is a concept primarily derived from Microeconomics, especially from the Theory of General Equilibrium and Welfare Economics, which describes the situations in which the allocation of goods and services by the market system is not economically efficient, nor responsible for promoting social well-being and, including, in some cases, even individual well-being. In other words, market failures can be seen as situations in which individuals' pursuit of pure and exclusive individual interests can lead to inefficient outcomes, even in a way that compromises the functioning of the entire market mechanism.[29]

Faced with the imminence of market failures, state intervention is proposed as the ideal solution to correct such distortions, aiming to establish an environment conducive to perfect competition — the optimal point of efficiency. In this context, the discussion shifts to the "should-be", exploring how regulation should be conceived and what approach would be most appropriate to maximize social welfare. Regulation involves the choice of a criterion to define what is best.

For Peltzman:

> Until the early 1960s, the prevailing theory of regulation was what Joskow and Noll called "normative analysis as a positive theory" (or NPT). This theory, which has existed in one form or another since Adam Smith, considered market failure to be the motivating reason for the entry of regulation. Once established, regulatory bodies should reduce or eliminate the inefficiencies generated by market failure.[30]

It should be noted that state intervention in the form of regulation is justified in the presence of market distortions which is its reason for being since without inefficiency there is no reason to propose solutions outside the private sector.

It is crucial to emphasize that this theory sees the state agent as a benevolent leader, endowed with omnipotence and omniscience, capable of, armed with all the pertinent information, intervening to guide the market in the promotion of efficiency, the so-called first best solution, which represents the best way to regulate the firm, given the chosen efficiency criterion.

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[29] NEUBARTH TRINDADE, Manoel Gustavo. *Conformação regulatória do mercado de capitais a partir das falhas de mercado*: proposta de regulação dinâmica e modulável. Tese (doutorado em direito) — Universidade Federal do Rio Grande do Sul, Porto Alegre, 2017.

[30] PELTZMAN, S. The economic theory of regulation after a decade of deregulation. *Brookings Papers on Economic Activity*, v. 20, p. 1-59, 1989. Our translation.

However, it was found that such a choice is not fully effective in all cases, especially because regulators face the situation of asymmetric information, uncertainties, and other imperfections that mitigate the first best criterion.

As Professor Bernardo Muller teaches, the evolution of the theory has led to the achievement of a second-best solution for regulation, as market failures are taken into account in the relationship between regulator and regulated:

> The next step, then, is to subject the benevolent dictator to these new constraints and obtain the second-best solution, i.e., the way to regulate the firm that maximizes social welfare by taking into account these imperfections. From there, one can compare the constrained solution with the complete information solution and realize the effect of the constraints. Whereas in the complete information solution, the regulator can extract all monopoly rents from the firm, in the restricted solution it is necessary to leave part of these rents with the firm, as an incentive for it to correctly disclose the information about it.[31]

Thus, the proposed solution entails the creation of a set of contracts by the regulator or carefully designed incentives for firms to disclose crucial information about their type and effort. To achieve this purpose, the regulator needs to allow the company to maintain certain benefits, which does not indicate a weakness on the part of the regulator, but rather a consequence of the presence of asymmetric information.

The great criticism about normative theory concerns the fact that it disregards political and economic institutions, that is, the political process is not faced, as well as its empirical results are not so feasible.

3.2.2 Positive political theory of regulation

With a growing deregulation movement, skeptical theories were developed regarding the benevolent nature of economic regulation by the State, especially under the influence of the frequent Public Choice works of the Chicago School, which began to be published in the 1950s, the birthplace of the Political Theory of Regulation.

This theory offers a approach to the analysis of gaps in markets, focusing primarily on the understanding that any method of resolution inevitably

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[31] MUELLER, Bernardo. Regulação, Informação e política: uma resenha da teoria política positiva da regulação. *Revista Brasileira de Economia de Empresas*, Brasília, DF, v. 1, n. 1, p. 9-29, 2013. p. 12-13.

entails distributional implications. This focus comes from the fundamental premise that agents, when maximizing their interests, will act in a way to obstruct, redirect, or safeguard the implementation of policies that may impact them, seeking support, including from other regulatory entities, audit bodies, and even in the legislative branch, to put pressure on regulators.

Diverging from the normative approach, which seeks a Pareto Dominant correction, the Political Theory of Regulation recognizes that the solution to market failures is shaped by political institutions. There is no universal superior fix, and positive analysis uses the concept of "*remediability*" to evaluate policies. In other words, a policy is considered efficient if there is no superior viable alternative that results in net gains.

Thus, the premise of the Political Theory of Regulation admits that regulation not only implies relationships between several agents but also recognizes that each group involved seeks to adopt strategies to influence the process according to its interests. In short, political institutions play a crucial role. It is important to emphasize that this theory is inserted in the context of the deregulation process, previously explained.

In 1971, George J. Stigler of the University of Chicago presented a central thesis in his paper, arguing that "regulation is acquired by industry and is designed and operated primarily for its benefit".[32] In this context, the view of the state as a benevolent entity is discarded in favor of a perception in which the state is regarded as both a potential source of threat and a resource for all economic activity in society. This moment marked the beginning of what would come to be known as the Political Theory of Regulation line of studies.

After Stigler, Posner made a crucial critique and, several years later, gave the theory its name. Other theoretical developments were undertaken by Peltzman in 1976 as well as Gary Becker in 1983.[33]

Thus, it is evident that, while the Normative Theory is based on a criterion of efficiency in the face of market failures, the Political Theory of Regulation is based on the criterion of redistribution, that is, how firms allocate their resources to encourage or protect themselves from regulations that contradict their interests, to capture those responsible for regulation.

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[32] STIGLER, George J. The theory of economic regulation. *Bell Journal of Economics and Management Science*, New York, v. 2, n. 1, p. 1-21, Spring 1971.

[33] PELTZMAN, S. The economic theory of regulation after a decade of deregulation. *Brookings Papers on Economic Activity*, v. 20, p. 1-59, 1989.

4. Results

In light of the above, it is observed that the Antaq of Brazil, when addressing theme 2.2 of its regulatory agenda, adopted an approach in line with the contemporary regulatory paradigm. In other words, it recognized that its intervention must be cautious, preserving market dynamics, especially in a scenario in which it was not possible to evidence a market failure about the collection of demurrage, based on the research of benchmark international, as well as the observation that the complaints directed to Antaq are not representative when taking into account the high volume of foreign trade transactions that are carried out in Brazil all the years.

However, even in the face of this finding, the agency chose to implement a more transparent and publicized policy, which enables harmonization of conflicts between users and shipowners, promoting the symmetry of information between agents, which reflects the choice of a Second Best solution, with incentives designed to achieve the desired purpose. Going further, Brazil faces bottlenecks in container logistics in Brazil, especially due to the historical retention in bonded terminals. This problem directly reflects the delay in the delivery of containers, as well as in the collection of demurrage. In other words, the cause of the problem is logistical, not regulatory.

The main obstacles relate to (i) problems related to the lack of logistics infrastructure in ports/terminals, causing congestion and delays due to internal accidents; (ii) Customs Clearance — challenges at the beginning of customs clearance, including the registration of the Import Declaration (DI) and parameterization in the green, yellow, red and gray channels, according to specific regulations; (iii) road transport — difficulties in land road transport, often used to remove goods from containers from ports/terminals, involving risks such as queues, accidents, thefts, robberies, and truck drivers' stoppages or strikes; and (iv) intervening public agents — intervention of public agents in the import process, highlighting the Brazilian Federal Revenue Service, the National Health Surveillance Agency (Anvisa), the Ministry of Agriculture, Livestock and Supply (Mapa).

These logistical problems were presented by the National Federation of Maritime Navigation Agencies (Fenamar), within the scope of the taking of subsidies 2.2 of Antaq's Regulatory Agenda.[34] It should be noted that,

[34] ANTAQ. Process no. 50300.010899/2020-14. Available at: https://sei.antaq.gov.br. Accessed on: November 20, 2023.

according to the Normative Theory of Regulation, there must be a justification to regulate, either the identification of inefficiency or the promotion of constitutional purposes of public interest. Thus, if studies have proven that the cases analyzed by the agency on abusiveness do not reflect the density of the market, nor do the amounts charged differ from international trade, too much regulation could lead to government failures, including reflecting distortions in the market.

In the present example, it is not difficult to imagine that the container could start to be used as a cargo warehouse, because it is not expensive for users to deliver it in the agreed time, which, consequently, could discourage the import of products and, also, there would be an increase in the price of the transported products.

According to Dario da Silva Oliveira Neto and Alexandre Cordeiro Macedo:

> Government failures, in general, refer to the frustrated and unsuccessful attempts of the State to regulate the correction of market failures. While much is said about the imperfections that the free market presents, little is said about the imperfections that the state is also capable of presenting.[35]

In addition, as advocated by the Political Theory of Regulation, companies, to maximize their interests, will invariably seek to change or redirect any form of regulation that may harm their interests. It is no coincidence that, after the conclusion of Antaq's analysis of the alleged abusiveness, sustaining the absence of market failures, there was a mobilization on the part of the associations to challenge such decision, through appeal under No. 50300.006635/2023-17.[36] For this reason, it was concluded that Antaq's performance followed appropriate parameters in light of the current regulatory framework.

5. Conclusion

The purpose of this paper was to investigate the intervention of the Antaq of Brazil in the maritime market scenario, especially regarding the allegation

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[35] MACEDO, Alexandre Cordeiro; OLIVEIRA NETO, Dario da Silva. Abuso de poder regulatório: uma evolução da advocacia da concorrência no Brasil. *Revista de Defesa da Concorrência*, Brasília, v. 9, n. 2, 8-26, 2021.

[36] ANTAQ. Process no. 50300.006635/2023-17. Available at: https://sei.antaq.gov.br. Accessed on: November 20, 2023.

of abusiveness in the collection of demurrage containers. In a preliminary approach, the intervention paradigms were analyzed, outlining a historical path in which the state function evolved from playing the role of direct entrepreneur to assuming the responsibility of ensuring compliance with the rules in force in the market.[37]

Once the current regulatory framework was established, data regarding the controversy over alleged abusiveness were collected. In this context, the dispute arose as to the legal nature of the aforementioned charge, highlighting the arguments of users about possible market failures permeated by alleged excessive prices, as opposed to the defense of full contractual freedom sustained by the shipowners. In the delimitation of the factual context underlying the discussion, it was observed that, during Antaq's assessment of the subject, the option to maintain the status quo was outlined due to the absence of market failures, notably due to the conformity of the prices practiced with the international scenario in other ports and terminals.

Subsequently, in the wake of the description of the preponderant elements of the Normative Theories of Regulation and Positive Policy, it was found that the assessment took into account the imperative of justifying the need for regulation in the sector, as well as there was mobilization of the industry to maximize its interests, trying to redirect or safeguard the implementation of policies that may impact them.

Finally, it was concluded that the appraisal followed appropriate contours to avoid relapsing into regulatory abuse, as well as to create a system of incentives that curbs improper practices, with an informational and transparent system.

As a suggestion for future work, it is suggested to investigate the impact of the chosen regulatory model, as it is possible to monitor how agents will react to the creation of incentives for the establishment of a clearer and more transparent database. In addition, considering that the logistical bottlenecks are pointed out as one of the problems for the collection of container demurrage, other studies may delve into the theme to map the various obstacles about infrastructure in the port and maritime sector.

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[37] Justen Filho, *Curso de direito administrativo*, *op. cit*.

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