REGULATING INTERSTATE PASSENGER TRANSPORT BY MEANS OF INDEPENDENT AGENCIES: CHALLENGES TO THE INSTITUTIONAL DEVELOPMENT OF ROAD PASSENGER TRANSPORT IN BRAZIL

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ABSTRACT

The aim of this paper is to analyse the present situation regarding interstate road passenger transportation in Brazil. The emphasis is put in the changing institutional context of the industry, once Federal Government recently achieved the Congress approval for an administrative reform that maintains the public service concept in approaching transportation service but introduces a regulatory agency with duties related to market regulation and services monitoring. Beginning with a historical approach to long distance passenger transport in Brazil, the current situation of the industry is described and its development under the new institutional and regulatory arrangements is discussed. Conclusions highlight the political risks that public transport policy and planning come to be captured by colluded industry with severe negative effects on economical efficiency and public benefits.

BRAZIL: A COUNTRY OF ROAD TRANSPORT

In a historical perspective, the development of countrywide transport network in Brazil was directed towards a strong dependence on road transport, and this may be observed when we study the different cycles infrastructure policy has undergone since the end of the 19th century. Although the analysis of economic and political forces behind that development is out of the scope of this paper, it remains worthy to describe those cycles in order to give a picture of the historical process of Brazilian transport infrastructure network.

First attempts to design and implement national transport networks in Brazil occurred already during the monarchy period of Brazilian history (1822-1889), as it was pointed out by Brazilian transport historians (Coimbra, 1974; Ferreira Neto, 1974; Conselho Nacional de Transportes, 1974). In 1822, Brazil becomes a politically independent State. Until then, through more than three centuries of

colonial domination by the Portuguese Empire, Brazil's economy was directed towards the exportation of just a few commodities. Within this context, the development of interregional commercial interchanges and of the internal market could only be very slow.

On the other side, the political independence itself did not give sufficient impulse to overcome those barriers to internal market development. The slow maturing of a significant interregional commerce would be based upon steady economic growth of main exporting regions. On its turn, a large building program of a really national network would depend on a more vigorous growth of internal market. The imperial age witnessed the emergence of a North-to-South coastal transport by ships provided by Government, whose primary objective was to turn feasible the administrative control of the vast territory. However, before the end of monarchic phase, some expansion of commerce between national ports brought opportunities to the rise of private coastal ship transportation in a significant scale. Within this context a policy of subsidised concessions to private water carriers and ports could be implemented more or less successfully (Santos and Aragão, 2001).

As agricultural frontiers expanded through the interior of the country, the needs for better transport connections between the plantations and the exporting ports were growing. The construction of railways in Brazil came to reinforce a network characterised by a set of "exportation corridors", whereas very few lines had some stronger integrative role for the inner market. The first governmental attempts to provide a thoroughgoing interregional surface transport infrastructure were frustrated. The private initiative was not prone to invest on it — mainly because there were more profitable opportunities in the farms-to-ports transportation market — and public financial resources were still not enough to invest in linkages, which did not yet show significant demands.

Through the first republican period (1889-1930), Brazilian economy remained basically dependent on external commerce. Although internal market was getting increasingly more important — the end of slavery in 1888 should be understood as a very important factor to this incipient growth — it still was not enough to give rise to a very dynamic interregional commerce. Since 1880 foreign companies and a few Brazilian investment groups were building and exploring railways as well urban tramways, public lighting and other urban services, which were conceded and subsidised by the Government. Hereby, in fifty years the Brazilian rail network could raise from 7,000 to 32,500 km, and the growth rate was thus 36% in each decade.

During the second Republican phase (1930-1960) Brazil was able to free itself from the dependence on exportation of primary goods and to introduce an industrialisation policy based on the needs of the internal market (import substitution policy, strongly supported by protective and intervening State regulation). It is worthy to note that these changes are timely coincident with the reduction of the role

of the railways as a dynamic sector, even in the industrialised countries, and with the rise of the automotive industry all around the world.

As formerly imported goods were progressively manufactured in Brazil, the needs for a national distribution network grew. The public policy was then addressed to fulfil these needs, and it came that the concrete situation favoured the rise of a transport mode whose supply could be adjustable to an increasing demand for goods transportation, that is, of road transportation. Highways could be implemented in a more incremental way and they required less additional sunk costs than railways. Furthermore, funds for road construction based on taxes on fuel consumption would be more easily accepted since these would be directly channelled towards the provision of more and better highways.

A first National Transportation Plan was finally adopted, and a National Road Authority was set up in order to program and manage road construction, all this supported by a special fund formed by those earmarked taxes. On the other hand the Government progressively absorbed the already decadent railways; and competition from private road carriers was able to reduce rail market shares very quickly. As a result, only 5,500 kilometres were added to the national rail network during all the period between 1930 and 1960 (5,5% growth rate for in each decade). With respect to the long distance domestic land passenger transportation, the market share of the railways in 1950 was just about 30%, compared with 62% in hands of the road carriers.

The period between 1960 and 1995 may be understood as a complete development cycle. During its first half, Brazilian economy had a very impressive development with mean annual growth rates about 6%. The industrialisation process was effectively completed, as a very broad range of industrial goods was internally produced. But from the last seventies to the end of this period, the external debt and fiscal crisis resulted in a severe economic deadlock. Notwithstanding over all that period the railways kept their decaying pace. About 25% of the rail network extension were put out of service in those 35 years, and the long distance passenger market share for railways decreased until just a residual figure. Thus the coaches became absolutely hegemonic in all the land passenger transport markets in Brazil (Brasileiro and Henry, 1999).

THE BRAZILIAN LONG DISTANCE PUBLIC TRANSPORT MARKET

Presently, the supply of long distance public land transportation in Brazil is largely dominated by road transportation. Apart form individual transport, the market share of the road passenger carriers is around 98% for the number of passengers, and 96% for the amount of passengers-kilometres, as estimated by the authors upon official data supplied by GEIPOT (2000). Actually, these figures are slightly underestimated since hired and excursion coaches transportation is not considered. Since

railways and water transport are almost absent in the inter-city passenger transportation market, and since air transportation is still not a feasible option for the great majority of the Brazilian population, people remains absolutely dependent on the services supplied by the coach operators.

The inter-city passenger land transportation market organisation in Brazil is two-folded. Intrastate road passenger transport is under the responsibility of the State Governments. Due to the size of the State territories, a substantial part of intrastate road transport may be considered as integrating the long distance transportation market, which thus differ from the regional and metropolitan transportation markets. In its turn, the Federal Government keeps by Constitution the responsibility over the interstate and the international road transport.

In both cases, the regulatory framework is based on the legal public service concept, whereby the operation of the routes is "delegated" by the Government to private carriers through concession contracts. Until the nineties, the essential features of both federal and State regulation were in line with Brazilian long tradition concerning concessions in the transport sector. In this tradition, some aspects are worthy to mention:

- A single route is conceded to a single operator
- Public authority defines fares, on the basis of a standard cost sheet and of an estimate of medium vehicle occupation (a percentage of seats, usually 70%, is adopted)
- The concession contracts are supposed to be awarded in a tendering process that generally never occurs — new routes are usually delegated to the operator that traditionally serves the respective area, and contract are periodically renewed without any negotiation or further requirements regarding minimum operational performance levels.

Presently, in which respects to interstate transport, 176 operators run 12,883 coaches, transporting more than 95% of the total amount of interstate passengers (GEIPOT, 2000). Some concentration in this branch of the industry may already be observed: on the top, two companies (Gontijo and Itapemirim) own respectively 1,135 and 1,101 vehicles. More than half of the total vehicle fleet is owned by a small set of 16 enterprises, four of them with more than 500 coaches each the remaining 12 with a fleet between 200 and 500 vehicles. The group formed by the four biggest companies alone owns more than 30% of the total fleet. Also a geographical concentration may be observed: around 60% of the fleet have their operational base in the Southeast Region, which is the most industrialised part of the country and where the three largest Brazilian cities (São Paulo, Rio de Janeiro and Belo Horizonte) are situated (Brasileiro and Henry, 1999).

This concentration process can be firstly explained by the fact that the companies run for a long time in a strongly protected market. The Federal regulation never submitted them to true competition e.g., by means of competitive tendering procedures. Intermodal competition is no more than residual since

the only mode generally available as an option to coaches is the expensive air transport. So, as actual uncontested owner of their routes coach carriers exploited the regional markets in a monopolistic manner.

On the other side, the operators have developed a particular organisational culture. Different from the situation seen in other countries in Latin America, they did not emerge from syndicates and co-operatives; they are rather family enterprises, which is an aspect that may be observed in all other industrial sectors still dominated by Brazilian companies. Presently, however, illegal operators who are increasingly taking an active part in the national passenger transport market are progressively challenging this familiar, monopolistic and protected industry.

THE CHALLENGE OF THE ILLEGAL OPERATORS

Since the eighties illegal road transport operators have been markedly present in the urban scene. In the nineties this presence became more evident in almost all Brazilian medium and large cities. There, they have challenged the traditional operators, which on their turn have for a long time enjoyed protection from any competition and were even dispensed from competitive tendering procedures, gaining virtual monopolistic control over whole areas. The illegal ones run in the rule small vehicles (vans) with a capacity between 8 and 17 seats (Santos *et al*., 2001).

More recent is the urge of illegal transportation in the inter-city and regional transportation market. Here, the use of older and badly maintained buses and coaches is more frequent, but these precarious vehicles actually run routes longer than 2500 km, transporting people between the metropolitan centres of the Southeast to the main centres of the North and Northeast regions (Salvador, Recife, Fortaleza, Belém). Field observations in the Metropolitan Region of São Paulo by the National Public Transportation Association (ANTP), a non-profit organisation that lobbies for regulated public transportation in Brazil, have detected more than fifty illegal coach terminals, which are used by coaches that run to the different corners of the country. The magnitude of the competition by illegal inter-city transportation can also measured by the fact that since 1990, the four major official coach terminals in São Paulo have suffered from a decrease of 42% in their patronage (Folha de São Paulo, 2001, May 27th). Besides the coaches, illegal inter-city transportation is been increasingly practised by microbuses, which leave São Paulo City for the inner part of São Paulo State or even for the Northeast. In some Brazilian States, inter-city road transportation by vans have already been accepted and regulated by regional transport authorities.

Different reasons may be brought in to understand this urge of the illegal passenger transportation. Some of them may be mentioned:

- The need for more flexible services
- The increasing unemployment rate, but also the detection of a most profitable albeit risky investment alternative for the savings of some middle-class groups
- The aggressive marketing policy by the international manufacturers of small size transit vehicles.

In the present contribution, however, we wish to focus regulatory failure in the industry as a very essential reason for illegal operators challenging it. On the one side, the former transport administrative structure has been severely dismantled by the recent “administrative reforms" at the Federal, State and municipal levels. On the other, the permanent collusion and capturing efforts by the regulated coach operators have led to the vanishing of any respectable regulatory authority in the industry. The actual lack of competitive selection procedures, which are foreseen by Constitution (art. 175) for any industry categorised by Law as a “public service”, is one but not the only symptom of this demoralisation process of public authority.

REGULATORY REFORMS AND THE ISSUE OF THE COMPETITIVE TENDERING PROCEDURES

The move for broader regulatory reform in Brazilian transport sector started in the beginning of the nineties, when the National Programme for Privatisation (Act n. 8031, of the year 1990) was approved. From that point, the most different infrastructure industries have been submitted to respective privatisation programmes, whereby the maintenance of roads and the operation of the railways have been given in concession to the private initiative. A by-product of this process was the closure of the traditional authorities and the creation of new regulatory agencies (Brasileiro *et al*., 2000; Brasileiro and Aragão, 2000).

These regulatory reforms maintain some basic principles of the Constitution. With respect to road transportation, the Constitution foresees in its article 21 that the interstate transportation is the duty of the Union, thus it is to be considered as a "public service". And by the article 175 of the same Constitution, the provision of public services is the duty of Government, but its direct execution may be delegated by means of concessions or permissions, but always preceded by a procurement procedure. The concession itself does not lead necessarily to exclusivity rights: by the Act n. 8987 of the year 1995 (that stands for ruling the concession of public services) any exclusivity must be explicitly and previously justified on economic terms. By the same Act, the search for competitiveness and productivity is the duty of the conceding authorities.

Therefore, the concession of public services, especially of those that do not configure clear “natural monopolies” moves itself between economic regulation of monopolies and antitrust legislation. The need and obligation of providing competitive tendering procedures can be clearly derived from these

principles. Especially in the inter-city transportation industry the traditional monopolistic regulatory approach is unjustified: this is the industry that could benefit, more than others are, from a more free regulation.

PRESENT REGULATION OF INTERSTATE ROAD PASSENGER TRANSPORT IN BRAZIL

But this understanding is not followed by the ruling legislation. Albeit defined as a public service, interstate road passenger transportation is ruled by the Decree n. 2521 of the year 1998. This reaffirms the Federal Government as the responsible Government level for its direct operation or for its delegation to private companies (art. 1). This delegation may be given by means of permission or of an authorisation. The Ministry of Transportation keeps the competence for the control of the operations (art. 2). The permission shall be preceded by procurement procedure (art. 3), and the execution of the services shall observe the principles of regularity, continuity, efficiency and moderate fare levels (art. 4).

Once the procurement procedure promoted by the Ministry of Transportation (art. 32), the permission is to be formalised in a contract, whose clauses are previously defined by the Authority. The contract shall obligatorily include the route definition, the timetable or frequencies, the characteristics and the size of the fleet, the parameters for measuring required productivity and quality levels, and the fare sections (art. 20). With respect to fares, the operators may introduce promotional prices, provided that these are announced 15 days in advance to the Minister of Transportation (art. 27). By this, the regulation tries to enforce the principles of the freedom of choice for the user, of stimulus to free competition and of the variety of fares and of service quality and quantity (art. 32, XI).

By these rules, the legislation seems to foster competition and efficiency, following thus narrowly the spirit of the reforms introduced during the nineties. Surprisingly, the same Act foresees a very long contract period (15 years). More surprisingly yet, the permissions which were valid by the time of the adoption of the Act were automatically renewed for another 15 years, beginning from the year 1993, which was the year when the former legislation (Decree n. 952) was enacted! This blunt contradiction is to be considered as a direct result of the capturing efforts by the operators, which resist to the introduction of any efficient and effective regulatory reform.

Thus only in 2008, if the political context does not change, there will be the opportunity to introduce tendering procedures in the interstate road passenger industry in Brazil. On the other side, this situation tends to worsen additionally the attack of the industry by the illegal operators, as the regular ones will continue to be overprotected and to feel not obliged to introduce better services.

REGULATORY AGENCIES: WILL THEY BRING IN A MORE EFFECTIVE REGULATION?

On the federal level, a project already approved by the Congress introduces a deep administrative reform in the transportation sector. Three entities, all of them linked to the Ministry of Transportation, shall be created: the National Land Transportation Agency (ANTT), the National Water Transportation Agency (ANTAQ) and the National Transportation Infrastructure Department (DINFRA). (Brazilian air transportation is not subordinated to the Ministry of Transportation but to the Ministry of Defence). As for land transportation, the first and the last ones are of relevance and to be treated here.

ANTT shall be a "special autarchy" with a compounded duty area. Firstly, ANTT is the regulator of interstate and international land transportation services. On the other hand, ANTT shall regulate the exploration of those transport infrastructures that have been (or will be) conceded to the private sector (i.e., toll roads, privatised railways and general rail transportation). It is in the competence of ANTT to celebrate the concession contracts, to foster competition in the sector, to secure the rights of the users and also to execute the national transportation policy in its duty area. It is also charged with the duties of proposing to the Ministry a general plan for the concession of infrastructure and services and to analyse new proposals for the participation of the private sector in the transportation infrastructure investments. It shall also determine the fares and give the license to operators, control the execution of the services, and arbitrates in conflicts.

With respect to DINFRA, its role shall be to construct and maintain infrastructure that remains under governmental control, to develop and manage the respective projects and to supervise the contractors. Beyond this, DINFRA will be also charged with the duties of establishing and managing programmes for research and technological development in its respective duty resort.

One important issue to be cleared and which remains unanswered by the legislative Act is the actual relationship between ANTT and the Ministry and how autonomous the Agency will be respect to the Ministry. Here we find a somewhat awkward symbiosis between the Brazilian traditional Administrative Law — deeply influenced by French Administrative Law and its public service concept — and notions and legal institutes derived from Anglo-Saxon Administrative Law (i.e. the Common Law branch of Western Law), as the relatively independent public utilities agencies.

The French public service concept starts from the viewpoint that the activities submitted to this rule belong primarily to the State, but the private sector may run it under an administrative contract. This is a contract that Public Administration is free to alter or even to suspend unilaterally, provided that operators' "economic and financial equilibrium" is to be granted. In this case, Public Administration

remains with the functions of planning and controlling the services and of establishing the fares. The public service concept regards the access to the activities under scrutiny as a basic right of the citizen, which shall not endanger by its eventual lack of resources to use them. The Authority that manages the system and the relationships between government, operators and users is primarily an executioner of a governmental policy, and there is little room for autonomy between the "autorité organisatrice" and the more central governmental bodies.

On the other side, the Anglo-American public utility concept does not regard the respective activities as governmental one. In principle, they remain activities of full private and commercial character. But the public interests involved in the supply and consummation of these goods may rise a duty for the Government to control them and even to interfere into their planning and price levels (quantitative or economic regulation), especially when severe market failures arise. The aim of the Government is then to protect the consumer from the market failures, not to award him an automatic right to its access. Another role for the Government is to arbitrate conflicts between the involved parties, especially between the operators and the users and the whole society. As some conflicts can arise between the operators and the public policies, the Regulatory Agency concept foresees its relative freedom from the direct governmental interference; since the idea of autonomous or quasi-independent regulatory bodies.

In the praxis, both concepts can produce similar results. For decades, countries under the Common Law concept interfered deeply in the services and even had they run by public enterprises. On the other side, the notion of public service may admit freer handling of the relationships between the "Concession Giving Power" and the concessionaire, even some beneficial competition between concessionaires.

The problem arises when both concepts are mixed together without any clearer notion of their different legal approach. In the case of ANTT, this happens as several transportation activities are defined by Constitution as public services (arts. 21 and 30). But the ANTT is to be created following a general Administrative Reform policy, which has introduced concepts from Anglo-American Law, as the regulatory bodies. Concrete issues that can and will arise are, for example, *whose is the competence for general planning and establishing a general transportation policy*? The Act suggests some interference of ANTT in this area, and the viewpoints of the regulatory body (more concerned with the relationships between the parties) can blur the character of public policy in transportation planning. Especially if the central administrative body (the Ministry) remains omissive in this domain and if operators capture the regulatory agency, then transportation policy, planning and regulation will be defined by the interests of the regulated parties, not by the interests of the whole society. Thus the introduction of independent agencies without a clear separation between policy and regulatory management can lead to the independence of the whole transportation policy from Government!

On the other side, the continuing use of concession contracts (since the public service concept has not been put out of function) may be an impediment for introducing some salutary competition, especially in those markets which are not natural monopoly, e.g. inter-city passenger road transportation. The concession contracts may turn difficult free and challenging entries and reinforce an overprotective environment, which is known as harming efforts for more productivity, quality and innovation. Particularly, the Act that creates the new regulatory bodies does not establish clearly competition as a main aim; worse than this, the current permissions that had been given without tendering procedures are not interrupted.

In the present historical context, Brazilian Federal Government has retracted itself from active policies in the different infrastructure sectors, as a result of a policy more primarily concerned with the short-term fiscal equilibrium. The concrete result of the legal "mélange" public service/regulatory agency may be a general capture not only of the regulation but of the whole transportation policy by the regulated (and highly colluded) industry, which will remain overprotected. As retraction from governmental policy leads easily to retraction from governmental control duties, even from the entry control in the interest of the colluded and capturing industry, doors will remain open to the entrance of illegal operators. But this will not signify the implementation of transparent and general competitiveness through the backdoor: illegal operators remain free from governmental enforcement of the most basic rights of the users. Their vehicles, drivers and services do not use to fulfil the least safety, quality and reliability requirements of a regular industry!

THE CHALLENGE: TO CLARIFY THE REGULATORY FRAMEWORK AND TO INTRODUCE COMPETITIVE TENDERING PROCEDURES

As introduced, Brazilian public road transportation is presently undergoing a deep crisis, characterised by a progressive fall of the patronage levels and by a fierce competition by illegal operators that run smaller vehicles. These are more flexible and agile and have a competitive advantage in a market that requires increasingly quick and frequent services. In the contrary, the heavy and slow bus vehicles lose the terrain they had for sure for long decades, especially if they have to compete with other vehicles the same scarce road space. On the other side, the long lasting overprotective environment has turned the bus and coach enterprises unprepared for any competition. This very competition is forcing itself into reality, but in a highly undesired manner, that is the wild competition for the passenger on the streets and roads, which reduces the necessary safety and reliability levels.

The solution of this problem requires the reinforcement of the governmental policy and action, which implies that the authorities reassume their duties with respect to establishing a clear transportation policy, which shall give priority to public transportation, and to introduce competitive entry

procedures. Thus a main role for the Agency will be to adopt these principles and to grant that the contracts are fully enforced and that competitive tendering procedures are organised. There shall be also a clear separation between the policy and planning duties of the Ministry and the regulatory duties of the Agency. Only this way will ensure a new flourishing of the passenger transportation enterprises and lead to an enhancement of the service quality and efficiency.

Competition has even more room in inter-city passenger transportation, which can benefit from deeper going direct deregulation measures, as the natural monopoly character can not be clearly demonstrated in this very industry. Here governmental regulation shall focus rather on reliability, safety and quality. The entry barriers are to be reduced to a minimum, opening the door to a beneficial competition in fares, frequencies, quality, innovation and diversification.

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