1. Introduction

1. This submission begins in Part 2 with a description of U.S. ports, their ownership and management structure, and some ongoing developments in this sector. Part 3 outlines general competition concerns that affect infrastructure markets such as ports, and discusses the application of competition and economic principles in the analysis of operational and restructuring issues related to ports. Part 4 summarizes the statutory federal antitrust exemption for marine terminal operators and the role of the Federal Maritime Commission in regulating U.S. ports.

2. The U.S. Ports System

2. America's ports play an important role in handling merchandise trade moving to and from other ports around the world. Each year, these ports handle exports produced at U.S. factories and farms and imports of goods such as automobiles, machinery, electronics, apparel, shoes, toys, and food. American households depend on the nation's container seaports for everyday items, and American businesses depend on these seaports for facilitating the exchange of merchandise with trading partners around the world.[1]

3. There are 183 commercial deep draft ports in the U.S., dispersed along the Atlantic, Gulf of

Charleston, Georgetown, and Port Royal, South Carolina, which are located across 100 miles of the Atlantic coast. The basic distinction is that a "port" is a geo-economic entity whereas a "port authority" is a government entity.

8. Technological innovations over the past half-century have led to a decrease in cargo handling costs at many container ports. Of those innovations, containerization has led to the largest reductions in general cargo handling costs at ports. The advent of containerization facilitated a shift in how and where general cargo products are shipped, and in response to those changes, billions of dollars have been spent by container lines on new ships, by ports on their intermodal infrastructure, and by marine terminal operators on berths and equipment.

9. In container liner trades, cargo units have been standardized along the lines of the twenty-foot equivalent unit (TEU) intermodal container, and this standardization has allowed ports and liner companies to invest in mechanized systems and equipment to automate the cargo transport process and raise productivity.[2] By automating the process, containership operators have been able to speed the loading and unloading of vessels, increasing the amount of time a vessel is at sea rather than in port, and allowing the vessel operator to benefit from increasing economies of scale.

3. Identifying Competition Issues in the Ports Sector[3]

10. Ports, like other infrastructure sectors, are often characterized by capital stocks of sufficiently high fixed and sunk costs that their economies of scale are not exhausted at existing and forecast levels of demand, rendering duplication of facilities potentially costly and inefficient. Economists and other experts

> Seek innovative ways to create competition among vertically integrated providers, where the economies of scale in the capital stock either have been reduced by technical change (telecoms) or persist in some aspects of scale but not others (railways). In railways, where economies of system size are typically exhausted before economies of density,[7] most of the countries in the Americas have chosen to rely upon competition among integrated providers competing at common points rather than seeking vertical restructuring and access by competing train operating companies to a common track.[8]
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> Finally, and alternatively, renew strenuous attempts to achieve efficient operations within the traditional context of government ownership or government regulation. The literature on "incentive regulation" has constituted a spirited attempt to correct some of the well documented flaws of older systems of regulation without jettisoning regulation altogether.[9]

11. Increasingly, experts have recognized that competition may take unexpected forms. Railways face competition from motor or water carriers for many commodities. Cable television providers are increasingly offering telecommunications services, as are internet service providers; correspondingly, telecommunications services providers have begun offering cable television services. In the case of ports, it may be inefficient and unnecessary to create additional competition among terminals *within a single port* if there is competition *among ports*.

3.1. Competition in a Systems Context

12. Seaports are one component of a vertical chain that carries a product from producer to customer. This chain may include inland transport from producer to port, the multiple port services themselves, water transport, port services at the destination port, and inland transport to the final customer – as well as intermediate terminals at various stages for freight consolidation, plus agents offering to arrange particular steps, such as freight forwarders and third party logistics providers. Together these components constitute a system.

13. Competition analysis begins with market definition and analysis of the choices faced by both goods producers and goods customers. In defining the relevant market for a particular port, the issue on the producer side is whether that port has market power vis-à-vis that producer: is the producer forced to pay what the port charges if the producer is to sell its product, or does the producer enjoy other, economic alternatives? Such alternatives might be other ports, but they might also be other types of customers for the goods produced.

3.2. Market Definition on the Goods Producer Side

14. In the case of iron ore, for example, an important commodity for ports, a miner and processor of iron ore who wishes to export its product may be economically "captive" to one port, or may have several other ports among which to choose, depending upon his location, upon the internal transport options potentially serving alternative ports, upon the terminal facilities available at these alternative ports

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7 Savignat, M.G., and C. Nash, "The Case for Rail Reform in Europe – Evidence from Studies of Production Characteristics of the Rail Industry," International Journal of Transport Economics 26 (1999), 201-217.

8 Pittman, Russell, "Options for Restructuring the State-Owned Monopoly Railway," in Scott Dennis and Wayne Talley, eds., Railroad Economics (Research in Transportation Economics, v. 20), Boston: Elsevier, 2007.

9 Laffont, Jean-Jacques, and Jean Tirole, Competition in Telecommunications, Cambridge, MA: MIT Press, 2000.

3.3. Market Definition on the Goods Buyer/Customer Side

19. This market definition exercise for a port is then performed from the standpoint of the

26. The FMC cannot deny or modify filed agreements, but must seek a judicial injunction in order to prevent the effectiveness of a filed agreement. The FMC can delay the effectiveness of a filed agreement if it seeks additional information from the parties necessary to analyze its competitive effects. This process, adopted in 1984, was modeled on the Hart-Scott-Rodino merger review procedure.

27. Under a proceeding before the agency, the FMC can take administrative action to ensure compliance with Shipping Act provisions, including a requirement that an MTO may not:

> Agree with another MTO or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;
>
> Give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or
>
> Unreasonably refuse to deal or negotiate.[21]

28. The FMC can enforce these statutory provisions with civil penalties.[22] Injured parties can file complaints with the FMC, which can award reparations for actual injuries.[23]

29. With respect to agreements filed by MTOs and/or common carriers, if the FMC determines that an agreement "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost,"[24] the FMC may seek to enjoin the operation of the agreement by bringing a suit for injunctive relief in the federal district court for the District of Columbia. The FMC has done so on one occasion, when it sought in 2009 to block the operation of an agreement between the Ports of Los Angeles and Long Beach that involved discussion and potential coordination of their respective "Clean Truck Programs," which were intended to reduce air pollution caused by trucks used to transport cargo to and from the ports. The FMC alleged that the agreement was likely to reduce competition, increase transportation costs, and decrease transportation service. The district court denied a motion for a preliminary injunction, ruling that the FMC had failed to show that trucking companies would gain market power or that competition between the ports would be reduced, and had failed to show a likelihood of irreparable harm and a balance of equities and public interest in its favor.[25] The case was eventually dismissed.

5. Conclusion

30. Ports constitute an important infrastructure in the U.S. economy. Traditional competition analysis, including examination of competition in a systems context from the perspective of both goods producers and customers, generally illuminates competition issues relating to the sector. However, a statutory antitrust exemption for certain agreements filed by ports with the FMC removes those agreements from the reach of the antitrust laws, and places them instead within the FMC's regulatory jurisdiction.

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21 § 41106.

22 § 41107.

23 §§ 41301, 41305. Note, however, that the Supreme Court has held that the Eleventh Amendment provides sovereign immunity to the states, and thus to port authorities that are arms of the state, from suits by private parties before the FMC. *FMC v. So. Carolina Ports Authority*, 535 U.S. 743 (2002).

24 § 41307(b).

25 *FMC v. City of Los Angeles*, 607 F.Supp.2d 192 (D.D.C. 2009).