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SUMARIO / SUMMARY / RESUMO

Editorial

We are pleased to share the second issue of the year 2022 of the Law and International Politics journal, which is integrated by great global scientific contributions, which allow us to visualize a trend of knowledge growth in the areas of law and politics. It is important to emphasize that the views of the writers in this issue provide a multifaceted panorama that guides us to rethink the legal-political action agendas for the various nations.

The first article analyzes the economic crisis caused by the COVID-19 pandemic, analyzed in light of the current announcement by the Federal Reserve of the United States of America of a possible recession in the face of the inflation that has occurred in the last quarter. The document concludes with a series of economic policy proposals regarding the characteristics of the crisis and the accumulation model of the long-term growth cycle that began with the establishment of neoliberal policies to the detriment of post-war Keynesian policies.

The second of the articles addresses a study that focuses on the argument of guaranteeing the quality of lubricating oils in Angola through the country's regulations, where the vision of nations both politically and legally intend to monitor the quality of products that are marketed in the country's environment, creating market regulations but in turn forcing the quality of the product through the standard to be a cause of protection for the acquisition of the product. Accordingly, the article analyzes Executive Decree No. 536/15 of the country of Angola. The article concludes with an analysis that presents characteristics, units, limit values and test methods with which product quality certification could be acquired, all according to the article's proposal.

In the third article we will be able to appreciate a research on a new topic that has gained strength in Latin America, the Ecuadorian family businesses, which contribute to the development of the country and are generators of employment. However, legal regulations have not been comprehensively established in this regard and have had to adapt to their environment, therefore, this study criticizes the regulations in terms of the dispersion of the legal figure of Ecuadorian family businesses in the legislation of the same country, impacting on a legal act that is vital for families in Ecuador, that is, succession as a legal process that should be strengthened through legislation to ensure the continuity of such companies, thereby achieving growth and development through generational succession.

This second issue of MLS-LIP includes a fourth article that analyzes the legal figure of the trust as a means of assigning federal participations as a source of payment and guarantee of credits of the federal entities in the country of Mexico. In particular, it is analyzed from the perspective of the State of Colima, due to the particularities of the trust contract for the allocation of federal participations. The study is nourished with an analysis of the incompatibility of the federal entities to legislate in relation to the feasibility of using the trust as a mechanism for the allocation of federal participations, as a source of payment and guarantee of the credits assumed by the federal entities.

In this same line, the fifth article deals with an investigation on the evolution of electric power generation in the public and private sectors due to the change in the electricity legislation in 1996, by means of the General Electricity Law of Guatemala. This research focuses on an interesting analysis of the information provided within the years under study and the variables defined, the analysis of the articles of the law that regulates the generation of electric power and the selection of the experts interviewed; all with the vision of providing an overview that allows to know the electricity subsidy provided in the country since 2017, and that is adequate to achieve the satisfaction of the electric power service to the users of the country, in hours.

Finally, the journal has included a sixth article that investigates the legitimate way for centralized or sectional States to transfer legal, administrative, operational and managerial capacities in general to decentralized entities of the State itself or private sector entities, by means of delegations. The study focuses on the country of Ecuador, where there are several ways of delegating financial, administrative and operational competencies and management to foreign state-owned companies, national or foreign private companies and even through public-private partnerships. As a result, we analyze the delegations of Ecuador's seaports, which are part of the State's strategic sectors due to their infrastructure conditions, geopolitical location and connectivity

facilities, elements that make them attractive to national and international investors specialized in maritime business, a situation that transforms them into valuable allies for international trade and the transit of tourist passengers. The Ecuadorian State intends that the comparative and competitive advantages of infrastructure and strategic positioning serve to generate sustained development based on the capacity to provide agile, safe and cost-competitive port services.

With this, we welcome the reader to the diverse visions of the writers and their interesting contributions to the construction of a political state and the rule of law.

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THE 2007 CRISIS IN THE UNITED STATES: SUPPLY-DEMAND IMBALANCE OR PROFITABILITY CRISIS?

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Summary. The economic crisis caused by the COVID-19 pandemic and the current announcement by the Federal Reserve of a possible recession in the face of the inflation that has occurred in the last quarter makes it necessary to discuss the nature of crises in terms of short and long term cycles in the economy, their characteristics and main consequences. The characterization of the 2007 crisis as a crisis of profitability and as the end of a long-term economic growth cycle, as well as the socio-economic particularities it presents, opens the way to the possibility of formulating more efficient and effective policies to deal with cyclical crises in the face of the difficulties presented by the exhaustion of an accumulation model linked to neoliberal globalization. For this reason, the objective of this research is to find the main characteristics of the aforementioned crisis by means of a descriptive socio-historical study for the case of the United States as the main world economic center, and thus, to characterize the last long-term cycle of capitalism. The approach aims to be comprehensive, so the phenomenon is analyzed from the main economic schools: neoclassical, neo-Keynesian, Keynesian and Marxist. The document concludes with a series of economic policy proposals regarding the characteristics of the crisis and the accumulation model of the long-term growth cycle that began with the establishment of neoliberal policies to the detriment of post-war Keynesian policies.

Key words: Economic cycle, crisis, conjunctural economic policies, structural economic policies

LA CRISIS DE 2007 EN ESTADOS UNIDOS ¿DESEQUILIBRIO ENTRE OFERTA Y DEMANDA O CRISIS DE RENTABILIDAD?

Resumen. La crisis económica provocada por la pandemia del COVID-19 y el actual anuncio de la Reserva Federal de una posible recesión frente a la inflación que se ha presentado en el último trimestre hace necesaria la discusión de la naturaleza de las crisis en términos de los ciclos de corto y largo plazo en la economía, sus características y principales consecuencias. La caracterización de la crisis de 2007 como una crisis de rentabilidad y como el fin de un ciclo de crecimiento económico de largo plazo, así como las particularidades socio-económicas que presenta abre paso a la posibilidad de formular políticas más eficientes y efectivas para enfrentar las crisis coyunturales ante las dificultades que presenta el agotamiento de un modelo de acumulación ligado a la globalización neoliberal. Por esta razón, el objetivo de esta investigación es encontrar las principales características de la crisis antes citada por medio de un estudio socio-histórico de corte descriptivo para el caso de Estados Unidos como principal centro económico mundial, y así, caracterizar el último ciclo de largo plazo del capitalismo. El planteamiento pretende ser integral por lo que se analiza el fenómeno desde las principales escuelas económicas, la neoclásica, neokeynesiana, keynesiana y marxista. El documento concluye con una serie de propuestas de política económica entorno a las características de la crisis y del modelo de acumulación del ciclo de crecimiento de largo plazo que comenzó a partir del establecimiento de las políticas neoliberales en detrimento de las políticas de corte keynesiano de la posguerra.

Palabras clave: Ciclo económico, crisis, políticas económicas coyunturales, políticas económicas estructurales

Introduction

The term crisis refers to the point at which economic expansion abruptly ceases, to a situation of acute stagnation or to a serious disturbance in the economic system or a sector of it (Sabino, 1991). Crisis is associated with the terms recession and depression, which are used in basic economic texts, referring to the former as a low degree of crisis and to a severe, deep and long crisis for the latter (Rodriguez, 2009).

The 2007 crisis shook mainstream economic theory and has challenged the claims of economic self-regulation. The *sub-prime* mortgage crisis in the United States managed to shake the global financial apparatus as a whole and has been catalogued as the worst economic crisis since the Great Depression of 1929; the rapid contagion to the main economic powers precipitated the world into a recession from which it has still not been able to fully recover and keeps a possible recovery vulnerable.

The injection of liquidity by the Federal Reserve to clean up the financial system and overcome the crisis, as well as the maintenance of interest rates at levels close to zero, prevented the recession from deepening and many economists considered the crisis to have been overcome; however, more than ten years after its onset, some economists have begun to question these assertions: what were the particular characteristics of the 2007 crisis in the United States? why were counter-cyclical policies insufficient to achieve a strong recovery? could a new crisis in the United States be possible? what would be its causes and consequences?

The aim of this paper is to respond to the questions raised above by means of alternative explanations to the neoclassical line that consider the crisis endogenously to the explanatory model in order to point out the particularities of the current crisis, the exhaustion of countercyclical policies to achieve sustained recovery and the possibility of a new crisis in the central economy of modern capitalism.

The 2007 U.S. crisis: general characteristics and orthodox explanation

The crisis officially began in December 2007, when the highest level of the previous boom, which began in November 2001, was reached, and the slowdown began and ended in June 2009. The second quarter of 2007 was the epicenter; in April New Century Financial Corporation, a leading mortgage lender, filed for bankruptcy, which caused other lenders with similar operational characteristics to begin to close; the rating agencies had reduced their scores, categorizing them as high-risk borrowers, a situation that generalized distrust about the financial system (Duca, 2013). By the summer of 2008, Fanny Mae (Federal National Mortagage Association) and Freddy Mac (Federal Home Loan Mortagage Corporation), two companies promoted by the government to achieve housing goals, were showing significant losses and the G. W. Bush administration made a significant injection of money, but without fully backing their committed funds, increasing distrust of the risk of default and precipitating housing prices and other financial assets (Krugman, 2015).

The reduction in housing prices began at the end of 2006. The decrease was initially moderate (3%), with no significant increase in the risk of default. However, in early 2007 the price decline accelerated (15%) without lending stopping throughout the mortgage system, because the decline was still focused on the states with the largest housing bubbles. Once the fall in prices became generalized, losses for both lenders and debtors became evident and housing prices began a downward spiral that spread to the rest of the financial markets due to restricted access to new credit; this resulted in a liquidity crisis, which in some cases turned into insolvency (Krugman, 2015).

With the impossibility of restructuring the debt and with the failure of the federal housing development bailout in mind, it was decided to conduct a bailout that left no doubt that the debts were properly backed; among the most important beneficiaries of the bailout were Bear Stearns, Citygroup, America Investment Group and Bank of America. The total bailout amounted to 2 trillion dollars, equivalent to more than 14% of the GDP of the United States, of which two thirds went to the financial sector and the rest was concentrated in the automotive sector, mainly in three companies, General Motors, Ford and Chrysler, which committed 106.3 billion dollars. To the above amount must be added 787, 000 million that were released in February 2009, mostly dedicated to federal and local tax exemptions for companies and individuals; the rest was dedicated to boosting infrastructure, science, health, energy, education, training and protection of vulnerable populations (Gutiérrez, 2015).

The housing crisis resulted in the Great Recession of 2007-2009 that spread to the broader economy through four main avenues. Growth in the construction industry stalled, wealth and thus consumer spending declined, reduced the ability of financial firms to lend, and eroded the ability of firms to raise funds from the stock markets; in this situation, investment contracted and with it economic growth (Duca, 2013). According to the Department of the Treasury (2012) during the recession real GDP contracted by just over 5%, 8.8 million jobs were lost, household debt reached over 120% of real household income, and accelerated the growth of the fiscal deficit to accumulate a total of $6 trillion in 2011.

Causes and solutions of the crisis in the neoclassical monetarist school

The neoclassical school, basing the whole explanation of the economic system on the idea of general equilibrium, does not develop a theory to explain the crisis, although it conceives it as imbalances resulting from the lack of a free market caused by state intervention or other externalities. In this sense, the neoclassical consensus attributes the 2007 financial crisis to three key factors: (a) an expansionary monetary policy triggered by the low interest rate that the Federal Reserve adopted at the turn of the century in response to the 2001 economic recession; (b) a policy of stimulus to home purchases that pushed prices away from the equilibrium point; and (c) an incorrect valuation of risk by financial intermediaries and regulatory institutions as a result of product innovation that was priced similarly to traditional instruments (Meltzer, 2009; Schwartz, 2009; Taylor, 2009).

In contrast to the previous consensus are the defenders of the post-2001 monetary policy because, in their opinion, it prevented a deeper crisis, recovered investment and kept inflation under control. These authors attribute the subsequent financial bubble to excess savings in newly industrialized Asian countries with large surpluses that fed investment funds, altering prices, demand and, above all, the risk perception of economic agents, leading them to make decisions far from the market optimum (Greenspan, 2008a, 2008b and 2010; Khon 2009). Another factor to which great importance is given is the existence of preponderant financial actors that can take advantage of both privileged information and their market power to hide and carry out movements that can destabilize healthy economies with the sole purpose of obtaining higher profits; this factor is called *Moral Hazard or moral* risk (Brunnermeier, 2009; Bordo, 2008).

The neoclassical current observes the crisis, following the above arguments, as temporary imbalances that will be resolved by the correct functioning of the market once economic agents gain sufficient experience in the valuation of the new financial instruments, confidence in the financial system is restored and overly lax monetary policies are avoided, without contemplating the possibility of a profound change in economic relations for any scenario.

Causes and solutions of the crisis in the neo-Keynesian school of thought

The economic analysis of the neo-Keynesian school accepts in general terms the neoclassical synthesis of general equilibrium; however, it affirms that there are imperfections in the system that can unbalance the economic structure as a whole. Such imperfections must be corrected or smoothed by the state through public policies to avoid acute recessions (Berzosa, 2018).

The explanation of the 2007 neo-Keynesian crisis is built around the critique of the policies of deregulation of the financial system at the international level, very optimistic about the free market, which followed the breakdown of the post-war capitalist pact. Deregulation resulted in the proliferation of actors and instruments outside of standard regulation that managed to concentrate a large part of the world's financial capital movements without major restrictions. This, together with public policies that have been geared towards the inflow and outflow of financial capital, has created bubbles of all kinds around the globe, to the detriment of policies that promote full employment.

Most developed countries tried to recover growth after the turbulent decade of the 1980s by gradually reducing interest rates and advancing the deregulation of financial capital. Cheap credit caused financial bubbles that, when burst, made it difficult to employ countercyclical monetary policy due to lower interest rates and the rigidity of the system to increase the fiscal deficit. In this situation, if the economy and the currency are sufficiently influential, the crisis can be global in nature.

The above aspects are part of the mechanism of the 2007 crisis. The low interest rates in the United States in the post-crisis stage at the beginning of this century caused an over-indebtedness of families due to the bubble in the real estate sector that kept housing prices growing; however, when the slowdown and doubts about the increase in prices began, speculative movements began that reduced the price of assets questioning the payment of liabilities, especially short-term liabilities, not only in the real estate sector but also in other sectors, causing a liquidity crisis. The reduction in the price of financial assets across the board did not only hit the United States; the crisis was quickly transmitted to the rest of the world due to financial globalization that exposed all participants and the strong influence of the dollar.

The decline in credit, despite the reduction in interest rates, caused investment to slow not only in the construction sector, but in many others that depended on the abundant credit of recent years; thus, capitalists' expectations were affected, delaying investment spending and deepening the decline in growth. Despite the depth of the crisis, it is claimed that the correct intervention of the State and the strong injection of liquidity, both to recapitalize the mortgage sector and to encourage investment, prevented a long and deep depression. However, it is noted that the loss of the interest rate as a countercyclical instrument due to the abuse of recent years must be made up for by increased public spending to avoid a future relapse.

The solutions focus on a recapitalization of the financial system in a coordinated manner among the major economies so that the financial system regains confidence and credit flows again, a reform of the regulatory system of financial institutions that includes the characteristics of the non-bank financial sector, and an increase in public spending to reactivate job creation at levels close to full employment. The problem with this solution is that it does not depend on any particular national economy, no matter if it is the largest like the United States; the only way for a stable and vigorous recovery is the coordination of expansionary policies of the great powers.

In short, neo-Keynesian ideas, by accepting the dogma of general equilibrium, reduce the crisis to a problem of confidence among agents generated in the financial sector and which manages to unbalance aggregate supply and demand. Without the correct intervention of the State, it can be prolonged and deepened. The explanation lacks an analysis of the relationship between the financial sector and the productive sector, because in the general equilibrium view money is only a veil that does not influence the determination of equilibrium prices or create aggregate demand. Therefore, to avoid a prolonged liquidity crisis, caused by the low interest rates of recent years, effective demand must be increased through government spending and moderate inflation must be allowed to promote investment and consumption. The proposed solutions are considered valid because they have historically proven effective in preventing major depressions, but it is not specified in what situations they are effective or for what time intervals they will be effective.

The general equilibrium model is incompatible with the existence of crises and, therefore, it is out of scope to precisely define their causes, consequences or possible solutions. However, there are heterodox alternatives based on both Keynesian and Marxist thought that consider the crisis as an integral part of the economic system and define it for different levels of aggregation and different time horizons, thus offering a better picture of the current economic reality. For the Marxist and other Keynesian currents, crisis has always been central because it is considered a characteristic phenomenon of capitalism and, therefore, they include it as an integral part of the explanatory model of economic behavior.

The economic crisis in Marx and Keynes as an endogenous factor in the system

The mention of crisis in Marx is found throughout his work and recognizes multiple causes such as: underconsumption or overproduction, sectoral disproportionality and downward movements of the rate of profit. However, the first disturbances are considered part of the nature of capitalism because of the physical separation between sales and production, and the individual production of anarchic organization that makes equilibrium states difficult, but not as the sole cause of severe disruptions in the functioning of the system. The main variable that keeps the system in constant growth is the rate of profit and its decrease in general terms can cause the other imbalances to

worsen until the extended reproduction of the system presents serious difficulties, stopping the accumulation of capital (Shaikh, 2006).

Profit for Marx is central because it is the variable that makes it possible for capitalists to invest in new capital to bring the system to constant growth and which, through competition, causes the technological advance of the system. The rate of profit is understood as the relation between the surplus value and the total capital invested, i.e., it depends on the unpaid labor time of the worker within the productive process and the investment in total capital, in accordance with the law of value which states that the only economic surplus comes from the exploitation of labor within the productive process, making it evident that the original cause of the crisis is the conflict between workers and capitalists.

The transmission mechanism of the crisis is described as follows: the need to obtain surplus, the wage-profit conflict that prevents the free extraction of any level of surplus value and the competition between producers mark a tendency to accumulate capital at a higher rate than the rate at which the surplus value appropriated by the capitalist grows, which reduces the rate of profit in the long run, causing investment and growth to decline. However, the trend is not considered constant and there are circumstances that manage to counteract it, such as: the increase in the exploitation of labor, the reduction of wages below their value, the cheapening of constant capital, relative overpopulation, foreign trade and the increase in stock capital. In other words, the general and most important tendency of capitalism is the decrease of the rate of profit in the long term, but capitalism has multiple mechanisms to stop or reverse the process, opening the possibility of great fluctuations in the process of accumulation.

The crisis for Marx is a characteristic state of capitalism that generates fluctuations in accumulation that tend to occur recurrently in the short and long term, both because of the temporal separation between purchases and sales and the configuration of individual production and investment decisions, but above all because of the decreasing trend of the rate of profit in the long term and the application of mechanisms to counteract the decline.

Keynes, on the other hand, writes his main work around the crisis, which he perceives as an abrupt change in economic relations that leads the system from an upward trend to a downward one, which can extend into a depression. The change is explained by a variable, the marginal efficiency of capital, which is understood as the expected returns on a new unit of capital. Thus, as the marginal efficiency of capital decreases, investment and economic growth decrease and unemployment increases (Keynes, 1936).

The mechanism is transmitted to the system as follows: during an economic boom, good expectations increase investment and consumption, thereby boosting aggregate demand and driving investment above actual expectations, which lowers future returns on investment. In the crisis phase, unrealized expectations delay investment spending, and employment and consumption are reduced, until expectations about future investment returns and investment spending decline across the board due to

increased uncertainty. Poor expectations about yields stop purchases of stocks and financial assets at first, precipitating a wave of selling of stocks and bonds that depresses prices and further reduces investment, employment and consumption to the point of recession.

The recessionary situation may drag on, however, since it is aggregate demand that determines the supply side of the system Keynes assumes that, by stimulating demand from the State, the prospects for future returns on the part of capitalists may improve; the latter, accompanied by a monetary policy that avoids raising interest rates in the stage following the collapse of asset prices, should lead the system into a new growth cycle to avoid a deep recession.

The Keynesian and Marxist explanations see the crisis as a phenomenon that is recurrent in capitalism, but explained differently. For Keynes, capitalists' expectations of expected returns, which in turn determine the level of investment, do not have to coincide with actual profit levels, creating an erratic system of decisions that makes for an unstable system. For its part, the crisis in Marx, in addition to identifying the fluctuations that can cause the erratic decision making of the system, adds the decreasing tendency of the long-term rate of profit as a process that highlights the contradictions of the process of extended reproduction of capital and gives way to large oscillations in the rhythms of economic accumulation.

Keynes observes the phenomenon of crisis as avoidable if the State drives the level of investment to full employment by stimulating demand at the moment when entrepreneurs' expectations are affected and by decreasing their spending at the moment when prospects exceed reality. In contrast, Marx, observes the process of crisis as inevitable because it exposes the structural contradictions of the system, but sees the trauma as a potential process of transformation that opens the way for accumulation to be reactivated, allowing for a new long cycle of growth.

The difference in the two conceptions lies in the objective of the explanatory models. Keynes concentrates on the short-term crisis caused by differences between aggregate supply and demand, which is determined by decisions on expected demand, which tend to equalize through movements in the level of utilization of installed capacity; when the movements of utilized capacity are efficient and achieve the tendency to equalize supply to the effective demand of the economy, there are periods of stable growth without large fluctuations in short-term accumulation.

On the other hand, Marx recognizes the existence of short-term cycles, but also explains the long-term economic functioning that depends on the general level of the rate of profit, which in turn depends on slow-moving factors such as the degree of exploitation, the technological level and the general level of installed capacity (Duménil and Lévy, 1999). Therefore, two types of crises can be distinguished, which require different actions for their solution and with different consequences. Based on this idea, in the following sections an effort is made to integrate in a basic way the central ideas about short and long term crises and their interconnection in current capitalism, a reasoning that has been developed in the last decades to reconcile Keynesian and

Marxist ideas and to give an integral explanation of economic cycles adapted to the current conditions of the economy.

Short term, crisis and money

The prerequisite for a stable growth process in the short term is the tendency of aggregate demand and supply to equalize. In the short term, productive decisions are made based on the utilization rate of installed capacity and on expected demand because capital stocks are considered fixed and changes in their level slow; in the same sense, prices are not determinant in the short term because their adjustment is considered slower and debt decisions are adjusted to investment needs by channeling savings through bank loans or issuing bonds and shares; financing is granted based on the balance sheets and solvency of each company (Duménil and Lévy, 1999). In the short-term analysis, investment depends, on the one hand, on own resources based on profits generated and, on the other hand, on available savings originating from money capital accumulated on the basis of these profits; the institutional framework that allows the issuance of money and the increase of funds available to capitalists is a factor that is considered basic, but which has a greater influence in the long term (Duménil and Lévy).

The utilized capacity of capital tends to remain below 100%, because the individual organization of production keeps aggregate demand unstable and a sufficiently large underutilized capacity is necessary to allow for adjustments during the production process. In this sense, a level of employment below full employment is also considered necessary to absorb increases in demand without a rapid rise in the nominal wage.

Short-term investment decisions focus on the amount of working capital and the level of employment required in each period, which in turn are determined by expected demand. The investment devoted to expanding the capital stock is determined in the medium term by the level of the rate of profit, which results from factors that move more slowly and are considered to be long term. Following the previous argument, the crises that cause short term cycles present a mechanism as follows: during the boom, individual companies cover the demand and its increase by increasing the work shifts and the circulating capital put into production; in this way, as the utilization rate increases and the unemployment rate decreases, wages begin to press for a general increase, a situation that will decrease the rate of profit of the system, investment and growth. However, in a normal state of expansion with a high general level of profit, these falls in the rate of profit should be temporary; the high level of profit allows for greater responsiveness and causes capitalists to adapt to the new conditions by reducing pressures on the rate of profit through investment in labor-saving capital in the medium term.

On the other hand, credit in the short term is indispensable to speed up purchases and sales in the system, thus helping aggregate demand and supply to equalize; however, the interest rate transfers part of the surplus value produced in industry to the financial sector; therefore, a sudden increase in interest rates in the short term, caused

by the increase in demand for credit, may be the second reason for a short-term crisis by affecting net profit, investment and the growth of supply. However, in a context of a high rate of profit, this reduction should be easily corrected given the greater availability of own resources to finance growth and, thus, competition will lead to a rapid increase in the supply of loanable funds, bringing the interest rate back to lower levels. In this scenario, countercyclical Keynesian policies that provide for a decrease in government-set interest rates to pressure a reduction in market interest rates can adjust the rate of net profit to prevent a prolonged squeeze on net profit and revive economic growth.

Long waves and the money market

Decisions in terms of the level of installed capacity that are made in the long run are governed by the rate of net profit, which in turn depends on the rate of surplus value and institutional factors that determine the financial and fiscal structure that influences the establishment of the levels of money supply and the availability of funds for capitalists, especially long-term capitalists. In this time horizon, capitalist competition mobilizes capitals between sectors and companies to take advantage of the difference between the existing profit rates along the system and obtain higher profits; this causes a tendency to the equalization of profit rates around the average rate and, also, of the capacity utilization rates of installed capital. Prices in this space of time become relevant in capitalist decision making because they signal persistent aggregate supply-demand imbalances; real wages are considered inelastic, but the nominal wage can adjust to the relative price movement of consumer goods (Duménil and Lévy (1999).

The level of extraction of surplus value depends on the relationship between wage increases and increases in productivity, the latter due to the choice of the productive technique and the configuration of the labor market that determines the characteristics of the demand for labor, but also on factors that influence the characteristics of the supply of labor force and the formation of the industrial reserve army, that is, the formation of the long-run average real remuneration depends not only on the level of productivity resulting from the technique used in production, but also on the configuration of the supply of labor power, which determines its relative scarcity or abundance and, therefore, its capacity to exert pressure on the wage-profit conflict and its influence on the level of surplus value of the system.

The level of investment depends on the level of average profit, which sets its limits, but also on factors such as the possibilities and facilities for financing it in the long term through the issuance of equity and debt capital, as well as the absorption of available savings through bank credit (Duménil and Lévy, 1999).

The presence of large fluctuations in the levels of investment and economic growth in the long-term context can be explained by the trend reduction in the rate of profit, which is the result of two factors: 1) the wage share and thus the profit share which is determined by the degree of unemployment and the balance of power between labor and capital; 2) the capital-to-capacity ratio which is determined by the choice of technique derived from the imperative of cost reduction imposed on individual firms by

competition (Shaihk, 2016). The ratio of total output to total output at normal capacity utilization is another factor that can generate fluctuations in the average rate of profit, but given that capacity utilization among the different productive units tends to equalize with normal capacity, this factor is considered close to one in the long run under conditions of economic growth.

It is in this sense that long waves are considered as a process inherent to capitalism, since the rate of profit is the driving force of investment, which marks the limits of accumulation and the characteristics that frame the wage-profit conflict to which it is subordinated. In this case, the fiscal and monetary framework can soften the crisis and even prolong it indefinitely, but at the same time it will be stopping the recovery of the rate, the transformation of the productive apparatus and, therefore, the growth of the system to pre-crisis levels.

The 2007 crisis in the United States: characteristics, causes and consequences

The *New Deal* meant for the United States a new pact between the State and the capitalist class that defined a Keynesian or social democratic economic structure, directly stimulated by the government to achieve levels close to full employment, in addition to modifying the patterns of consumption and reproduction of the labor force to make them consistent with mass production capitalism. The mechanisms to achieve this were: 1) Regulation of the labor market and legalization of labor representation to negotiate wages; 2) Investment in public infrastructure, to help raise the productivity of the system and connect the internal market, as well as to provide abundant labor for large industry through internal migration; 3) Increased spending on social security and the indirect wage in a way that would generate a stable labor supply and workers' consumption for the growing supply of goods (Coriat, 1982).

On the other hand, the post-World War II pact of capitalist nations succeeded in promoting trade through international monetary stability. This stability was achieved with the commitment to fix the exchange rates of national currencies to the dollar and the dollar was made exchangeable for a certain amount of gold, thus setting a theoretical limit to the printing of dollars, but making the dollar the world currency (Chapoy, 1983)

In this configuration, fiscal stimulus encouraged productive investment and supply growth was easily absorbed by the systematic increase in working class incomes and the rise in world trade. The rise in wage costs was offset by an increase in productivity resulting from the implementation of new production techniques based on the Fordist production line and the scientific organization of labor throughout the system, allowing for a long period of growth (Coriat, 1982). Moreover, the high level of the rate of profit made it possible to overcome cyclical or conjunctural crises relatively quickly due to the abundance of own resources available in the hands of capitalists to face them.

In the first half of the 1960s, the rate of profit began to decline due to the deceleration of productivity increases relative to wage increases (Duménil and Lévy, 2007). However, accumulation continued as a result of a constant fiscal stimulus that managed to stop the fall in the rate of profit by increasing the use of installed capacity above its normal level, the result was an overheating of the economy and inflation

The crisis process of the seventies provoked an economic policy shift based on neoclassical ideas that claimed that inflation was caused by large fiscal deficits that sought to maintain full employment, which made the labor market rigid and wage adjustments. Investment and productivity would also have been reduced by the exaggerated intervention of the State in business, which prevented the expression of the true individual will and, therefore, prevented the correct self-regulation of the system (Ceceña, 1984).

With these ideas as backing, the conservative wing of U.S. politics achieved political change in 1980 and with the election of Reagan, the economic recovery plan was launched, which focused on the following points: 1) Reduction of the fiscal deficit focused on the reduction of social spending, but with a progressive increase in defense spending and reduction of the tax rate on businessmen; 2) Imposition of limits to state intervention through the cancellation of the suppression of dependencies considered unnecessary and inefficient, in addition to the elimination of policies, controls and regulations to private businesses, especially financial ones; 3) Application of a restrictive monetary policy to combat inflation; and 4) Promotion of free trade and especially the free flow of international capital under the leadership of the United States and the dollar (Bouzas, 1982).

During the Reagan administration, the transformation was consolidated throughout the 1980s and caused a slow and unstable recovery of growth, unemployment grew following the trend of the last years of the previous decade and managed to stop the systemic growth of wages; the public deficit and the external deficit increased progressively, but inflation began to stop. The reduction of taxes made new resources available to capitalists, which restored modest growth, but with growth increased the demand for imports as a result of the appreciation of the dollar due to high interest rates, in addition to increasing the public deficit with the reduction of tax collection (Ceceña, 1984). However, the reduction of wage pressures and the stabilization of the profit rate created the conditions for economic recovery based on the precariousness of the labor market and the reduction of indirect wages due to cuts in social spending.

The 1990s saw the consolidation of new economic policies that were reinforced by the integration of new communication technologies into industry and finance. The new technology set the trend of accumulation, which was concentrated in this type of machinery and equipment, achieving almost a decade of growth with productivity increases above the wage increase, which remained at reduced levels that resulted in the recovery of the rate of profit, but without reducing either the public or trade deficit, or increasing installed capacity at the same rates of the previous long cycle.

In summary, the recovery of the rate of profit from the reduction of the wage share and the introduction of new technologies to industry and finance that made it possible, reached its peak in the second half of the 1990s where the rate of profit began to fall as a result of a cyclical crisis explained by the wage increase in conjunction with a process of over-accumulation in the technology sector driven by stock market capital. From this point on, the rate of net profit recovered due to the systemic reduction of the interest rate and financial globalization that made it possible for capitalist enterprises to obtain profits from credit leverage, thanks to the international interest rate differential. With this configuration, financial stimulus results in economic growth above normal capacity, without recovering the level of investment.

Overaccumulation is reflected in the construction sector based on household indebtedness, causing the real estate bubble that burst in 2007 as a result of the end of the short cycle caused by a strangulation of the rate of profit resulting from an increase in the wage share of income and a gradual recovery of the interest rate from 2003-2004. The recovery that occurred in 2009 is explained by the increase in the net profit rate due to a further reduction in the interest rate, and also by the injection of monetary resources to the financial and industrial sector, which made it possible to recover liquidity, demand and the profit rate due to the increase in the use of installed capacity, but without recovering productive investment to the same extent.

Conclusions

The 2007 crisis in the United States can be explained as part of the general mechanism of fluctuations in the general rate of profit, but with particular characteristics that can be explained by the conditions of recovery from the last structural or long-term crisis. In this sense, it can be affirmed that the last long cycle of the U.S. economy was achieved thanks to the recovery of the rate of profit based on the reduction of wage costs and the obtaining of absolute surplus value. However, the rate of profit did not recover to post-war levels and remained relatively low, which also caused economic growth to be lower and more unstable in the face of the reduced availability of resources to face economic crises.

The weak recovery of the rate of profit in the long wave (from the 1970s onwards) also defined the destiny of capital in the long term, privileging the financial space as the preferred market to valorize the available capital, especially since the crisis of the technological bubble. In this configuration, household debt grew in response to low wages, low productive investment and depressed aggregate demand to fuel the mortgage bubble that finally burst in 2007. In this context, the probability of a new crisis is high due to the low level of the rate of profit and it is also probable that the economic crises that arise will be increasingly deeper, unless there is a restructuring of the social and productive structure that allows for a sustained recovery of the rate of profit, investment and aggregate demand.

Keynesian counter-cyclical policies are functional to overcome cyclical crises by avoiding deep crises through the restoration of the rate of profit through the injection of money, government spending and the increase in the use of installed capacity; however, by avoiding the devaluation of capital, it has hindered a full recovery of the rate of profit, causing a weak economic recovery and has hindered the transformation to create the necessary conditions of profitability for a new long wave of sustained growth.

The 2007 crisis in the United States is a crisis of profitability caused by a low rate of profit which is associated with the weak recovery of profit during the last long wave but is not due to a process of general over-accumulation but sectoral and, being commanded by financial capital, take the form of highly unstable financial bubbles that provoke recurrent crises, low economic growth and expansion of financial forms of valorization of individual capitals, which have been maintained in the new century by means of the injection of large sums of money by the State to avoid their collapse, but delaying their necessary transformation.

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TECHNICAL REVISION TO ANGOLAN EXECUTIVE DECREE NO. 536 - 15 OF AUGUST 28, 2015 ON THE SPECIFICS OF LUBRICANTS CONSUMED IN ANGOLA - SUBSIDIES AND NORMATIVE UPDATES

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Summary. The study focuses on the issue of quality assurance of lubricant oils in Angola, whose normative that regulates this quality is the Executive Decree No. 536/15 of August 28, which describes the specifications of the lubricants sold in the Republic of Angola (attached). Chapter II of the aforementioned Executive Decree points to the minimum standards of API, SAE, NLGI and ACEA as international specification references for compliance in terms of consumption quality of the different lubricant oil families, but with little depth in terms of control instruments (reference tables) or monitoring of this compliance. This scenario is aggravated by the fact that there is a crowded market for this product, with several brands and *players*, as a result of the 90% dependence on imports. The legislation applied in Angola is described and with recourse to the comparative study is based on the technical specifications of reference by the decree, its limits, methods and regulatory updates, with the aim of enriching the Executive Decree n.no. 536/15 of August 28, the result is the segmentation of classes and standards with specifications described in the form of tables, where they present the characteristics, units, limit values and test methods in which they can easily be used at the time of their tests for product quality certification (lubricating oil) and therefore,it is recommended that these tables are attached as a subsidy to that Decree.

Keywords:Quality; Lubricants and Executive Decree No. 536/15.

REVISÃO TÉCNICA AO DECRETO EXECUTIVO ANGOLANO N.º 536 - 15 DE 28 DE AGOSTO DE 2015 SOBRE AS ESPECÍFICAÇÕES DOS LUBRIFICANTES CONSUMIDOS EM ANGOLA - SUBSÍDIOS E ACTUALIZAÇÕES NORMATIVAS

Resumo. O estudo centra-sena problemática da garantia da qualidade dos óleos lubrificantes em Angola, cujo normativo que regula a referida qualidade é o Decreto Executivo N.º 536/15 de 28 de Agosto que descreve as especificações dos lubrificantes comercializados na Republica de Angola (em anexo). O capítulo II do Decreto Executivo supracitado, aponta para referências de especificações internacionais os padrões mínimos da API, SAE, NLGI e ACEA para cumprimento em termos de qualidade de consumo das diferentes famílias de óleos lubrificantes, mas com pouca profundidade a nível de instrumentos de controle (tabelas de referência) ou monitoramento deste cumprimento. Este cenário é agravado pelo facto de existir um mercado preenchido deste produto, com diversas marcas e *players*,fruto da dependência à 90 % de importações. Descreve-se oa legislação aplicada em Angola e com recurso ao estudo comparativo fundamenta-se as especificações técnicas de referência pelo decreto, seus limites, métodos e actualizações regulamentares, com o objectivo de enriquecer oDecreto Executivo n.º 536/15 de 28 de Agosto, resultado é asegmentação das classes e normas com as especificações descritas na forma de tabelas, ondese apresentamCaracterísticas, Unidades, Valores Limite e Métodos de Ensaio no qual facilmente utilizáveis na altura dosseus testes decertificação da qualidade do produto (óleo lubrificante) e por isso,recomenda-se que estas tabelas sejam anexadas como subsídio ao referido Decreto.

Palavras-chave:Qualidade; Lubrificantes e Decreto Executivo N.º 536/15.

REVISIÓN TÉCNICA DEL DECRETO EJECUTIVO ANGOLEÑO N.º 536-15 DE 28 DE AGOSTO DE 2015 SOBRE LAS ESPECIFICIDADES DE LOS LUBRICANTES CONSUMIDOS EN ANGOLA - SUBSIDIOS Y ACTUALIZACIONES NORMATIVAS

Resumen. El estudio se centra en la cuestión de garantizar la calidad de los aceites lubricantes en Angola, cuya normativa que regula dicha calidad es el Decreto Ejecutivo nº 536/15, de 28 de agosto, que describe las especificaciones de los lubricantes comercializados en la República de Angola (adjunto). El capítulo II del citado Decreto Ejecutivo señala las normas mínimas de API, SAE, NLGI y ACEA como referencias de especificación internacional para el cumplimiento en cuanto a la calidad del consumo de las diferentes familias de aceites lubricantes, pero con poca profundidad en cuanto a instrumentos de control (tablas de referencia) o seguimiento de dicho cumplimiento. Este escenario se ve agravado por el hecho de que existe un mercado abarrotado de este producto, con varias marcas y actores, como consecuencia de la dependencia del 90% de las importaciones. Se describe la legislación aplicada en Angola y con el recurso al estudio comparativo se basa en las especificaciones técnicas de referencia por el decreto, sus límites, métodos y actualizaciones reglamentarias, con el fin de enriquecer el Decreto Ejecutivo N º 536/15 de 28 de agosto, el resultado es la segmentación de las clases y las normas con las especificaciones descritas en forma de tablas, que presentan Características, Unidades, Valores Límite y Métodos de Prueba en la que fácilmente utilizable en el momento de sus pruebas para la certificación de la calidad del producto (aceite lubricante) y por lo tanto se recomienda que estas tablas se adjuntan como un subsidio a ese Decreto.

Palabras-clave: Calidad; Lubricantes y Decreto Ejecutivo N.º 536/15.

Introduction

To be available and consumed in the market, every product must meet quality standards that are standardized in organizations, specialty centers, and concomitantly in the countries in general to regulate such products and their consumption.

These standards are designed under specific conditions influenced by factors such as the types of raw materials used to obtain the product and/or the origin of the product,

the production chain, the climate at the place of consumption, and the means or forms of consumption of the respective product.

In the case of lubricating oils, in Angola, there is at the production level a facility that mixes and makes available several lines of lubricating oils of one brand, namely the *NGOL*brand. The remaining brands, are imported by several companies to satisfy the national consumer needs, making the consumer market full of several brands. This scenario naturally makes the certification of the quality of this product indispensable.

This leads us to think that on the one hand Angola needs to import this product to meet consumption needs and on the other there is the legal Executive Decree 536/15 of August 28 that regulates the specifications of lubricants sold in the Republic of Angola, in its Article 3 the decree points to international specification references such as the minimum standards of API, SAE, NLGI and ACEA for compliance in evaluating the quality of the different families of lubricant oils. But a close look at it shows how little depth there is at the level of control instruments (reference tables).

In light of this, and also because of the concern to ensure the quality of the lubricating oils sold, the following research question arises:

How to enrich the Executive Decree No. 536/15 of August 28, on the quality of lubricating oils marketed in Angola?

In order to solve this question, the following research hypothesis is deduced:

To enrich the Executive Decree No. 536/15 of August 28, on the quality of lubricating oils marketed in Angola is necessary to gather the reference tables of international specifications with the standards of API, SAE, NLGI and ACEA, for compliance in the different families of lubricating oils as guarantee the quality of lubricating oils consumed in Angola and annex them as a subsidy to the aforementioned Decree.

Therefore, the research was carried out with the general objective of present subsidies for the Executive Decree No. 536/15 of August 28, 2015, on lubricants consumed in Angola.

From the study's problematic to the public interest

As already mentioned, there is in the Angolan legal system executive Decree No. 536/15 of August 28, 2015, which has no means of instrumentalizing its objective, which is to regulate the quality of lubricants consumed in Angola. To monitor the quality status of this product, in addition to referencing only the standards API, SAE, NLGI and ACEA standards for compliance, it should bring the reference tables for the exercise of verification of such standards, especially in the context context of the need to control the quality of this product when it remains on the market, at the risk of being difficult to ascertain the quality of the same, since the technical standards API, SAE, NLGI and ACEA, are not freely available for public consultation, and some series referenced in the Decree are obsolete.

This premise falls under general administrative law, which has as its task the legal protection of citizens in general from the measures, rules and plans of the public administration, the protection of equality, proportionality, predictability, freedom from arbitrariness and corruption, and the legal control of administrative activity (Sousa, 2016). Contextualized to our study is raised here to the public interest in favor of the Natural Resources Law, with field of action of the Oil and Gas Law, and this intervention seeks

to solve the problem raised in this study, in ways that the standard meets better public interest.

To be made available for the subsequent stages and segments, the fuels and non-fuel finished products are sent to the other chemical processing and/or para-chemical plants, and in the case of the Chemical Industry Intermediates, these must strictly meet the specifications required for such, in order to be absorbed by chemical industries as raw material. In this sense the primary objective is to meet the product specifications, required for each case.

The specifications of a product are the characteristics required by the market (commercial specifications) or by law (legal specifications) for certain qualities determined through *standard* laboratory analysis.

It is important to note that the specifications of a given product can be:

Legal specifications, these are subdivided into Fiscal: Their purpose is to classify a product, in order to define the manufacturing tax. Sanitary: They aim to limit the content of harmful products and substances. Example: Sulfur in Liquefied Petroleum Gas (LPG).

Commercial Specifications: Their purpose is to guarantee, as far as the finished products are concerned, a quality that meets the market's requirements. Example: The octane number of gasolines.

Technical Specifications: The technical specifications refer to the basic products. Their purpose is to guarantee to the base products, certain characteristics that correspond to the requirements of the production programmer's work program based on legal and commercial specifications.

Ensuring that these specifications are observed in the manufacture of which consumer good goes against the international reality that is the globalization of consumer law.

The theme of Consumer Law has been widely discussed nowadays and in this sense, according to (Durovic, 2019, p. 129)

> The year 2020 is an important year for international consumer law. Thirty-five years have passed since the adoption of the first version of the UN Guidelines for Consumer Protection.Thirty-five years later, the UN Guidelines remain the most important global instrument in the area of consumer protection, contributing to building the confidence of both consumers and traders operating in the marketplace. Consequently, the two main questions are what contribution the UN Guidelines have made to the development of consumer law, and to what extent the UN Guidelines have contributed in practice to the internationalization of consumer law during the thirty-five years of their existence.

In 2016, the United Nations established Guidelines for Consumer Protection, and according to (United Nations, 2016), in the field of Standards guidelines for the safety and quality of consumer goods and services, it brings the following principles:

> Member States should, as appropriate, formulate or promote the development and implementation of standards, voluntary and otherwise, at the national and international levels, for the safety and quality of goods and services and give them adequate publicity.National standards and regulations for the safety and quality of products should be reviewed from time to time to ensure their

> conformity, where possible, with generally accepted international standards.Where a standard lower than generally accepted international standards is being applied because of local economic conditions, efforts should each be made to raise that standard as rapidly as possible.

These guidelines emphasize the responsibility of the producer and the regulator to formalize a satisfactory market environment for the availability of any product.

Lubricants production in Angola and applicable legislation to regulate quality

"Lubricating oil is used to provide a film between bodies, reducing wear and tear on materials and increasing their life span" (Gândara, 2000 apud Morais & Kurtz, 2021, p. 102). The identification of the types of lubricating oils is arranged in several categories, among which the following are the main ones, ranging from the type according to the origin, to the way of separation during its production, to the service mode and the use.

To date, Angola has only one lubricant oil producing plant (IMUL), and due to the low processing capacity of the Angolan refinery, the country is unable to produce the base oils and therefore they are imported.

> The current production capacity for lubricating oils is 20,000 MT/year, but the industry plans to increase its capacity to 40,000 MT/year, which shows that the 20,000 MT/year capacity is no longer sufficient to meet consumer needs. The company that produces lubricating oils from Angola is called IMUL (Instalação da Mulemba de Lubrificantes) and appear on the market under the brand name NGOL.In the third quarter of 2018, sales of lubricants on the domestic market fell by 62% in volume compared to the analogous period in 2017.Imports are permanently followed by PUMANGOL, SONANGALP, COSAL, JAMBO, IMPOLEOS and LUBÁFRICA (Morais & Kurtz, 2021).

The legal norms that parameterize the specifications of lubricating oils establish the limit values of the possible results of a quality test, to define whether it can be commercialized or not.

In legal matters, in the field of quality assurance of lubricant oils, there are the following legal diplomas in Angola:

Law No. 28/11: It is an Act passed on September 1, 2011, which to determine the standards for the activities of crude oil refining, storage, transportation and marketing of petroleum products.

Executive Decree No. 536/15: It is a decree issued on August 28, 2015, which regulates the specifications of lubricants sold in the Republic of Angola. In its article 3 to 9, it points to international specification references such as the API, SAE, NLGI, and ACEA minimum standards.

These standards refer to:

API*(American Petroleum Institute*): The API standard was developed by the American Petroleum Institute in the United States of America and is based on performance levels of lubricating oils, that is, on the type of service the machine will be subjected to. They are classified by two letters, the first indicating the type of engine fuel and the second the type of service.

API categorizes oils into classes, with terminology that tends to follow the behavior of evolving engines (Gestroil, 2017).

ACEA*(Association des Constructeurs Européens d'Automobiles* / European Automobile Manufacturers Association): ACEA compiles and makes available the service oil sequences that define different lubricant categories. Usually the term ACEA is preceded by one or two letters, being A, B, C, D and E. The letter A indicates that the oil is for gasoline engines of light-duty vehicles, the letter B indicates that the oil is for diesel engines of light-duty and commercial vehicles, the letter C indicates that the oil is for light-duty vehicles with diesel particulate filters, and the letter E indicates that the oil is for diesel engines of heavy-duty vehicles. Since 2014 the standards of the ACEA A and ACEA B sequences have come together, becoming ACEA A/B which is the indication that the oil is suitable for gasoline engines and diesel engines of light vehicles,(Lubritejo, 2008, & ACEA, 2016).

NLGI (National Lubricating Grease Institute): The NLGI has established a scale for the classification of greases. NLGI, has a standardized numerical scale for the consistency of greases, based on ASTM D 217, with a penetration range of 000 for semi-fluid greases to 6 for rigid greases. (Exxon Mobil Corporation, 2009). The following table shows the classification of greasesification of lubricating greases.

Table 1

NLGI Grade Definition

NLGI Degree of Consistency	000	00	0	1	2	3	4	5	6
Penetration Scale by ASTM standard at 25°C (1/10 mm)	445 - 475	400 - 430	355 - 385	310 - 340	265 - 295	220 - 250	175 - 205	130 - 160	85 - 115

Note: Source: Adapted from Exxon Mobil Corporation (2009)

Based on (Lubritejo, 2008) nLGI 000 and NLGI 00 grades refer to fluid lubricating oils and are used in gearboxes and centralized systems. NLGI 0 and NLGI 1 grades are semi-fluid and are used in centralized lubrication systems. NLGI grades 2 and 3, are consistent and used in bearings. And finally, NLGI grades 4, NLGI 5 and NLGI 6 are very strict and rarely used.

Methodology

The study observed careful documentary analysis, starting with the Angolan legislative package which presents the technical standards that guide the quality required for petroleum products sold in Angola in general, and with a focus on the regulation of the quality of lubricating oils. After identifying insufficiencies in the regulations, and in particular in Executive Decree no. 536/15 of August 28, thetechnical standards indicated for compliance by the decree itself were reviewed, and through comparison, reference tables were built, as a tool that can easily be used when applying the Decree.

Results and Discussion

To be commercialized the product must comply with the specifications. The specifications of a product, are the characteristics required by the market (commercial specifications) or by laws (legal specifications) for certain qualities determined through *standard* laboratory analysis.

The *standard* analyses that Executive Decree 536/15 refers to are predetermined by API, ACEA and NLGI technical standards. They establish a set of classes, standards that categorize lubricating oils, the analysis of which according to such standards is carried out using ASTM test methods.

These methods prescribe procedures to be employed in performing the tests, and allowable results to be found.

Below we detail the specifications of these standards and suggestions for improvement:

For lubricating oils for four-stroke petrol engines, the API SJ or ACEA A3/B3 standard must be met (Decreto Exectivo n.º 563/15 de 28 de Agosoto, 2015)**.** For ease of inspection follow the proposed Properties and Specifications.

For API SJ: As a subsidy to Executive Order No. 536/15, it is proposed to add the following Properties and Specifications(For laboratory testing) benchmark:

Table 2

API SJ standard for lubricating oils for four stroke gasoline engines

Features	Units	Amount / Limit	Testing Methods
SEA Viscosity Grade 5W -30			
Kinematic Viscosity at 100°C	mm2 /s	11.32	ASTM D 445
Flashpoint °C	c	237	ASTM D92
Pour point °C	c	- 38	ASTM D 5950/15468
SEA Viscosity Grade 5W - 40			
Kinematic Viscosity at 100°C	mm2 / s	13.79	ASTM D 445
Flashpoint °C	c	230	ASTM D92
Fluid Point °C	c	- 35	ASTM D 5950/15468
SEA Viscosity Grade 10W - 30			
Kinematic Viscosity at 100°C	mm2 / s	10.62	ASTM D 445
Flashpoint °C	c	226	ASTM D92
Fluid Point °C	c	- 30	ASTM D 5950/15468
SEA Viscosity Grade 10W - 40			
Kinematic viscosity at 100°C	mm2/s	14.28	ASTM D 445
Flashpoint °C	ºC	237	ASTM D92
Fluid Point °C	ºC	- 39	ASTM D 5950/15468
SEA Viscosity Grade 15W - 40			
Kinematic viscosity at 100°C	mm2/s	15.41	ASTM D 445
Flashpoint °C	ºC	230	ASTM D92
Fluid Point °C	ºC	- 30	ASTM D 5950/15468

Note: Source : Infneum (2015)

For ACEA A3/B3: As a subsidy to Executive Order No. 536/15, it is proposed to add the following Properties and Specifications benchmark (For laboratory testing):

Table 3
Standard A3/B3 for lubricating oils for four stroke gasoline engines

Features	Units	Limits A3/B3 (2016)	Testing Methods
1. Laboratory Testing			
Viscosity class according to SAE J300 - latest standard update		No restrictions except as defined by HTHS and shear stability requirements. Manufacturers may indicate specific viscosity requirements related to ambient temperature	
Kinematic viscosity at 100°C after 30 cycles	mm2/s	≥ 3.5	CEC L-014-93 Or ASTM D6278 Or ASTM D7109
Dynamic viscosity at 150°C and shear rate for^{105s-1}	mPa-s	≥ 3.5	CEC L-036-90
Dynamic viscosity at 100°C and shear rate for^{105s-1}	mPa-s	–	CEC L-036-90
Maximum weight loss after 1h at 250ºC	%	≤ 13	CEC L-040-93
Basic Number Total	mgKOH/g	≥ 8.0	ASTM D2896
Sulfur Compounds	%m/m	Report	ASTM D5185
Phosphorus Compounds	%m/m	Report	ASTM D5185
Sulfated Ash	%m/m	≥ 0.9 e ≤ 1.5	ASTM D874
Chlorine	ppm m/m	Report	ASTM D6443
Maximum variation for characteristics after immersion for 7 days in fresh oil without pre-aging: Tensile strength Elongation at Break Volume Variation	Elastomer % % %	RE6 Report -70/ +20 -5.5/ +2.1	CEC L-112-16
Trend-stability	ml	Sequence I (24ºC) 10 - 0 Sequence II (94ºC) 50 - 0 Sequence III (24ºC) 10 - 0	ASTM D892
Trend-stability	ml	Sequence IV (150ºC) 100 - 0	ASTM D6082 High temperature foam test
MRV	mPa-s	–	CEC L-105-12
Stress Yield	Pa	–	

(MRV at SAE J300 temperature, Applicable to fresh oil viscosity grade)			
Oil oxidation at 168h (DIN51453)	A/cm	≤ 120	
Oil oxidation at 216h (EOT) (DIN51453)	A/cm	Report	
Viscosity increase, relative to 168h (Delta KV 100)	%	≤ 150	CEC L-109-14
Viscosity increase, relative to 216h (Delta KV 100 to EOT 216h)	%	Report	

Note: Source: Association of European Automobile Manufacturers (2016)

For lubricating oils for four stroke diesel engines should meet API CH-4 or ACEA B3/E3 (Decreto Exectivo n.º 563/15 de 28 de Agosoto, 2015)**.**For ease of inspection follow the proposed Characteristics and Specifications(For laboratory testing):

For API CH-4: As a subsidy to Executive Order No. 536/15, it is proposed to add the following Properties and Specifications benchmark (for laboratory testing):

Table 4

API CH - 4 standard for lubricating oils for four-stroke diesel engines

Features	**Units**	**Limits**	**Testing Methods**
1. Laboratory Testing			
Viscosity class	SAE J300	Depends on the oil grade	Manufacturer's specifications and target viscosity within the SAE J300 specification
Copper Increase	Ppm	max. 20	
Lead increase	ppm	max. 120	ASTM D6594
Tin augmentation	ppm	Report	
Copper strip classification (D130)		max. 3	
Sequence I		max. 10/0	
Sequence II	tend/stab	max. 20/0	ASTM D892
Sequence III	ml	max. 10/0	
After SAE xW-30 shear viscosity	cSt	min. 9.3	ASTM D6278
After SAE xW-40 shear viscosity	cSt	min. 12.5	
Noack evaporation loss (SAE 10W-30)	% loss	max 20	ASTM D5800
Noack evaporation loss (SAE 15W-40)	% loss	max 18	ASTM D6417

Note: Source : Infneum (2015)

For ACEA B3/E3 : As an allowance for Executive Order No. 536/15, it is proposed to move to the E4 standard, since it is for four-stroke diesel engines. According to ACEA (2018) in the revision of the latest publication of the ACEA sequence of standards does not contemplate the E3 class, as it has been obsolete since October 2004.

On the other hand, according to (Lubritejo, 2008),

E3: They are universal application engine oils for heavy-duty diesel vehicles in severe service that meet EURO 1 and EURO 2 emission levels, with extended change intervals.

E4: These are universal application engine oils for heavy-duty diesel vehicles in severe service that meet EURO 1, EURO 2, EURO 3 and EURO 4 emission levels with extended change intervals, according to the manufacturer's standards. Compared to the E3 it has superior performance in cleaning the piston and soot.

In this sequence of recommendations a (Association des Constructeurs Européens d'Automobiles, 2016),

The Class indicates oil intended for one type of engine, currently there are:

A / B = Light Duty Gasoline and Diesel engines;

C = Catalyst compatible oils for gasoline and light duty diesel engines with aftertreatment devices;

E = Heavy-duty diesel engines;

Other grades may be added in the future if, for example, natural gas engines may require characteristics of the oil that cannot be readily incorporated into existing grades.

In this context, it is suggested to include ACEA E4 in place of ACEA B3/E3 for four-stroke diesel engines.

Accordingly, as a subsidy to Executive Order No. 536/15, the following Properties and Specifications benchmark is proposed to be added:

Table 5
ACEA Standard E4 for lubricating oils for four-stroke diesel engine vehicles

Features	Units	Limits E4 (2016)	Testing Methods
1. Laboratory Testing			
Viscosity class according to SAE J300 - latest standard update		No restrictions except as defined by HTHS and shear stability requirements. Manufacturers may indicate specific viscosity requirements related to ambient temperature	
Kinematic Viscosity at 100°C after 30 cycles	mm2/s	Depends on the grade of the oil	CEC L-014-93 Or ASTM D6278 Or ASTM D7109
Kinematic Viscosity at 100°C after 90 cycles	mm2/s	Depends on the grade of the oil	CEC L-014-93 Or ASTM D6278 Or ASTM D7109
Dynamic viscosity at 150°C and shear rate for^{105s-1}	mPa-s	≥ 3.5	CEC L-036-90
Dynamic viscosity at 100°C and shear rate for^{105s-1}	mPa-s	_	CEC L-036-90
Maximum weight loss after 1h at 250ºC	%	≤ 13	CEC L-040-93
Sulfated Ash	%m/m	≤ 2	ASTM D5174
Phosphorus Compounds	%m/m		ASTM D5185
Sulfur	%m/m		ASTM D5185
Chlorine	ppm m/m	Report	ASTM D6443
Maximum variation for characteristics after immersion for 7 days in fresh oil without pre-aging: Tensile strength Elongation at break Volume Variation	 % % %	RE6 Report -70/ +20 -5.5/ +2.1	CEC L-112-16
Trend-stability	ml	Sequence I (24ºC) 10 - 0 Sequence II (94ºC) 50 - 0 Sequence III (24ºC) 10 - 0	ASTM D892
Trend-stability	ml	Sequence IV (150ºC) 200 - 50	ASTM D6082 high temperature foam testing
Oxidation induction time	min	≥ 65	CEC L-085-99
Total Basicity Number (TBN)	mg KOH/g	≥ 12	ASTM D2896
		According to SAE	CEC L-105-12

MRV	mPa-s	J300 for new oil	
Stress Yield (MRV at SAE J300 temperature, Applicable to the fresh oil viscosity grade)	Pa		
Oil oxidation at 168h Increase in kinetic viscosity 100°C, after 168h (Delta KV 100)	A/cm %	≤ 90 ≤ 130	CEC L-109-16

Note: Source: Association of European Automobile Manufacturers (2016)

For automotive gear oils except for automotive automatic transmissions the API GL-4 or API GL-5 standard must be met (Decreto Exectivo n.º 563/15 de 28 de Agosoto, 2015). For ease of inspection follow the proposed Properties and Specifications.

For API GL-4: As a subsidy to Executive Order No. 536/15, the following Properties and Specifications benchmark is proposed to be added:

Table 6

API GL - 4 for automotive gear oils except for automotive automatic transmissions

Features	Units	Value/ Limits	Testing Methods
SEA Viscosity Grade 80			
Color (ASTM)	-	L1.5	ASTM D1500
Density (15° C)	g/cm3	0.885	ASTM D4052
Kinematic viscosity at 40°C	mm2/s	79.8	ASTM D 445
Kinematic viscosity at 100°C	mm2/s	9.75	ASTM D 445
Viscosity Index		100	ASTM D 2270
Flash point (COC)	c	230	ASTM D92
Pour Point	c	- 30.0	ASTM D 5950/15468
SEA Viscosity Grade 90			
Color (ASTM)	-	L2.0	ASTM D1500
Density (15° C)	g/cm3	0.894	ASTM D4052
Kinematic viscosity at 40°C	mm2/s	185.6	ASTM D 445
Kinematic viscosity at 100°C	mm2/s	17.3	ASTM D 445
Viscosity index		99	ASTM D 2270
Flashpoint (COC)	c	234	ASTM D92
Fluid Point	c	- 22.5	ASTM D 5950/15468

Note: Source: JXTG Nippon Oil and Energy Corporation (2011)

For API GL-5: As a subsidy to Executive Order No. 536/15, the following Properties and Specifications benchmark is proposed to be added:

Table 7

API GL - 5 for automotive gear oils except for automotive automatic transmissions

Features	Units	Amount / Limit	Testing Methods
SEA Viscosity Grade 80			
Color (ASTM)	-	L1.5	ASTM D1500
Density (15° C)	g/cm3	0.888	ASTM D4052
Kinematic viscosity at 40°C	mm2/s	75.8	ASTM D 445
Kinematic viscosity at 100°C	mm2/s	9.44	ASTM D 445
Viscosity Index		101	ASTM D 2270
Flash point (COC)	c	234	ASTM D92
Pour Point	c	- 30.0	ASTM D 5950/15468
SEA Viscosity Grade 90			
Color (ASTM)	-	L2.0	ASTM D1500
Density (15° C)	g/cm3	0.897	ASTM D4052
Kinematic viscosity at 40°C	mm2/s	184.6	ASTM D 445
Kinematic viscosity at 100°C	mm2/s	17.2	ASTM D 445
Viscosity Index		100	ASTM D 2270
Flashpoint (COC)	c	234	ASTM D92
Pour Point	c	- 25.0	ASTM D 5950/15468
SEA Viscosity Grade 140			
Color (ASTM)	-	L2.5	ASTM D1500
Density (15° C)	g/cm3	0.903	ASTM D4052
Kinematic viscosity at 40°C	mm2/s	386.7	ASTM D 445
Kinematic viscosity at 100°C	mm2/s	28.5	ASTM D 445
Viscosity Index		101	ASTM D 2270
Flash point (COC)	c	236	ASTM D92
Pour Point	c	-12.5	ASTM D 5950/15468
SEA Viscosity Grade 75W - 90			
Color (ASTM)	-	L1.5	ASTM D1500
Density (15° C)	g/cm3	0.892	ASTM D4052
Kinematic Viscosity at 40°C	mm2/s	75.9	ASTM D 445
Kinematic Viscosity at 100°C	mm2/s	13.8	ASTM D 445
Viscosity Index		189	ASTM D 2270
Flash point (COC)	c	208	ASTM D92
Pour Point	c	- 45.0	ASTM D 5950/15468

Note: Source: JXTG Nippon Oil and Energy Corporation (2011)

For Greases must meet the degree of consistency corresponding to the NLGI classification Applicable, (Decreto Exectivo n.º 563/15 de 28 de Agosoto, 2015)for ease of inspection follow the proposed Properties and Specifications.

For NLGI: As a subsidy to Executive Order No. 536/15, the following Properties and Specifications benchmark is proposed to be added:

Table 8

NLGI for greases must comply with the degree of consistency corresponding to the NLGI classification

Features	Units	Amount / Limit	Testing Methods
NLGI 000			
Color (ASTM)	-	Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	320	ASTM D445
Drop point	c	0	ASTM D566
Welding load, by four-ball test	kgf	_	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	250	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	0.4	ASTM D2266
Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	_	ASTM D2266
Penetration, 60X, 0.1mm	mm	460	ASTM D217
NLGI 00			
Color (ASTM)	-	Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	160	ASTM D445
Drop point	c	0	ASTM D566
Welding load, by 4-ball test	kgf	250	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	_	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	_	ASTM D2266
Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	0.5	ASTM D2266
Penetration, 60X, 0.1m	mm	415	ASTM D217
NLGI 0			
Color (ASTM)		Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	160	ASTM D445
Drop point	c	190	ASTM D566
Welding load, by four-ball test	kgf	250	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	_	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	0.4	ASTM D2266
Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	_	ASTM D2266
Penetration, 60X, 0.1mm	mm	370	ASTM D217
NLGI 1			
Color (ASTM)		Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	160	ASTM D445
Drop point	c	190	ASTM D566
Welding load, by four-ball test	Kgf	_	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	250	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	0.4	ASTM D2266

Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	_	ASTM D2266
Penetration, 60X, 0.1mm	mm	325	ASTM D217
NLGI 2			
Color (ASTM)		Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	160	ASTM D445
Drop point	c	190	ASTM D566
Welding load, by four-ball test	kgf	_	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	250	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	0.4	ASTM D2266
Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	_	ASTM D2266
Penetration, 60X, 0.1mm	mm	280	ASTM D217
NLGI 3			
Color (ASTM)		Brown	Visual
Kinematic Viscosity at 40°C	mm2/s	160	ASTM D445
Drop point	c	190	ASTM D566
Welding load, by four-ball test	kgf	_	ASTM D2596
Extreme pressure of the welding spot by the four-ball test,	kgf	250	ASTM D2596
Mass wear diameter, by the four-ball test,	mm	0.4	ASTM D2266
Wear Protection, four-ball test Max.40kg, 1200 rpm, 1h, 75°C,	mm	_	ASTM D2266
Penetration, 60X, 0.1mm	mm	235	ASTM D217

Note: Source: Exxon Mobil Corporation (2009)

An addendum to the Executive Decree No. 536/15, in order to add to the tables presented, will further facilitate the evaluation of the quality of lubricants in Angola.

Conclusions

In ways to enrich the chapter II of the Executive Decree No. 536/15 of August 28, which regulates the specifications of lubricating oils sold in the Republic of Angola, the work illustrates aproposal for *segmentation of the classes and standards for measuring the main properties of the product for sale with specifications*, based on international references. This proposed segmentation of classes and standards with specifications is illustrated in the form of tables, where we can see thecharacteristics, units, limit values, and test methods that we think quality inspectors and certifiers can easily use when testing for product quality certification.

Since lubricating oils for four-stroke diesel engines must meet theAPI CH-4 or ACEA B3/E3 standard in accordance with Executive Decree No. 536/15, the study also concluded that it is necessary to update the inclusion of the ACEA E4 standard to replace ACEA B3/E3 for four-stroke diesel engines, because in the review of the latest publication of the ACEA sequence of standards does not include the E3 class, as it has been obsolete since October 2004.

Based on the results of the study carried out, it is recommended to the Ministry of Mineral Resources and Petroleum, representing the Government of the Republic of Angola, that increase the subsidies (tables, where are presented,Characteristics, Units, Limit Value and Test Methods) to the Executive Decree No. 536/15.

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THE MORTALITY OF ECUADORIAN FAMILY BUSINESSES DUE TO LACK OF SUCCESSION PLANNING

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Summary. Ecuadorian family businesses contribute to the country's development and generate employment. Despite their importance, no comprehensive legal regulations have been established in this regard and they have had to adapt to their environment. This study articulates the dispersed regulations of succession legislation in order to understand the early mortality of this type of companies that cannot achieve generational transmission, because they do not have a perfectly determined succession planning that allows the predecessors to transmit their business legacy to their successors in an organized, defined and legally adequate manner to the requirements and specifications of the family businesses that they must face at any given moment. In the introduction, studies related to the subject are collected from other approaches, while this research is from the perspective of law, for which legal and conceptual aspects of the lack of an inheritance plan that allows it to be maintained over time for generations are expressed. The methodology used is a non-experimental qualitative approach, using documentary, bibliographic, constitutional and legal instruments through the socio-legal method. As a result, the lack of succession planning is one of the reasons for the mortality of this type of companies. In relation to the discussion and conclusion, public policies are needed, where the State establishes mechanisms so that these companies do not disappear during generational changes. And that for its growth and development, not only an organizational structure is required, it must react to the generational changeover as a change that can occur at any time, so it is necessary to have a succession plan to support it

Key words: Succession, family business, planning, mortality, generational succession, generational replacement

LA MORTALIDAD DE LAS EMPRESAS FAMILIARES ECUATORIANAS POR FALTA DE PLANIFICACIÓN SUCESORIA

Resumen. Las empresas familiares ecuatorianas, contribuyen al desarrollo del país y son generadores de empleos. A pesar de la importancia que tienen no se ha establecido de manera integral normativa

jurídica al respecto y han tenido que adaptarse a su entorno. En el presente estudio se articula la normativa dispersa que tiene la legislación sobre la sucesión para poder entender la mortalidad temprana de este tipo de sociedades que no pueden alcanzar la trasmisión generacional, por no contar con una planificación sucesoria perfectamente determinada que permite a los antecesores trasmitir su legado empresarial a sus sucesores de manera organizada, definida y jurídicamente adecuada a los requerimientos y especiaciones de las empresas familiares que deben afrontar en cualquier instante. En la introducción, se recogen estudios relacionados al tema desde otros enfoques, mientras que esta investigación es desde la perspectiva del derecho, para lo cual se expresan aspectos jurídicos y conceptuales de carecer de un plan sucesorio que permita mantenerse en el tiempo por generaciones. La metodología utilizada es con enfoque cualitativo del tipo no experimental, empleando los instrumentos documentales, bibliográficos, Constitucionales y legales a través del método socio-jurídico. Obteniendo como resultado que la falta de planificación sucesoria es una de las razones de mortalidad de este tipo de empresas. En relación a la discusión y conclusión se necesita políticas públicas, donde el Estado establezca mecanismos para que estas empresas no desaparezcan en los cambios generacionales. Y que para su crecimiento y desarrollo no solo se requiere de una estructura organizacional, debe reaccionar frente al relevo generacional como un cambio que se puede producir en cualquier momento por lo que se requiere tener un plan sucesorio que lo sustente

Palabras clave: Sucesión, empresas familiares, planificación, mortalidad, relevo generacional

Introduction

One of the constitutional precepts of a State of Law and justice such as Ecuador, is to respect the right to property in all its forms; a guarantee that all people have with social and environmental responsibility. However, in order to do so, public policies and other mechanisms must be adopted. Thus, when family businesses are analyzed with regard to this right of succession transfer, their regulations are found to be disintegrated in this legislation. The importance of their study is that these companies contribute to the development of the country's economy and generate employment, which is why it is vital for these organizations to survive over time.

From the analysis of family businesses in Ecuador, by Espinoza, C., Salinas, A., Camino-Mogro, S.& Portalanza,A.(2021), it can be seen that 90% of the jobs are generated by family businesses and they contribute approximately 40% of the Gross Value Added (GVA) of the economy. The study shows the importance of family businesses in its economy with a strong local focus. It would be a strategic plan where the governmental muscle accompanies the creation and dissemination of these evolution policies.

The exponential growth of family businesses is worldwide, an event that has been occurring for many decades, and also entails the need for Ecuador to have a succession planning that allows the transfer to the new generation, since this incorporation is not an isolated event but a process that will occur at any time and will produce a change in these companies.

For Machado, L. (2010), the moment of transition is critical because parent-employer-entrepreneur problems arise, who despite having to totally relinquish control of the company, does not do so. The founders tend to remain within the organization, ordering, controlling and deciding, even when the successors have taken over, which causes discomfort not only within the company and its collaborators, but also causes friction within the family. While for Belausteguigoitia, R. (2012) succession involves the three subsystems of the family business (Family, Company and Ownership), which undergo important changes, the mere possibility of

a change in the power structures of companies generates uncertainty.

Changes that should not be traumatic, but in an organized manner within an evolutionary process that takes time to develop, without this, the uncertainty arises from not having an adequate succession planning for the change of command; organizational and administrative strengthening, decision making, family conflict resolution and established legal regulations that allow a smooth and adequate transition, since this involves crucial aspects for future generations as well as for the founders. Inevitable situation that these companies must go through, where the conditions for this transition must be analyzed, such as clear family rules that allow it to last over time.

The professor of the Pontifical Catholic University of the Dominican Republic, Justo, M. (2004) points to several authors who have conducted studies of the family business in different areas of observation, such as: (Adeyemi-Bello, 2001) and (Sorenson, 2000) who have opened great debates on the leadership of the founders in comparison to their successors. Indeed, the study of each family member is fundamental to determine the behavior transmitted from the family to the company and vice versa. One of the most peculiar mysteries is the failure of these companies when they attempt their continuity, despite the fact that there are countless guides on this subject, they are still pigeonholed within a high mortality rate.

While the 2014/2210 European Parliament report (INI), on family businesses in Europe, the rapporteur being Niebler, A. (2015) indicates: sooner or later all family businesses have to face a momentous decision: the question of the handover at the head of the company. Every year, some 450,000 businesses are sold throughout Europe, which in turn employ around two million employees. Given the multitude of difficulties associated with these transfers, it is estimated that up to 150,000 companies may close their doors each year and some 600,000 jobs may be lost. Policy must take action and establish the right framework conditions to prevent this loss of jobs. National inheritance, gift and corporate tax regimes make it particularly difficult to transfer businesses between family members. Even so, the family thus loses most of the control of the company, even though retaining it is, from the company's point of view, one of the key factors for success.

The objective of this research is to legally determine the circumstances that, due to lack of succession planning, Ecuadorian family businesses have a high mortality rate, considering the constitutional mandates of Ecuador and the laws that deal with family, property and business, internal regulations that must be analyzed to establish the lack of a succession plan for the sustainability of these companies and that allows them to be maintained for generations.

The transfer of the predecessor's command decision to his descendant affects the structure of the company and the family, as well as its survival and ownership. Thus determining the problem that exists on this issue, not knowing if the successor is interested in continuing with the business, knows about it, as well as if he/she is capable of making decisions for the benefit of the company or if it is an imposition of the outgoing partner who wants continuity through his/her family line.

Article 67 of the Constitution of the Republic of Ecuador (CRE) recognizes the different types of families and protects them as the nucleus of society, with equal rights and opportunities, as well as their members. While the Ecuadorian Civil Code in force on the company, recognizes its juridical person, with capacity of enjoyment as of exercise to contract rights and obligations being a juridical person that can be

represented extrajudicially or judicially, called administrator or manager according to the social contract in accordance with the established in Art. 113 of the Law of Companies. The Superintendence of Companies, Securities and Insurance is in charge of all commercial companies and their corporate control, including family businesses.

According to Art. 213 of the CRE (2008), the superintendencies are: the "technical bodies of surveillance, auditing, intervention and control of economic, social and environmental activities, and of the services provided by public and private entities, with the purpose of ensuring that these activities and services are subject to the legal system and serve the general interest; in application of Art. 430 of the Law of Companies.

With respect to the property according to Art. 321 CRE: "The State recognizes and guarantees the right to property in its public, private, community, state, associative, cooperative and mixed forms, and that it shall fulfill its social and environmental function", in accordance with paragraph 26 of Article 66 (ibidem)

And as for the succession, this can be intestate or testamentary, as established by the Ecuadorian Civil Code in its Book III of the succession by cause of death, and of the donations between living persons, Title I on the definitions and general rules and according to what is determined in Art. 231: The rules contained in Title II, Book Three of this Code, referring to the various orders of intestate succession with respect to the spouse, shall apply to the intestate succession of the spouse intestate succession with respect to the spouse, shall apply to the surviving cohabitant, in the same manner as surviving cohabitant, in the same manner as the precepts related to the marital portion. Considering in the same way if it is the de facto union, which is recognized in the Constitution of the Republic of Ecuador in its Art. 68.

Although the Constitution and the internal laws recognize the family and property, as well as the association (company), independently, when these three subsystems merge, a family company is formed that legally exists, however, the lack of planning in the business succession, would lead to conflicts and individual interests of the family members, power struggles, arbitrariness in decision making, which would affect the organizational and administrative structure, management and control. For Valenzuela, López and Moreno (2015) planning: "is presented as a challenge in this type of organization, because it is at this stage where the two component subsystems (family-company) must be harmoniously integrated with a view to the growth of the business". Y according to information issued by the Superintendency of Companies, Securities and Insurance of Ecuador: "Of the companies incorporated, a high percentage belong to the group of family companies, due to the fact that many capitals in the country are linked by consanguinity or affinity".

This refers us to the Civil Code in force which in its Art. 22 states: The degrees of consanguinity between two persons are counted by the number of generations. Thus, the grandson is in the second degree of consanguinity with the grandfather; and the (sic) first cousins, in the fourth degree of consanguinity with each other. When one of the two persons is an ascendant of the other, the consanguinity is in the straight line; and when the two persons come from a common ascendant, and one of them is not an ascendant of the other, the consanguinity is in the collateral or transverse line. In accordance with Art. 23 ibidem: Affinity is the kinship that exists between a person who is "or has been" married and the blood relatives of his or her husband or wife, or

between one of the parents of a child and the blood relatives of a child of his or her husband or wife, or between one of the parents of a child and the blood relations of the other parent of the other parent. The line and degree of affinity between two persons is determined by the respective line and degree of consanguinity between in-laws and sons-in-law there is a straight or direct line of affinity in the first degree, and between brothers and sisters-in-law, a collateral line of affinity in the second degree between brothers and sisters-in-law, there is a collateral line of affinity in the second degree. The text in quotation marks was declared unconstitutional by the Constitutional Court of Ecuador (2011) in relation to this study:

The Ecuadorian Civil Code, since its origin in 1861, as well as its legal antecedents, i.e. the Napoleonic Code and the Civil Code of Andrés Bello, has not conceptualized the family; the same has occurred with the constitutional norm, which has recognized the family as the nucleus of society and has provided it with the corresponding legal protection for the development of its purposes. For its part, the Substantive Civil Code has limited itself to establishing what kinship consists of and how it is established.

Parraguez (1997) defines kinship as one of the most important legal relationships generated by the family institution, which we can define as the family relationship that links two or more persons. This family relationship may have different sources or origins and can be classified into kinship by consanguinity and kinship by affinity. In turn, each of them can be considered in two different lines, according to the existing direction of descent: the straight or direct line and the collateral line.

Established the relationship that the family can have with its members, combining total or partial capitals (property) generating a business to support their family or help the members of it; it generates bond and legal effects within the Ecuadorian State, among themselves as well as for third parties, where the Civil Code defines it as a company in its Art. 564.

This study is carried out from a purely legal perspective, to analyze the separate infra-constitutional regulations of Ecuadorian families, with the contribution of literature and research in other approaches related to this topic, will allow to determine that the lack of succession planning, condemns these organizations to mortality in the generational change.

Circumstances of mortality in Ecuadorian family businesses

According to the study conducted by IDE Business School to 142 family businesses in Ecuador, the following factors that affect this type of companies, do not transcend generationally, were determined through data collection and results:

Josemaría Vásquez, the director of Family Business and Ecuador Policy at IDE Business School, explains that one of the reasons for the mortality of family businesses is linked precisely to the issue of ownership and management succession. There are those who raise the issue of management succession, but it is not implemented. Companies are full of good intentions, but they don't quite make the leap. Another of the shortcomings detected by this IDE Business School survey is that there are family businesses that are still far from professionalization and clarity with respect to ownership, to the family, which allows for subsistence and order to avoid conflicts. (Universe 2019)

In this regard, Romero, J. and Zabala, K. (2018) state: Family businesses present unique problems arising from the interdependence between the family and the family's financial interests, which makes it more difficult to carry out the administrative process in all its phases (planning, organization, management and control).

Regarding the reasons that may lead to the failure of family businesses, the Superintendence of Companies (2020), according to its statistics, states that 47% pointed to poor management and 23% to lack of leadership. Guayaquil has 17,602 family businesses, representing 32.18% of the companies operating in Ecuador. At the national level, this type of company is the majority, since of the 54,702 companies registered with the Superintendency, 47,019 are family-owned, that is, 85.95%. The sectors in Ecuador with the highest number of companies classified as family businesses are wholesale and retail trade, professional activities, real estate activities and construction.

According to the National Institute of Statistics and Census INEC (2019): Commercial organizations in the city of Guayaquil represent 40.13% of the total sectors of the economy. In this regard, within the Ecuadorian business fabric, family businesses make a significant contribution, with a percentage of 98%. Despite this, the rate of succession succession to the second and third generations is increasingly low; statistics emphasize the difficulty family businesses have in overcoming the generational transition. In the same way for Cardona, H. & Rico, D. (2014) Family businesses contribute significantly to the economy in aspects of work and turnover, they also present certain drawbacks that derive from a lack of plans that guarantee an effective generational succession since, some of these establishments fail to transcend to the second and third generation.

Unlike non-family companies, these types of companies have specific and differentiating characteristics from those that are not, where the company, the family and the property are merged, leaving the management and its control to the management of these organizations, considering a competitive advantage, but at the time of the transition of its generational relay, inconveniences arise when in the first generation, concerned about the investment and its growth over time, without considering that at some point there may be a succession change of command or occur according to the law. This is an event that is not internalized, nor is he aware of the need to hand over his business legacy to his successors, and whether they are prepared to manage and direct it.

Poza (2005) considers family businesses as a fusion of the family system and the business system, taking into account three components that are interdependent and complementary to each other: family, ownership and management. The values of the owners is what generates the combination of these three elements which, depending on the context, can be conceived as a competitive advantage or as a source of vulnerability to generational change.

According to Gallo, M. (1997), "many family businesses are born, enjoy a period of growth that lasts approximately 20 years"; but between "25 and 75 years, most of these firms disappear, a time equivalent to the lifetime of the founder" (Beckhard and Dyer, 1983). And for Leandro (2012), Succession is considered one of the main problems faced by the family business. Regardless of the type of business or its size, sooner or later family businesses will be faced with tensions between

owners, managers and collaborators who can hardly detach themselves from the sentimental or affective aspects of kinship, which makes succession difficult due to the moral division between the family and business dimensions.

Business succession

Belausteguigoitia, I. (2012) indicates that: "For Trevinyo-Rodriguez (2010), "succession is a dynamic process through which the roles of the predecessor and successor evolve independently and in parallel until they finally overlap and become confused, causing the generational handover". Having established the difficulty of business succession that these types of companies go through in order to achieve continuity over time, one of the most relevant studies is by John Ward (1987), where it is calculated that "from first to second generation succession, 30% of the companies survive, and from first to third generation only 13%". While for the Heres Foundation (2015) determines that 30% of family businesses have difficulties with succession causing internal power struggle and discomfort among customers.

Carrying out the generational handover is a critical and unavoidable point that these organizations must face, when confronting the business responsibility for its continuity and the family affections and emotions where the founders who created the business or enterprise in an informal way and who gave life to the family business, according to their experiences, knowledge with the purpose of stopping a livelihood for their family, are at the age for their retirement and see that their management must transcend for the benefit of the one that is growing and must have an organizational structure, decision making. It generates a friction of conviction founder-entrepreneur-relay and retirement or to remain in this without the decision of command is a friction at the time of happening that affects the family environment and therefore the company. The transfer of the legacy to the heirs to guarantee continuity and prosperity for the family encounters the first barrier, which is that the founders or owners internalize and are aware of the need for succession.

Legal system on succession in Ecuador

In order to analyze succession from a business point of view, it is necessary to search in the Ecuadorian legislation for norms that correlate with the subsystems of the three circles model of Tagiuri and Davis (1996), to demonstrate the line of argumentation of this research. The legal framework of the companies or mercantile corporations is the Companies Law that regulates them, which establishes in Art. 1 what is the contract of companies, instituting in its second paragraph the provisions of this law, those of the Code of Commerce, the Civil Code and the agreements of the parties. This leads to verify the provision of society or company given by the Ecuadorian Civil Code in its article 1957: "is a contract in which two or more persons stipulate to put something in common, with the purpose of dividing among them the benefits arising therefrom. The partnership forms a legal person, distinct from the individual partners". In accordance with the first paragraph of Art. 564 of the same body of law, which determines: "A fictitious person, capable of exercising rights and contracting civil obligations, and of being represented judicially and extrajudicially, is called a juridical person."

With the enactment of the Entrepreneurship and Innovation Organization Law (2020), which changed the conception of the type of traditional companies that had Art. 2 of the Companies Law and incorporated the simplified joint stock company (SAS), there are currently 6 types of companies that are recognized with legal status in the country, with tax liability according to the Organic Law of Internal Tax Regime. Reyes, F (2020) about the simplified stock company indicates that: "was introduced to the Ecuadorian corporate regulatory context with the purpose of making changes in the traditional system and introducing novelties that solve practical conflicts of entrepreneurs and businessmen". Being one of the objectives of this law, according to Art. 2, paragraph a): To create an inter-institutional framework to define a State policy that fosters the development of entrepreneurship and innovation. While the goal of the family entrepreneur is to pass on his or her business legacy to the next generation, only a small fraction of them succeed. In Ecuador, the life expectancy of these companies is 30% that reach the second generation and 15% to a third generation (Santamaría & Pico, 2015).

When generations are enunciated, the succession transfer of the patrimony of its predecessor to his heirs is conceptualized. This takes us back to family law and within the Ecuadorian legislation to the Civil Code, which establishes two types of successions: the testate or intestate succession known as abintestato, being a way of acquiring the domain. The word succession according to the Pan-Hispanic Dictionary of Legal Spanish (2022) "Act of succession of one person to another in his rights and obligations". This succession may be universal (inheritance) or singular (legacy) as stipulated in Art. 993 in accordance with Art. 996 of the aforementioned law. As Carrejo S. (1968) indicates "Once the deceased has passed away, there must be either by legal disposition, or testamentary disposition a person who occupies the position, this person who receives the assets of the deceased receives the name of heir, acquirer, successor, successor, assignee" From which it is inferred that this transfer is by cause of death and they give the forms of how to succeed on his estate, however, the Ecuadorian law also provides for the transmission between living; where Andara, L. (2019) states that successions are classified as acts between living or by cause of death that within the law the latter is known as mortis causa, mortis causa. (2019) that successions are classified as acts between living or by cause of death, which in the law is known as mortis causa. Also noteworthy is the succession that takes place between individuals or individuals and universal succession or universal succession.

For the transmission between living persons, the Ecuadorian legislation establishes the ways of acquiring the domain, which are occupation, accession, tradition, succession by cause of death and prescription, stipulated in the first paragraph of Art. 603 of the Civil Code. Tradition, which is nothing more than the power and intention to transfer part or all of its patrimony from the one who owns it and the intention or capacity to acquire it by the other person. (Art. 686 ibidem) being a form of acquiring the domain the donation between living persons applying the provisions of Art. 1402 of the same body of law: "is an act by which a person transfers, free of charge and irrevocably, a part of his property to another person, who accepts it. This is in relation to the legacy to be passed on to their successors, according to the focus of this research.

Now, by law, it has already been established how to succeed according to kinship, whether by consanguinity or affinity. On the other hand, in the corporate

part, since there are several types of mercantile companies, they have different ways of transferring the right of properties that the family may have, which have their own characteristics and limitations, therefore the transfer of shares of a limited company differs from the shares of an anonymous company and thus from the others. The family business can opt for any type of organization in accordance with company law. However, when business succession is analyzed, there is no specific law or State policy that has defined this type of company in a comprehensive manner or legally establishes how to succeed the predecessor in office, how to carry out the generational handover, or even worse, how to survive the continuity of the family business over time. As of 2020, the Superintendence of Companies, Securities and Insurance of Ecuador approved through Resolution No. SCVS-NC-DNCDN-2020-0013 the application of the Ecuadorian Standards for Good Corporate Governance for all types of commercial companies under its control and surveillance. Non-binding if not included in the bylaws. And it urges to "Prepare for family succession at the family level and at the company management level by developing plans for generational transition."

Lack of succession planning

Without succession planning, family businesses would have a high failure rate to survive over time. "Succession is usually considered as the main problem of the family business and cause of most of its failures in growth and continuity" (Gallo, M. 1997) as well as "Succession planning can be considered the most critical factor related to the continuity or long-lasting life of the family business "(Matías & Franco, 2020).

While, for Anderson (2012), the other side of the success story of family businesses is failure, he argues that 75% of the firms that were originally created by the first generation of founders have been forgotten, that is, in the entrepreneurial graveyard; only a small fraction, close to 15% of the original companies reach the third generation, so that the phenomenon of mortality is replicated in all countries.

According to the study by Espinoza et al., (2021), on family businesses in Ecuador: Conscious planning and succession is a key aspect for the continuity of the family business. Being the main pillar of the economy, it is essential to work on concrete actions to strengthen the foundations of the family business through governance mechanisms and its different tools so that both the company and its families prosper through the generations. It is here, where the psychoanalytic knowledge and the juridical-societal benefits take a key participation in the setting up of families in front of the family business. From the surveys conducted, it was determined that 85.0% do not have a written succession plan, 9.4% do have one and 5.3% are in the process of having one.

This study was developed by Espiritu Santo University with the authors of the aforementioned research (2021) from a sample of 57,752 family s data obtained by the Superintendence of Companies, Securities and Insurance of Ecuador:

Regarding succession, 85% do not have a written succession plan, only 9.4% have such a document; but when asked about the criteria for choosing the successor, 66.3% do not have them, while 33.5% do, and the most important criteria

are professional experience within the company, academic training (specifically university) and that he/she must be an owner or a relative of the owners. The transfer of shares to descendants is divided while 38.8% have no plans to do so, 38.5% would do so via inheritance and 18.1% via donations. Only 24.8% of those interviewed stated that they have limits on the transfer of shares, while 73.2% do not. That is why succession planning; it allows to choose the successor in a preparation process, to see his training and involvement and professionalization are important for the company considering the core of the family business so that an eventual failure in the succession seems to be a key factor in the early mortality of family businesses (Cabrera Suárez & Santana, 2007).

From a legal conception of this research, succession planning covers the specific needs of the family business that allows managing the succession process according to the characteristics and circumstances in which any type of company is found; maintaining family ties, adequate organizational structures, appropriate change of command that allows this transition to be effective and instituted for the company, the family and without affecting the property. Calmet, A. (2007) affirms that "in planning, relationships are usually temporary; in a family business, relationships are for life. So how the family learns to work together can be a vital factor in family harmony and continued ownership."

Method

The methodology used in this study is of qualitative approach, supported by a documentary research with descriptive scope from the existing legal framework Constitution of the Republic of Ecuador, the Declaration of Human Rights and internal legal norms that allow reaching the object of study proposed, under the technique of content analysis in a rigorous manner through the use of scientific articles, statistical studies of the existing problem, documents and books to know the mortality of family businesses from a critical analysis of the current situation of this type of Ecuadorian companies due to lack of succession planning. To then systematize it with the support of some research sources. Applying the socio-legal method, which aims to study the social reality insofar as it has an impact on the social behaviors it seeks to modify. Thus, law seeks to transform social events, hence the incorporation of the scientific method (Arango, G. 2013). And for Aguirre-Román & Pabón-Mantilla (2020) "these are problems that seek to analyze and describe social facts and actions related to legal phenomena. In some cases, the methodical reference comes from the currents that, from the socio-legal field, seek to understand the relationships between social realities and legal norms". Figure 1 shows the methodological design to be used in this study

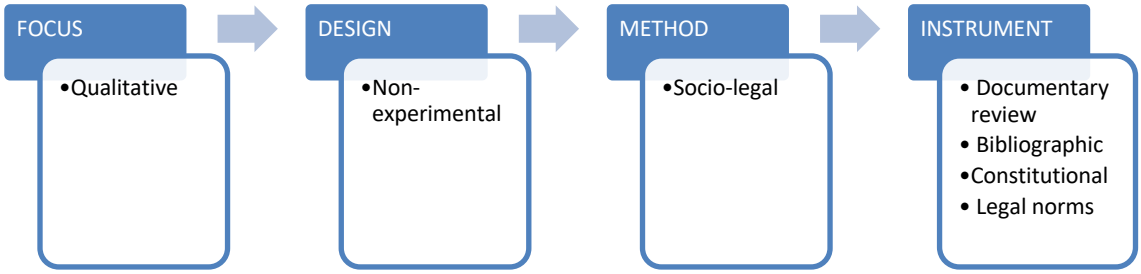

Figure 1. Methodological Design to be used

Results

From the documentary review and the scientific studies done in Ecuador on the reasons for the mortality of family businesses, using the methodological design and the established instruments, the theoretical results show that the main cause is succession, that, due to lack of planning, this type of company cannot transcend generationally. Considering that the independent laws and regulations, which are scattered throughout Ecuadorian legislation, do not help to solve this problem. The three-circle model of Tagiuri and Davis (1996) is used to represent in which legal bodies these regulations are found.

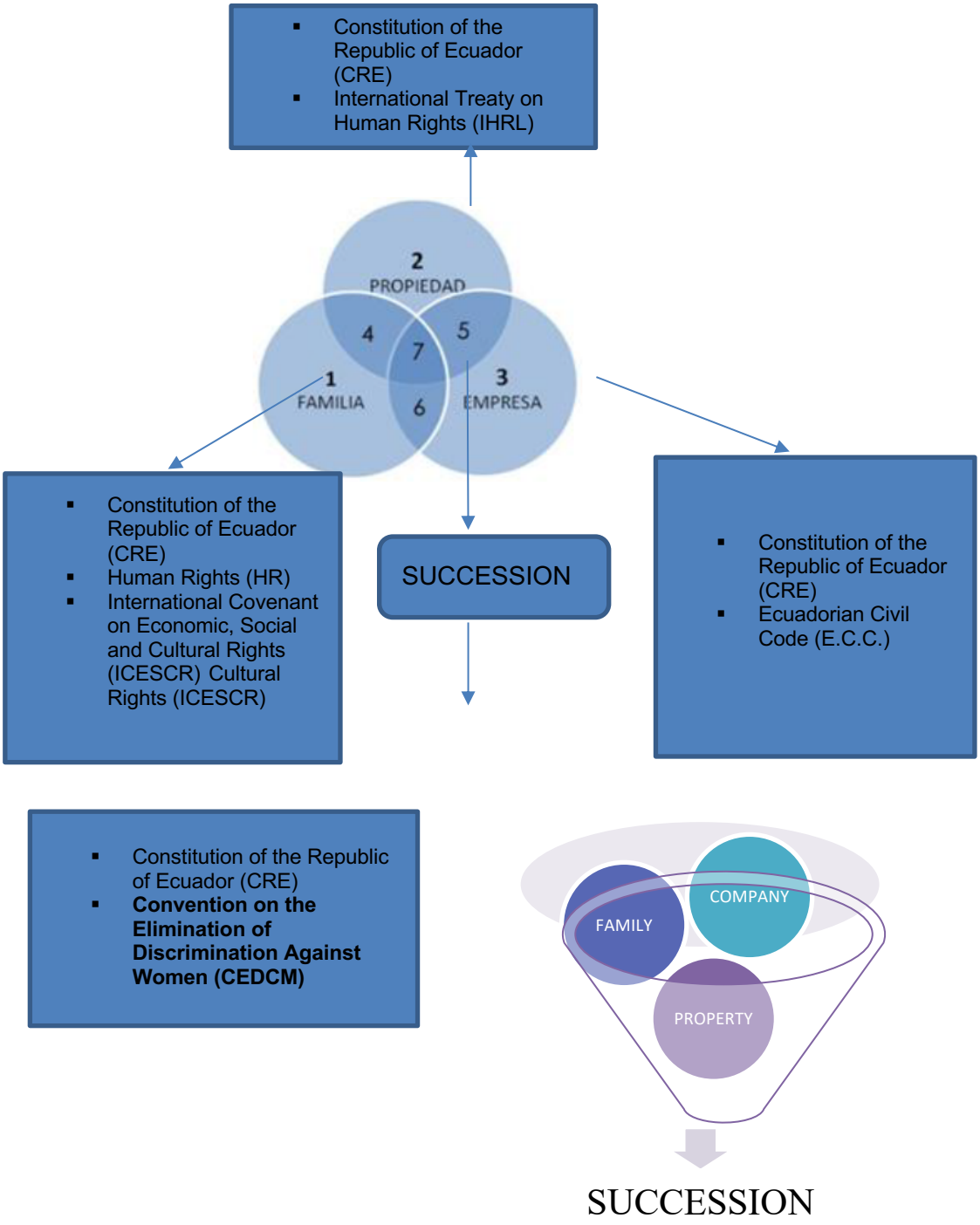

Figure 2. Model of the 3 circles.
Note: Source: Tagiuri and Davis (1996). Modified: by the researcher.

Although all types of families are guaranteed and recognized by the Constitution of the Republic of Ecuador (CRE), this precept is accepted as a State party that ratified the Declaration of Human Rights (DDHH) in its numeral 3 of Art.

16 recognizes: "The family, which is the natural and fundamental group unit of society and is entitled to protection by society and the State" as well as Art. 10.1 of the International Covenant on Economic, Social and Cultural Rights International Covenant on Economic, Social and Cultural Rights (ICESCR) (ICESCR**)** reads: 1. "The family, which is the natural and fundamental element of society, should be accorded the widest possible protection and assistance, especially for its constitution and as long as it is responsible for the care and education of dependent children."

In relation to property, Art. 17, numeral 1 of the International Declaration of Human Rights (IHRL): Everyone has the right to own property, individually and collectively. And so it is that in the legal framework of Ecuador, its Constitution also recognizes all types of property, there are the companies and their different forms of organization of production and management. As legal personality the Civil Code (CC.) ecuadorian law and the law of companies as a mercantile society where all the stipulations in this respect are found.

The connection of these subsystems for the proposed study is the succession found in the Civil Code in force in Ecuador (C.C.E.). Where the Convention on the Elimination of Discrimination against Women (CEDAW) in Article 16, paragraph 1, subparagraph h): "1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, shall ensure, on a basis of equality of men and women: (h) The same rights for each of the spouses in respect of the ownership, purchase, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

This article talks about family relations, property, as well as the disposition of property on equal terms (succession), eliminating any discrimination in this regard. That according to numeral 2 of Art. 11 of the Constitution of the Republic of Ecuador, it establishes formal equality of equality and non-discrimination for any reason, condition or motive. But as it was exposed in this study, nothing is said about the business succession, in spite of not having a specific legislation for this type of companies, it allows us to reach a legal conception that the succession planning would allow the continuity to be able to cope with the generational change and with this it does not produce the mortality of the family companies in this process.

The second legal argumentation, although the legal regulations analyzed in this research are disintegrated, they are complementary in order to understand the phenomenon that arises from family businesses in Ecuador and are part of the legislation that allows framing the need to not only have Ecuadorian Standards for Good Corporate Governance for its application, but public policies are required where the State articulates legislative regulations in this regard and encourages the development of family businesses, creating provisions for business succession planning for their survival to generational change.

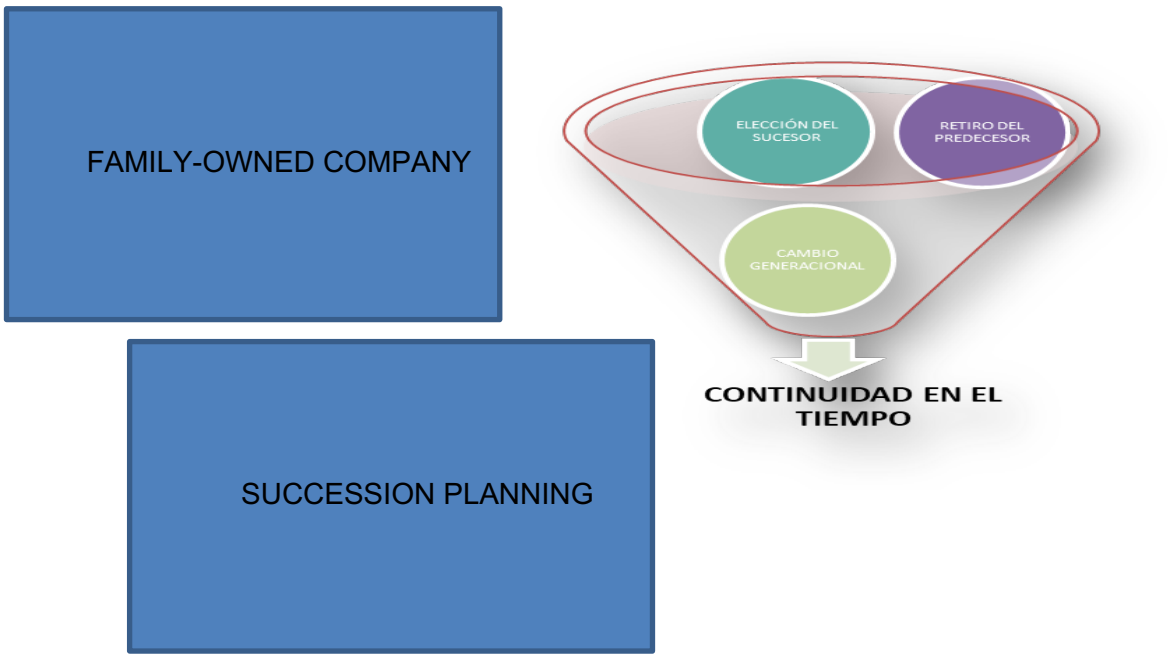

Figure 3. Circumstance of the object of study.

There are several reasons why family businesses do not survive over time, including changes in the family structure, agreements with third parties, competition, laws or the absence of a formal structure that turns it into a professional organization that plans the succession and regulates the relationships between family members, giving way to a more organized annex of the company. (Arruñada, B. 2007) As a third legal argument, the lack of succession planning is another reason for the early mortality of family businesses in Ecuador. According to the studies carried out and the support of the methodological instruments, it can be evidenced that this type of companies are born in the nucleus of the family, as an informal business to sustain the family, with the passing of time and its growth, a formal structure is needed within the company that allows regulating the relations of the family members with the company and this does not affect the property if for any reason there is a change of command, where the successors must be prepared for this, with the knowledge, professionalism and leadership to face the generational changeover with the commitment, linkage and permanence within the company.

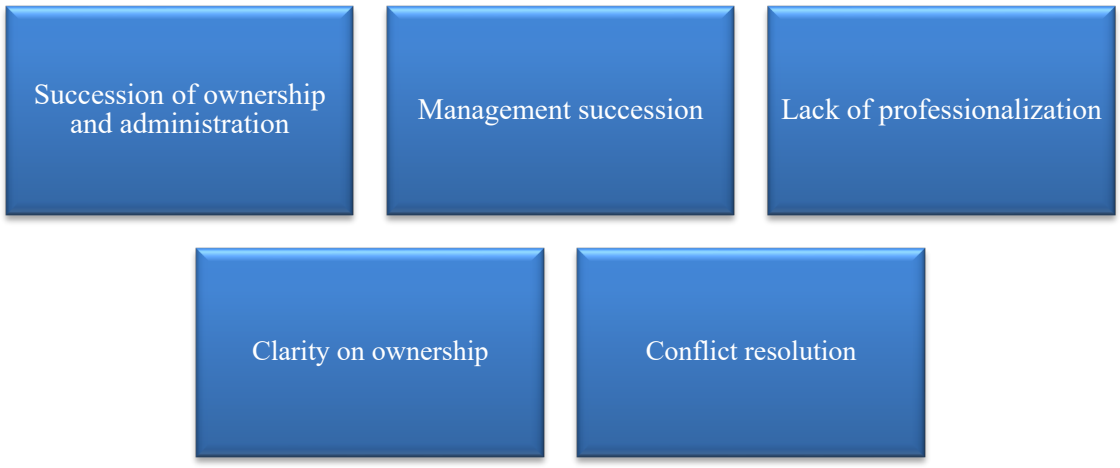

Figure 4. Circumstances of mortality in Ecuadorian family businesses

Note: Source: IDE Business School survey information (2019)

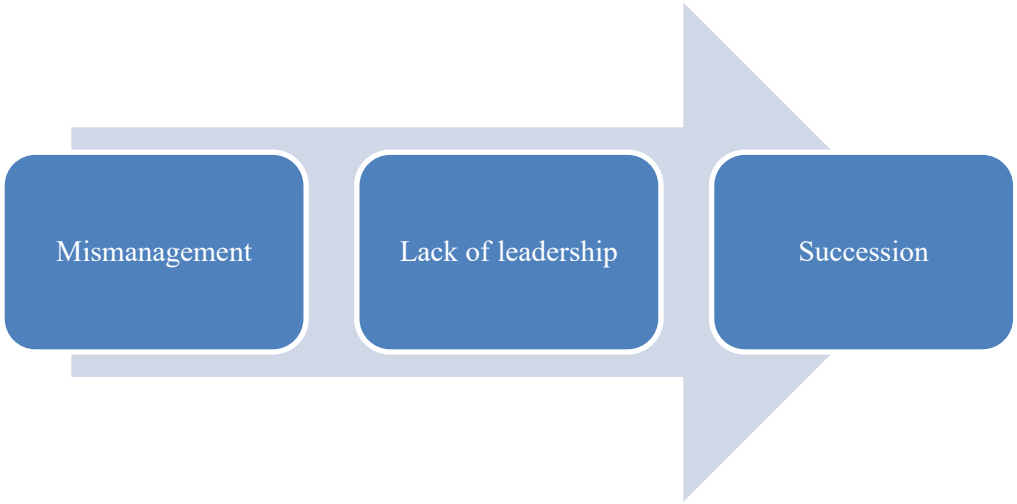

Figure 5. Reasons for the failure of family businesses for their continuity

Note: Source: Superintendency of Companies (2020)

The challenge for the new generation is not only to face the change of leadership but also the era of technology, innovation, growth of the company and its subsistence over time in order to transcend the family business, where a high percentage of this type of company has not yet become aware of the responsibility of business succession and, even worse, has not determined a form of planning in this regard.

Where the Superintendencia de Compañías, Valores y Seguros (2020) urges that: The Board of Directors shall maintain an updated succession plan for Management and other members of the Board of Directors, in order to maintain an adequate level of experience and knowledge within the company, to ensure an adequate course and continuation of its activities in spite of eventual administrative changes. This succession plan, formulated by the Board of Directors, must be approved by the general shareholders'

meeting, the body that has the exclusive power to appoint or remove the members of the administrative bodies of the companies, in accordance with the Companies Law.

Discussion and conclusions

Once the results of this study on the mortality of Ecuadorian family businesses due to lack of succession planning have been analyzed, we proceed with the discussion and conclusions in this section.

According to the review of the literature and statistics from other research related to the subject of this study, for the continuity in time of this type of companies, it is essential to have a succession planning that adapts the generational handover according to the needs and specifications of the company.

Since there is no legislation that considers family businesses as a whole, public policies are needed, where the State establishes mechanisms so that these companies do not disappear during generational changes, taking into account that they generate employment and contribute economically to the country.

Once the circumstances of the mortality of this type of companies are known, the lack of a previous succession is determined, causing conflicts between the family members and the company, leading to the failure in the generational transmission since they drift without a previous preparation that allows them to leverage on the clear guidelines and bases left by their predecessors by not having an organized, adequate succession planning and with clear regulations for this transfer.

For the growth and development of family businesses, it is not only necessary to have an organizational structure, to know how the business works, how to make decisions and control, but also to react to generational change as a change that can occur at any time, so it is necessary to have a succession plan to support this change.

The legacy that the businessman leaves for his successors is not only patrimonial, they are intertwined links between the company and the family, which entail the transfer of decisions, taking of commands and the responsibility of development, growth and above all a transcendence that can overcome the generational changes in a solid way, with adequate preparation and with correct guidelines that can be pre-established with a succession planning.

From the approach of this research, we contribute to the needs that Ecuadorian family businesses have, in the generational succession that does not subsist for not having an adequate mechanism for its transmission, that is why it is important a succession planning that will allow family businesses to shorten the generational gaps and not suffer friction in their change and are prepared to survive in time with a firm foundation, with clear structures, with legal rules and pre-established agreements that will avoid conflicts between the family and the company; and, if there are conflicts, they know how to proceed to solve them and thus turn a weakness that these types of companies have into a strength and that a greater number of family businesses use this succession planning as an advantage to leave their business legacy.

Table 1

Results of Constitutional review, human rights and related internal regulations

STUDY COMPONENT	CRE	HUMAN RIGHTS AND INTERNATIONAL TREATIES	CIVIL CODE	COMPANY LAW
1. FAMILY	Art. 67	Art. 16 numeral 3	Art. 14 numeral 2	
	Art. 68	Art. 10 numeral 1	Art. 222	
	Art. 69			
2. PROPERTY	Art. 321	Art, 17 numeral 1		
	Art. 66 numeral 26			
3. COMPANY	Art. 213, 312		Arts. 564	Art.1
			Art. 1957	Art. 2
				Art. 113
				Art.213
				Art. 430

Table 2
Results of Constitutional review, human rights and related internal regulations

STUDY COMPONENT	CRE	HUMAN RIGHTS AND INTERNATIONAL TREATIES	CIVIL CODE	COMPANY LAW
4. SUCCESSION	Art. 11 numeral 2	Art. 16 numeral 1 of item h)	Arts.	
			Art. 23	
			Art. 231	
			Art. 603	
			Art. 993	
			Art. 997	
			Art. 1402	
5. BUSINESS SUCCESSION PLAN				Resolution No. SCVS-NC-DNCDN-2020-0013

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ABUSE OF THE TRUST AS A SOURCE OF PAYMENT OR GUARANTEE AGAINST FEDERAL PARTICIPATIONS. CASE OF THE STATE OF COLIMA

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Summary. The purpose of this paper is to analyze the legal figure of the trust as a means of assigning federal participations as a source of payment and guarantee of credits of the federal entities. The particular case of the State of Colima and the particularities of its trust agreement for the allocation of federal participations will be analyzed, in order to be able to determine, in addition to its incompatibility to achieve the allocation of federal participations through such legal figure, the abuses that this implies, such as the lack of respect to the rights of hearing and defense of the State of Colima, in the execution of such federal participations, through procedures that do not guarantee the essential formalities of the procedure. The incompatibility of the federal entities to legislate in relation to the feasibility of using the trust as a mechanism for the allocation of federal participations as a source of payment and guarantee of the credits assumed by the federal entities will be studied, since the trust is a matter of reserved legislative adaptation for the Congress of the Union. The method used in this work is the inductive-deductive method with a qualitative approach, using documentary research instruments, through the qualitative analysis of legislation, jurisprudence and doctrine related to the subject matter of this work.

Key words: Federal participations, trust fund, public debt, Colima

ABUSO DE LA FIGURA DEL FIDEICOMISO COMO FUENTE DE PAGO O GARANTÍA CON CARGO A PARTICIPACIONES FEDERALES. CASO DEL ESTADO DE COLIMA

Resumen. El objeto del presente trabajo es analizar la figura jurídica del fideicomiso como medio de afectación de las participaciones federales como fuente de pago y garantía de créditos de las entidades federativas. Se analizará el caso particular del estado de Colima y de las particularidades respectivas a su contrato de fideicomiso de afectación de participaciones federales, para estar en aptitud de determinar, además de su incompatibilidad para lograr la afectación de participaciones federales a través de dicha figura jurídica, los abusos que ello implica como la falta de respeto a los derechos de audiencia y defensa del estado de Colima, en la ejecución de dichas participaciones federales, mediante procedimientos que no le

garantizan las formalidades esenciales del procedimiento. Se estudiará la incompatibilidad de las entidades federativas de legislar en relación a la factibilidad de utilizar al fideicomiso, como mecanismo de afectación de las participaciones federales como fuente de pago y garantía de los créditos asumidos por las entidades federativas, por ser el fideicomiso una materia de reservada adecuación legislativa para el Congreso de la Unión. El método utilizado en este trabajo es el inductivo-deductivo con enfoque cualitativo, utilizándose como instrumentos de investigación los documentales, a través del análisis cualitativo de la legislación, jurisprudencia y doctrina relacionada con la materia del presente trabajo.

Palabras clave: Participaciones federales, fideicomiso, deuda pública, Colima

Introduction

The purpose of this paper is to analyze the legal figure as a mechanism for the assignment of federal participations as a source of payment and guarantee of the federal entities, analyzing particular issues of the state of Colima, in order to see if such legal figure is compatible for such purpose.

On the other hand, the particular vicissitudes of the State of Colima will be analyzed in order to determine the way in which its trust for payment of obligations and allocation of federal participations is constituted, an analysis that implies establishing the abuses involved in using this allocation mechanism for federal resources.

In the particular case of the State of Colima, in 2002 a trust was conceived as a means of assigning federal participations to serve as a source of payment and guarantee for credit obligations contracted by the State with the authorization of the Local Congress; however, it is considered pertinent to analyze the corresponding legal figure, given the importance of the affected resources (federal participations) which have a component of public resources and therefore emphasis must be placed on their protection in order not to affect the interests of the Nation.

So far, it is pertinent and appropriate to analyze the figure of the trust as a means to guarantee the debt of the federal entities, charged to the federal participations, since according to the legal nature of the same, they are of an unseizable nature and only by exception, they can be subject to affectation, under the limits and budgets established by the law itself that contemplates the federal participations (Ley de Coordinación Fiscal).

However, it is necessary to analyze the particular case of the State of Colima, and thereby prove that the legal figure of the trust has been used in an inadequate manner, in violation of the law, thus affecting the interests of the governed by being involved in them, public resources inherent to the contributions and income from natural resources such as oil and mining, which are the property and domain of the Nation.

The justification for this study is updated as it is pertinent because, according to the public information of the State of Colima (www.col.gob.mx), it is known that as of September 2021, seventy-five percent of the present and future federal participations have been assigned to the guarantee trust created to guarantee the payment of the loans that the government of the State of Colima has contracted.

In addition to the above, the justification and relevance of the work is accredited, given that, in recent times, the figure of the trust has been questioned, since it has been considered necessary to analyze the figures by means of which the management of public

finances in an austere manner is prevented, reason why in Mexico it has been questioned and even the current administration of President López Obrador (2020), has extinguished several trusts.

Therefore, it is appropriate to analyze the use of the legal figure of the trust as a means to affect federal participations as a guarantee, circumscribing the study to the case of the State of Colima, in order to make the study more delimited.

Problem statement

It is considered necessary to analyze the use of the figure of the trust, in the particular case of the State of Colima, since it is considered that the figure of the trust has been abused, with the purpose of committing present and future public resources for the satisfaction of debts, charged to federal participations, as a means to guarantee said source of debt.

The problem addressed implies not only the excessive use of the figure of the trust as a method to affect the federal participations, to serve as a payment guarantee for the loans contracted by the federal entities and municipalities, which has occurred in the particular case of the State of Colima, since seventy-five percent of the present and future federal participations are committed by means of a trust, the abuse lies in the fact that an inadequate legal figure has been used for the purpose of materializing the affectation of the federal allocations, which aggravates even more the abuse against public resources.

Research objectives

1.- To analyze the historical and current evolution of the State of Colima, in relation to the allocation of federal participations through the figure of the trust.

2.- Demonstrate that the legal figure of the trust is incompatible to affect federal participations as a means of guaranteeing public debt.

3.- Analyze that, regardless of the fact that the local law contemplates the trust as a mechanism for the allocation of federal participations as a source of payment or guarantee of loans, the figure in question is unfeasible.

Theoretical Framework

Historical background, in the state of Colima, of the Trust as a means of assigning federal participations as a means of guaranteeing public debt

In July 2002, the Government of the State of Colima, represented by its then Governor, Fernando Moreno Peña, entered into a trust agreement F/2112337, irrevocable, for administration and source of payment, with a banking institution, which, from the date of substitution, as of September 29, 2021, 75% of the total federal participations received by the State of Colima, as part of the Fiscal Coordination Pact, are "affected" through the trust.

Based on the trust agreement in question, the Trustor (Government of the State of Colima) contributes in property several goods and rights, among them the federal participations, present and future, in the percentages stipulated in the agreement, in favor of the Trustee (credit institution), for the purpose of delivering in payment to the creditors of the State Government, who have registered their credit in the files of the trustee, being

the trustee in the first place, and the remainder of such resources shall be delivered to the Government of the State of Colima, acting in a duality, as Trustee in the second place.

In the particular case of the State of Colima, in relation to the trust agreement and its amendments, for the constitution of the trust for the allocation of federal participations, the Government of the State of Colima irrevocably assigned the rights over 75% seventy-five percent of the present and future federal participations, and the federal participations at the rate of 75% were annotated as the trust patrimony, being said assignment over those already received or those to be received in the future during the term of the trust.

For the purposes of this work, it is clear that the trust patrimony is constituted through the transfer to the trust institution of the rights that the State Government has over the present and future participations, at the rate of 75%. According to what has been stated in this work, it will be demonstrated that the transfer of such rights in favor of a private party such as the trustee, is not compatible, according to the provisions of the Fiscal Coordination Law, nor to the objects and purposes of the legal figure of the trust, since it has been constituted with a very personal right (public resources) of which the private parties do not have the quality or *ius imperio* to be able to be holders of the same, for this reason, it will be demonstrated that the figure of the trust has been abused for the purpose of affecting the finances of the state and this translates into the fact that to date 75% seventy-five percent of the total federal participations received are affected and transferred to the aforementioned trust, which is detrimental to the people of Colima.

Analysis of federal participations

Federal participations are contemplated in the Fiscal Coordination Law and are defined as the set of contributions to which the States and Municipalities are entitled to receive as part of the National Fiscal Coordination System, in this sense, federal participations can be defined as the freely available federal resources to which the States and Municipalities are entitled to receive as part of the fiscal coordination pact, (Tépach Marcial, 2011).

Based on Article 2 of the Fiscal Coordination Law, federal participations are mainly comprised of federal taxes from federal tax revenues, understood as all resources received by the Federation from federal taxes, mining rights and a portion of oil revenues from the Mexican Petroleum Fund.

In accordance with the above article and based on Cárdenas (2008), it is stated that federal participations, coming from federal participatory revenues, are intended to establish the amounts by means that the Federal government transmits to state governments through federal participations and contributions, and are composed of the total tax revenues not agreed upon in the entities, plus oil extraction rights and mining rights.

In line with the foregoing, it is undoubtedly held that, in accordance with the content of the federal participations, made up of taxes and duties on natural resources from oil extraction and mining, it is clear that the component in question has related implications in the sphere of the governed, according to articles 31 and 27 of the Political Constitution of the United Mexican States, the first of these articles refers to the obligation of Mexicans to contribute in an equitable and proportional manner to public spending, and the second provision refers to the fact that natural, mining or oil resources are property of the Nation, over which direct control is exercised.

In this sense, having a component of public resources, federal participations are protected by Article 134 of the Political Constitution of the United Mexican States, in

accordance with the principles of efficiency, effectiveness, economy, transparency and honesty to meet the objectives for which they are intended.

By virtue of the above and in view of the essential component of the federal participations, of public resources, coming from the contributions received from the Mexican citizens themselves, who in compliance with their constitutional obligations of article 31, deliver to the Nation the contributions established by law, as well as those from the use of natural resources, which, according to article 27 of the Constitution, are original goods of the Nation.

In line with the above, the Congress of the Union, with respect to the nature of the federal participations, established the general rule that the federal participations were not subject to affectation, being this congruent with the component of the same that implies public resources of a sensitive nature, since they come from the Nation, in its people (contributions) and territory (natural resources) components.

Article 9 of the Fiscal Coordination Law contemplates the characteristics of the federal participations, which state that federal participations are not subject to seizure, cannot be used for specific purposes and are not subject to withholding. The article in question makes an exception, stating that federal participations may only be used as a guarantee and source of payment, with the authorization of the Local Congresses and registered in the corresponding Registry of the Ministry of Finance, in favor of the Federation, credit institutions operating in Mexican territory, as well as individuals and legal entities of Mexican nationality.

From the foregoing legal considerations, it is stated that the federal participations are:

a.- These are the public resources to which the states are entitled to receive as part of the Fiscal Coordination System;

b.- They are constituted with 20% of the federal tax collection, which constitutes the collection of federal taxes (with the exceptions of Article 2 of the Fiscal Coordination Law), as well as the collection of mining rights and the corresponding oil revenues; therefore, in accordance with Article 134 of the Constitution, their component must be regulated in accordance with the principles of efficiency, effectiveness, economy, transparency and honesty to meet the objectives for which they are intended.

c.- Due to their nature, federal participations are not subject to seizure and may only be subject to appropriation to guarantee loans, provided they have been approved by local legislation and registered in the Debt Registry of the Ministry of Finance.

In accordance with the aforementioned characteristics, the "assignment" of federal participations as a guarantee of payment of credits, through the legal figure of the trust, is incompatible; however, in order to unravel the above, it is considered necessary to carry out the legal analysis, as applicable, of the legal figure of the trust, from which the incompatibility of the same will be concluded, for the purposes of article 9 of the Fiscal Coordination Law.

Analysis of the legal concept of trusts, in relation to the assignment of federal participations as collateral for loans

The legal concept of trust can be defined as the legal act by means of which a person called settlor transfers the ownership of property or specific rights to another person called trustee, who is obliged to exercise it for the benefit of the person designated in the contract as trustee or to transfer it to the latter. (Claudia Jaimez, 2010).

According to Rodríguez-Azuero (2007), the essential elements of the trust are the following:

a) Personal elements, constituted by the persons involved in the trust, such as 1.- The settlor, who through the separation of such person from his rights and the transfer made in favor of the trustee; 2.- The trustee, the person who, by virtue of the transfer, acquires the ownership or legal title of the assets contributed by the settlor. According to the Mexican legal framework, only those persons permitted by law, such as credit institutions (article 385 of the General Law of Credit Instruments and Operations), may have this character; 3.

From the personal element referred to above, and as far as the subject matter of this paper is concerned, the transfer of title or ownership made by the settlor to the trustee, with respect to the trust assets, stands out.

b) The trust is constituted by a set of assets and/or rights that constitute an independent and autonomous unit, affected to a determined purpose, any asset may be the object of the trust, unless they are of a non-transferable or very personal nature of the settlor. With the trust an independent patrimony is constituted, but for the same, it is necessary that the settlor gives up the ownership of the same and that the trustee becomes the trustee.

From the essential element in question, the fact of the independence of the patrimony is highlighted, which is materialized by the fact that, between the settlor and the trustee, a real transfer or alienation of the assets subject of the trust takes place. It should be noted that non-transferable or very personal assets of the settlor cannot be the object of a trust.

In the Mexican legislation, the figure of the trust is contemplated in Section One of Chapter V of the General Law of Credit Instruments and Operations (LGTOC), which in the articles that are of interest to the subject under discussion, states the following:

> Article 381.- By virtue of the trust, the settlor transfers to a fiduciary institution the ownership or title to one or more assets or rights, as the case may be, to be destined to lawful and determined purposes, entrusting the realization of such purposes to the fiduciary institution itself.
>
> Article 384.- Only the persons with the capacity to transfer the property or the ownership of the assets or rights object of the trust, as the case may be, as well as the judicial or administrative authorities competent to do so, may be settlors.
>
> Article 386.- All kinds of property and rights may be the object of the trust, except those which, in accordance with the law, are strictly personal to their owner.
>
> The assets given in trust shall be considered as assigned to the purpose for which they are destined and, consequently, only the rights and actions related to such purpose may be exercised with respect to them, except for those expressly reserved by the settlor, those deriving for him/her from the trust itself or those legally acquired with respect to such assets, prior to the constitution of the trust, by the trustee or by third parties. The fiduciary institution must record such property or rights in the accounts and keep them separate from its unrestricted assets.

> The trust constituted in fraud of third parties, may at any time be attacked for nullity by the interested parties.

From the provisions transcribed above, the elements indicated at the beginning of this subtitle can be deduced, related to the essential elements that, according to the doctrine, are necessary for the creation of the trust, as well as the restrictions for the creation of the trust, from which the following is highlighted.

Article 381 of the LGTOC establishes the definition of trust under Mexican law. From the definition in question, it is clear that there must be a real transfer, i.e., alienation of the assets or rights of the settlor in favor of the trustee; On the other hand, from Article 384 of the LGTOC, it is emphasized that, with respect to the personal element "settlor", it is required to have the power to transfer the ownership or title of assets, which is consistent with Article 381 of the referred norm, in the sense that, in order for a trust to exist, it is necessary the transfer or alienation of assets or rights made by the settlor in favor of the trustee; Finally, in relation to article 386, it is established that, as to the patrimonial element of the trust, and for the purposes of the present work, the strictly personal property of the owner cannot be part of the trust, that is to say, those that according to their nature cannot be subject to alienation.

Now, with regard to the local regulations of the State of Colima, it is referred that both the Public Debt Law of the State of Colima, in force until December 29, 2015, and the Public Debt Law of the State of Colima and its municipalities, both in their relative articles 12 and 9, respectively, establish the power of the executive branch to have powers to subscribe trusts as instruments for the collection and/or distribution of the total federal participations, susceptible of being affected as a source of payment or guarantee of obligations.

Now, it should be noted that the provisions in question, by which the trust is contemplated as a source or mechanism for the allocation of federal participations to serve as a source of payment or guarantee of the debt contracted in the state of Colima, were introduced to the legislation with the amendment published in the Official Gazette "EL Estado de Colima" dated September 26, 2009. Notwithstanding the foregoing, it should be noted that the trust F/2112337 by which the federal participations are affected, was created in July 2002, that is, seven years before the local legislation contemplated such legal figure as a mechanism of allocation to serve as a source of payment or guarantee of credits contracted by the State.

With respect to the foregoing, it is noted that although the local law of Colima contemplates the figure of the trust as a mechanism of affectation as a source of payment or guarantee of obligations of the state of Colima or its municipalities, it must be said that this has implications and cannot modify the text of the General Law of Credit Instruments and Operations, since it is the latter the one that regulates such mercantile act and establishes its requirements and limitations, given that, in accordance with Article 73 section X, it is the exclusive competence of the Congress of the Union to legislate in matters of commerce, including in such act the mercantile operation regulated by the General Law of Credit Instruments and Operations, such as the Trust.

Therefore, it is unnecessary and unimportant that the Local Congress of Colima has adapted its public debt laws to establish the trust as a mechanism to serve as a source of payment and guarantee of the obligations contracted by the state of Colima and its municipalities, since such issue does not modify or legitimize the prohibitions that the same legal figure of the trust establishes, such as the fact that, for the constitution of trusts, the alienation of assets or rights is necessary in a forced manner, as well as the prohibition

in the sense that only assets susceptible of alienation and which are not personal of the trustor can be the object of a trust, being that, for the reasons stated herein, it is clear that the present and future federal participations are inalienable and are of a very personal nature of the federal entities and the municipalities.

One of the objectives of this work is to prove that the trust is incompatible, regardless of whether the local provisions in this matter contemplate the mechanism of affectation in question, a premise that will be demonstrated in the progress of this work.

Method

Through the inductive-deductive method applied to the theoretical framework indicated above, the hypothesis can be demonstrated.

Qualitative approach and non-experimental design.

Instruments, review of legislation, legal framework and bibliographic references.

Through the inductive-deductive method, we will analyze the common aspects of the legal figures addressed herein, such as federal participations, trusts and the same. In other words, from the analysis of the general nature of these legal institutions, the objects and hypotheses of the research can be deduced.

Results

In trust F/2112337, the Government of the State of Colima, in its capacity as trustor, contributed to the trust the irrevocable assignment of 75% of the federal participations. In the purposes of the trust, it is established that the trustee is responsible for exercising the rights over the federal participations held in trust in accordance with the provisions of the contract; it was also agreed that the trustee, directly and without the intervention of the Government of the State of Colima, will receive from the Treasury of the Federation the percentage of the federal participations subject to the trust.

Now then, in the referred contract in the clause related to the constitution of the trust patrimony, in the first place, the State Government contributes in property a certain amount in cash, for the constitution of the trust, and on the other hand, it is also established that the trust is constituted with the irrevocable assignment in trust of the present and future federal contributions, which constitutes the percentage of federal participations in trust.

It has been demonstrated that, in the trust contract regarding the constitution of the trust, in relation to the federal participations, the parties that intervene in the contract, use the term "affectation", instead of the appropriate term, "to transfer in property", which in accordance with the applicable legislation (article 381 of the LGTOC), is the appropriate term and which, in addition, is used for the contribution of the amount in cash that is delivered as part of the trust patrimony.

Now, the following question arises Is the term "affectation" adequate for the constitution of the trust, in relation to the federal participations of the Government of the State of Colima? the answer is no, given that up to what has already been stated, it can be concluded that, for the constitution of the trust, it is necessary the transfer of the property

or ownership of rights and obligations, (articles 381 and 384 of the LGTOC), without the existence of a trust without the transfer or alienation of the trustor's property in favor of the trustee and for the purposes of the trust.

In accordance with Article 9 of the Fiscal Coordination Law, it is established that federal participations are unseizable and cannot be used for specific purposes; they can only be used as a guarantee or source of payment of obligations, with the approval of the local legislatures and registered in the debt registry contemplated in the Financial Discipline Law of the Federal Entities and Municipalities.

In line with the foregoing, since there is a prohibition of attachment or affectation, it is clear that, in application of the legal principle "A maiori ad minus", "A minore ad maius", which establishes that he who can do more can do less, and that if the less is prohibited, the more is prohibited, which means that if the attachment or affectation of federal participations is prohibited, it is even more prohibited, this means that if the seizure or assignment of federal participations is prohibited, it is even more so the alienation of federal participations is prohibited, since, as stated in previous paragraphs, for the constitution of any type of trust, the transfer or alienation of assets or rights is necessary, which is why the alienation of federal participations, whether present or future, is also prohibited.

In this sense, it is not feasible to consider that the creation of a trust implies a mere encumbrance or creation of a lien or security interest, since security interests are distinguished by granting the creditor the right of preference over the affected assets, while trusts created for the purpose of guaranteeing debts do not have these characteristics, in the sense of a right of preference, but rather the asset is subtracted from the assets of the debtor and the owner or holder thereof is the trustee.

In this regard, it is convenient to refer to the jurisprudence 1ª./J 12/2007 of the First Chamber of the Supreme Court of Justice of the Nation, in which the high court of the country establishes that the trust entity is the only holder of the rights, actions and obligations related to the trust assets, and therefore it is the only one entitled to go before judicial or jurisdictional instances, in order to exercise, defend and enforce the rights related to the trust assets.

On the other hand, the Second Collegiate Court in Civil Matters of the Seventh Circuit in the issuance of Thesis VII. 2º. C.73C (10th.), resolves that according to the jurisprudence referred to in the previous point, in which it is established that the ownership of the trust patrimony corresponds to the trustee when the property of the trust has been transferred in its favor, the foregoing regardless of whether they are public assets or assets belonging to official legal entities that have been the subject of the trust, this by virtue, concludes the Collegiate Court, because in its consideration the ownership and title of the assets subject of the trust is transferred in favor of the trustee.

In addition to the legal impossibility of using the legal figure of the trust to contribute the federal participations to guarantee or serve as a source of payment of credits, it is considered that the true effect of the use of the trust as a mechanism for the allocation of the federal participations is crystallized by the fact that the borrower, trustor of the federal participations, is left in clear defenselessness when a creditor requests payment from the federal participations, according to clause eight of the trust agreement F/2112337, the payment is made without further procedure and without the state government being able to oppose or assert grounds for which the payments would be improper, leaving the creditor in a state of defenselessness, being that the Supreme Court of Justice of the Nation has established the need that, in the process of execution of the

guarantee of the federal participations, the guarantee of hearing and defense must be respected. Regarding this particular issue, the Plenary of the highest court of the country, in resolving constitutional controversy 43/2005 regarding, among other issues, the respect for the rights of hearing and defense of public entities in the execution of guarantees charged to federal participations, states that, regardless of the fact that official legal entities, such as federal entities or municipalities, cannot be holders of individual guarantees (today human rights according to the constitutional reform on human rights of 2011), it is not an impediment that they can fail to comply with articles 14 and of the Political Constitution of the United Mexican States, nor that they must fail to observe the rule of law, nor that they can be allowed to arbitrarily comply with articles 14 and 14 of the Political Constitution of the United Mexican States, this does not prevent them from failing to comply with Articles 14 and 14 of the Political Constitution of the United Mexican States, nor does it prevent them from failing to observe the rule of law, nor does it prevent them from allowing arbitrariness to exist. In view of the foregoing, they conclude that it is necessary that the procedures for the execution of federal participations as a method of guarantee or source of payment must guarantee the essential formalities of the procedure, that is, that the public entity that is intended to be affected by such execution be given an adequate hearing and defense.

It should be noted that our highest court of the country has established the need to respect the rights of hearing and defense of the public entities, in order to safeguard the rule of law, regardless of the fact that, as already mentioned, there is a legal impediment to use the figure of the trust as a mechanism to affect the federal participations, since these are a personal property of the federal entities and the municipalities and contain a burden of public resources, which must be safeguarded in accordance with the principles of article 134 of the Constitution, it is stated that, in addition to this, the figure of the trust crystallizes an affectation to the rights of hearing and defense of the entity, in this case Colima, for the following reasons.

According to the trust agreement F/2112337 and its amendment agreements, in its clause *"EIGHTH. OF THE PAYMENT PROCEDURES"* states that the trustees will first submit their payment request to the trustee and the trustee will make the payment within the times established in the trust itself, highlighting that, in order to carry out the payment in question, not even, in accordance with the terms of the trust agreement, is it necessary to notify, much less to give the trustee intervention for, hearing and defense through the offering of evidence to the entity, in order to respect the rule of law and the rights of hearing and defense established in the trust, it is not even necessary to notify the trustee, much less to give the trustee a hearing and defense through the offering of evidence to the entity, in order to respect the rule of law and the rights of hearing and defense established in the Political Constitution of the United Mexican States.

In this regard, it is considered that, regardless of the fact that, in conventional procedures, such as the execution of trusts, the parties may freely agree, it is necessary to emphasize that the Supreme Court of Justice of the Nation, in resolving the amparo in review 795/2019 issued the thesis 1ª XLVIII/2020 (10ª) in which it states that, although it is allowed that the parties agree on conventional execution procedures, such as in the case of trusts for guarantee purposes, the referred procedures must respect the essential formalities of the procedure, meaning that, before the execution is carried out, a procedure is established in which at least the executed party is guaranteed the essential formalities of the procedure, meaning that, before the execution is carried out, a procedure is established in which, at least, the executed party is guaranteed that the execution will be carried out, the referred procedures must respect the essential formalities of the procedure,

meaning that, before the execution is carried out, a procedure must be established in which at least the executed party is guaranteed the faculty to be notified of the execution procedure, the possibility of contradiction and the offering of evidence in defense, the possibility of pleading, as well as the issuance of a resolution that resolves the issues raised by the parties. However, as it has been indicated and as the trust for the State of Colima is constituted, for the execution of the federal participations as guarantee or source of payment, it is not necessary to comply with the essential formalities of the procedure indicated above, since, as indicated above, the mere instruction of the trustee creditor is sufficient for the trustee to proceed with the withholding and corresponding delivery of the resources from the federal participations.

In this regard, and according to the jurisprudence of the Plenary of the Supreme Court of Justice of the Nation P./J. 47/95, under registry number 200234 essential formalities of the procedure must be understood to mean that, in a procedure followed in the form of a trial, and even more so in those in which privative acts established in article 14 of the Constitution are being ventilated, the parties must be guaranteed at least the following procedural rights: 1.- The notification of the initiation of the proceeding and its consequences; 2.- Opportunity to offer and present evidence for the defense; 3.- The opportunity to plead; and 4.- A resolution that settles the controversy.

In this sense, it is worth highlighting what Márquez, J. F. (2000) comments, this type of trust implies certain risks for the trustor, due to the possibility of abuses by the trustee, meaning that the simple possibility that the trustee may dispose of the trust assets at his own discretion constitutes a real court, since, as has been mentioned in the particular case of the state of Colima, not even the essential formalities of the procedure are respected.

Discussion and conclusions

First, federal participations, by their nature, are non-transferable and non-seizable, given that they have a component of public resources from the collection of taxes and royalties from the exploitation of natural resources that are the property of the Nation.

It is shown that Article 9 of the Fiscal Coordination Law establishes an exception, only a possibility of assigning federal participations, so that they may serve as a source of payment and guarantee for the agreed obligations, but this in no way implies that the state or the municipalities may transfer this right to third parties, since, as stated above, federal participations as an inherent right of the states and municipalities because they belong to the Fiscal Coordination Pact, are non-transferable.

In accordance with the law that regulates trusts (Ley General de Títulos y Operaciones de Crédito), the incorporation of trusts requires the alienation of assets or rights, and only assets and rights susceptible of alienation and that are not of a personal nature of the trustor may be alienated to the trust.

It is made clear that the fact that the Congress of the State of Colima has adapted its legislation on public debt to contemplate the trust as a mechanism of affectation to serve as a source of payment and guarantee for obligations, this cannot imply an exception to the law that regulates the trust, since it is not within the competence of local legislatures to legislate on these matters, given that commerce and everything inherent to it is a reserved and exclusive matter of legislation to the Congress of the Union.

It is evidenced that, by itself, the use of the trust for the purposes of source of payment, by itself is a violation of the norms that regulate the legal figure of the trust, which in itself constitutes an abuse of such figure, the affectation is aggravated, in the particular case of the State of Colima, the affectation is aggravated by the fact that, in the procedure of execution of the federal participations, the essential formalities of the procedure are not respected, leaving the State of Colima in a state of defenselessness.

It is noted that the foregoing does not mean that the federal entities, such as the State of Colima, cannot assign as a source of payment or guarantee the federal participations, but that the trust is not compatible as an assignment mechanism for such purposes, and in any case, the assignment would have to be made through the Ministry of Finance and Public Credit itself, through a procedure in which the essential formalities of the procedure are guaranteed to the parties.

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ELECTRICITY GENERATION FROM 1996 TO 2017 IN GUATEMALA

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Summary. The present study investigates the evolution of electric power generation in the public and private sectors due to the change in the electric legislation in 1996, by means of the General Electricity Law, for this purpose the synthetic analytical method was used, the study is carried out from the qualitative approach, with mixed methodology, the information is obtained from secondary sources, the information is obtained from secondary sources, which correspond to publications of entities of the electricity sector made by the international network, or by information provided, for the years under study and the variables defined, the analysis of the articles of the law that regulates the generation of electric energy and the selection of the experts interviewed for the question posed, was carried out according to the researcher's criteria; with the information obtained, it was found the increase in the generation of electric energy from the private sector, due to the opening to the investment of private capitals in electric projects and the possibility of entering the market, the change in the legislation causes the increase of the participants in the private subsector, registered as market agents, among which are the generating agents, the generation of electric energy available in 2017 is adequate to achieve the satisfaction of the electric energy service to the users, in peak hours.

Key words: legislation, electricity, generation, private sector, public sector.

LA GENERACIÓN DE ENERGÍA ELECTRICA DE 1996 A1 2017 EN GUATEMALA

Resumen. En el presente estudio se investigan la evolución de la generación de energía eléctrica del sector público y del sector privado por el cambio en la legislación eléctrica en 1996, por medio de la Ley General de Electricidad, para el efecto se utilizó el método analítico sintético, el estudio se realiza desde el enfoque

cualitativo, con metodología mixta, la información se obtiene de fuentes secundarias, que corresponden a publicaciones de entidades del sector eléctrico efectuadas por la red internacional, o por información proporcionada, para los años en estudio y las variables definidas, el análisis de los artículos de la ley que regula la generación de energía eléctrica y la selección de los expertos entrevistados para la pregunta planteada, se realizó de acuerdo al criterio del investigador; con la información conseguida, se encontró el incremento de la generación de energía eléctrica del sector privado, debido a la apertura a la inversión de capitales privados en los proyectos eléctricos y a la posibilidad de entrar al mercado, el cambio en la legislación causa el incremento de los participantes en el subsector privado, registrados como agentes de mercado, entre los cuales se encuentran los agentes generadores, la generación de energía eléctrica disponible en el año 2017 es adecuada para lograr la satisfacción del servicio de energía eléctrica a los usuarios, en horas pico.

Palabras clave: legislación, electricidad, generación, sector privado, sector público.

Introduction

This research studies the legal effects of the change in electricity legislation due to the enactment of the General Electricity Law, Decree 93-96 of the Congress of the Republic of Guatemala, and specifically, in the generation of electric energy, a stage of the electric energy process, which is developed by converting a form of energy through conversion systems, to electric energy.

Electricity law regulates the electricity process and its stages, which include the generation, transmission, distribution and commercialization of electricity.

To establish the effects of the change in electricity legislation carried out in the year 1996, the relevant articles of the General Electricity Law, the consultation of a question posed to experts, and the data of electricity generation by sector in the year 1996 and in the year 2017 are selected for analysis.

The information is obtained from the General Electricity Law, consultation with experts and sources of information from publications consulted on the Internet on the web pages of the bodies of the electricity subsector in Guatemala, as well as from international organizations.

Consultation with experts provides elements of judgment to relate the results of the legal analysis of the law and the quantitative information on public and private generation.

Investigation of the consequences of the change in legislation from the legal point of view and in the electricity generation of the public and private sectors.

In order to carry out the research, the research approach was elaborated with the justification of the study, the definition of the problem to be solved, and the objectives to be achieved.

Through the study, it is desired to know the situation of electric power generation, in the year 1996 and 2017, as a result of the change in the electric legislation, the methodology, procedures and research techniques to be carried out are described, consistent with the selected sample, and to the established research variables.

The results of the legal analysis, of the articles of the General Electricity Law, of the consultation with experts and of the quantitative information related to the generation of electric power, private and public, are presented, discussed and allow the elaboration of the conclusions and recommendations of the research.

The stated objectives allow to know the results of electric power generation, the stage of the electric process studied in the years 1996, and 2017, according to the local legal framework.

The conclusions are made after the results have been obtained and discussed, in relation to the General Electricity Law, the expert consultation and the data of public and private generation.

Method

Research Problem

According to García Ramis, L. J. (2012, p. 46-50) the defined problem synthesizes an analyzed situation, in order to order the research process according to the state of the art.

The general question of this research is presented as follows: What is the relationship between the change in electricity legislation and the generation of electricity in the private and public sectors in Guatemala?

Research objectives

The general objective, state Quisbert Vargas, Misael and Ramirez Flores, Dennis. (2011, p. 463-64) is related to the problem to be investigated and to the specific objectives, which need to be achieved as an answer to the general question, below are the general objective and the specific objectives.

General Objective

Investigate the relationship between the change in legislation in the electricity sub-sector and electricity generation in the private and public sectors.

Specific objectives

Investigate the articles of the Law that regulate the generation of electric energy

To know the generation of electric energy in the public sector

To know the generation of electric power in the private sector

Research Paradigm

For Villabella Armengol, Carlos Manuel. (2015 p. 927) in qualitative type research the paradigm is constructivist, social situations are studied in time and place.

The present research studies the effects of the electric legislation and its legal and social consequences, in the mentioned years and place, in the qualitative or constructivist approach, it analyzes and describes the information obtained, with respect to the norms that regulate the generation of electric energy.

The interpretation of the selected articles will be made in accordance with the Judicial Branch Law, Decree 2-89 of the Congress of the Republic, which establishes in Article 10.

> The rules shall be interpreted according to their text, according to the proper meaning of their words, to their context and in accordance with the constitutional provisions. When a law is clear, its literal tenor shall not be disregarded under the pretext of consulting its spirit.
>
> The whole of a law will serve to illustrate the content of each of its parts, but the passages of the law may be clarified in the following order:
>
> a) To the purpose and spirit of the same;

b) To the reliable history of its institution;

c) To the provisions of other laws on analogous cases or situations;

d) In the manner that appears most in conformity with equity and the general principles of law.

Research methodology

Rodriguez, A. and Perez, A. O. (2017, p. 181) describe that the method is conduit or means required to achieve the objective of the study and respond to the research problem posed.

The synthetic analytical method

According to Rodríguez, A. and Pérez, A. O. (2017, p.187) the synthetic analytical method is useful in searching for information or data from documentary sources, by means of analysis, it is possible to decompose the information into parts, with attention to the object of study, on the other hand, through the synthesis it is generalized and an answer is given to the solution of the problem posed, likewise the general principles of knowledge are obtained, although it is not used to obtain concrete or specific knowledge.

The inductive-deductive method

In the deductive inductive method one starts from the particular to the general, while with the deductive method one goes from the general to the particular, Rodríguez, A. and Pérez, A. O. (2017, p. 187) confirm that with the use of the inductive method the steps of observation, hypothesis statement, verification, thesis, law and theory are carried out, it is used to build knowledge,

By means of the inductive method, the punctual or concrete aspects of the situation are generalized, contrasted with the theory, principles and laws of reference; while with the deductive method the conclusions of the investigation are obtained, the combination of these methods allows the construction of knowledge.

The documentary method

Guzmán, V. (2021 p. 21) points out that in the documentary method, information on the research topic is sought, which is consulted, reviewed and organized, then classified, the documents with relevant information are selected, the content of the document is read and the corresponding record is made in the research instrument.

Triangulation

To make the contrast of the results obtained with the information from the sources of information consulted, triangulation is used, according to Hernández Sampieri, R. at all (2014, p. 417) in research it is better to use several sources of information and methodologies, for the collection, processing of information and obtaining the results.

Regarding triangulation, Forni Pablo and De Grande Pablo (2020, p. 163) confirm that the positivist paradigm includes quantitative methods, with the use of statistics to relate the results, and they also consider that the hermeneutic paradigm corresponds to the qualitative approach in which the starting point is induction according to the angle of vision of the experts through interviews and other research resources.

The use of mixed methodology and triangulation makes it possible to compare research results with respect to the particular situation under study.

Data analysis

Regarding data analysis, Hernández Sampieri, Roberto et al (2014, p. 418) express that it occurs in parallel with the corresponding collection.

The quantitative analysis of the data is carried out by grouping and ordering the data according to the periods to be compared. The legal analysis is carried out by means of the selected articles of the General Electricity Law.

Quantitative data analysis

Sampieri, R. Fernández Collado, C. and Baptista Lucio, M. (2014, p.272), the steps in the data analysis are carried out with the selection of the program with which the quantitative procedures grouped in tables will be carried out and by means of the figures, the variables under study will be visualized, according to the model that represents the data.

In order to analyze the data, descriptive statistics techniques are used in the grouping process, and then the information is expressed in tables and figures during the period of time under study, to illustrate, describe and interpret the changes in the variables under study, derived from the change in the electricity legislation.

Research design

According to Hernández Sampieri, R. et all (2014, p. 129), the research design is the selection of the strategies that are planned in order to achieve the general objective that provides the answer to the problem, in positivist approach, from the quantitative point of view, the research design is raised to test according to the selected test statistic, the defined statistical hypotheses.

Research with a qualitative approach is non-experimental; in this type of research, the variables under study are described, the effects of changes in the independent variable on the dependent variables.

The quantitative information available in publications of the entities of the electricity subsector will be compiled and recorded by means of the defined research instrument, with the answer to the pertinent question regarding electricity generation, which will provide results, which will be related to those obtained in the analysis of the articles and recitals of the General Electricity Law and the analysis of those obtained from the answers of the professionals consulted, with the purpose of improving the elements of judgment and vision to obtain the conclusions of the study related to electricity generation of the private sector and the public sector.

The selection of the sources of information, of the articles to be analyzed, of the experts who are consulted and the documentary information on the generation of electric power, is made according to the researcher's criteria, within the legal sphere, the articles of the law that regulate the activity of electric power generation will be searched and selected; by means of the respective research instrument, the information of the consultation to experts is obtained, the quantitative information collected and organized, the information of the generation of electric energy by the public sector and by the private sector is observed, with that information the results, the discussion and the conclusions of the study are obtained.

Population and sample

The population corresponds to the total number of individuals and the sample to part of the population, in the selection of the sample, Hernandez Sampieri, R. Fernández Collado, C. and Baptista Lucio, M. (2014, 175-176) say that, in the non-probabilistic, the selection of the sample depends on the researcher's criteria,

The sample of experts who will participate in the survey is made at the discretion of the researcher, it is considered professionals with experience in the electricity subsector of different professions, will respond to the question posed.

The articles of the standards will be selected for the regulation of electric power generation in the national legal framework.

The selection of the numerical information is selected to compare the generation of electric power in 1996 and 2020, which is the object of the study.

Research techniques

Research techniques, state Ñaupas Paitán, Humberto, Mejía, Elías, Novoa Ramírez Eliana and Villagómez Paucar Alberto (2014, p. 135) are procedures applicable in the studies during the execution of the research, they are classified as conceptual, descriptive and quantitative.

The field observation technique requires the recording of data collected by means of the research instrument, while the documentary technique requires the recording of data by means of an electronic sheet, organized by the variable and period of study, in this case it is the change in electricity legislation and the generation of electricity in the private sector and the generation of electricity in the public sector.

Variables

For Carballo Barcos, Miriam, and Guelmes Valdés, Esperanza Lucía. (2016, p. 141), a variable is integrated with variable or constant concepts, quantitatively or qualitatively, variables are classified by their nature in qualitative and quantitative, by their complexity, in simple and complex ,by their relationship in ordinal, nominal, interval and ratio, and measurement in ordinal, nominal, interval and ratio, qualitative variables are grouped by attributes, quantitative variables are expressed in numerical values, discrete or continuous type.

In the present investigation, the independent and dependent variables are extracted from the following general question:

what is the relationship between the change in electricity legislation and the generation of electricity by the private sector and the public sector in Guatemala?

The independent variable is the change in legislation, while the dependent variables is private sector and public sector electricity generation.

Investment in electric power generation projects is observed through the generation of electric power by electricity market agents, both from the private and public sectors.

The Research Instrument

The research instrument of documentary observation was designed in a Microsoft Excel sheet to record each relevant numerical data of the variables defined in the research problem, a research instrument is used to record the articles of the laws to be analyzed, and the documents with which the theoretical framework was made.

In the research, the instrument is required to collect the data, to achieve the specific objectives, it is expected to obtain evidence through the selected sources of information.

The collection and processing of quantitative information will use a Microsoft Excel file to represent the data in tables for the years under study.

The research instrument to be answered by the experts consists of the question posed in a closed form, with observations that the experts wish to make, on the generation of electric power.

Expected results

The change in the electricity legislation entails observing the legal effects that allow the participation of private capital in electricity generation projects, in accordance with the General Electricity Law.

The results of the research will describe the legal effects and the effects on electricity generation of the change in legislation, with attention to the de-monopolization and the opening of the market to private investment in electricity projects, and will be related to the results from the experts' answers, and those from the numerical information of the variables, in order to corroborate the results of the change in legislation in the electricity subsector.

Results

Results of the expert consultation

The experts consulted regarding the situation of electric power generation said that this is due to the opening of the electricity market, the liberalization of the electricity market and the legal security for the participation of the private sector.

The Organic Law of the National Electrification Institute (INE)

The organic law of the National Electrification Institute -INDE- Decree No. 64-94 and its reforms regulates the adaptation of this State agency in the electric sub-sector to the constitutional norms, in the second recital of said law the harmonization with articles 129 and 130 of the current Political Constitution is expressed.

The fourth recital states the scarce use of hydraulic resources in the country; the fifth recital states that economic development with the participation of the private sector is necessary; the seventh recital regulates the autonomy of INDE, and that it is one more entity in the organization of the electric sub-sector; article 1 of the Organic Law establishes that the NSDI is an entity with legal personality, assets and autonomy, while Article 4 of said law regulates the purposes of the NSDI, among the most important of which are to provide a solution to the shortage of electric energy, contribute to the use of natural resources in a sustainable manner, estimate the generation of electric energy with the use of renewable energy sources in the country, participate in electric projects and have its electric energy transmission facilities available for the use of generating entities; the aforementioned law regulates the manner in which the NSDI is organized.

Decree 93-96 and articles 129 and 130 of the Constitution.

With respect to the articles of the General Electricity Law and its regulations that regulate the generation of electric energy.

Article 1, paragraph a) regulates that the generation of electric energy is free, without State intervention, with the requirements expressed in the Constitution, the article in its pertinent part establishes "a) The generation of electricity is free and does not require prior authorization or condition by the State, other than those recognized by the Political Constitution of the Republic of Guatemala and the laws of the country".

The current Political Constitution of the Republic of Guatemala is the supreme law and of the highest legal hierarchy, it is in force since January 14, 1986, in Article 129 of the Constitution, it allows the participation of private initiative and considers the electrification of the republic as a matter of urgency, in its conductive part, Article 129 establishes: "The electrification of the country is declared of national urgency, based on plans formulated by the State and the municipalities, in which private initiative may participate." The electrification of the country includes the execution of electricity projects to provide electricity service to new users with sufficient capacity, for which it is necessary to expand the infrastructure that includes transportation, distribution and power generation networks.

Article 130 of the Constitution regulates the prohibition of monopolies and the equal treatment of private parties participating in the activities:

> Monopolies and privileges are prohibited. The State shall limit the operation of companies that absorb or tend to absorb, to the detriment of the national economy, the production of one or more branches of industry or of the same commercial or agricultural activity. The laws shall determine what is related to this matter. The State shall protect the market economy and prevent associations that tend to restrict market freedom or harm consumers.

Article 130 allows the State to protect freedom in the market, together with the prohibition of privileges to public or private persons, and allows the issuance of laws that eliminate monopolistic practices, with the opening of the market to investment, with freedom to carry out the stages of the processes, including the production of electricity.

The General Electricity Law regulates the elimination of vertical integration of the electricity process and monopolistic practices, provisions that are in harmony with the constitutional law, which establishes in Article 129 that private initiative may participate in the electrification of the country and in Article 130 the prohibition of monopolies.

Thus, the General Electricity Law and its regulations regulate the activities of the electricity sub-sector, in accordance with the principles established in Title I, in a market, with the participation of private and public capital, the elimination of vertical integration in the electricity process, and monopolistic practices.

Results of the analysis of the General Electricity Law

The market was opened to private sector investment, through private entities, the private sector participates with market agents, according to the activity in which they are registered.

Each market agent may only participate in one of the activities of the electric energy process: generation, transmission, distribution and commercialization of electric energy.

The unregulated market includes end users with maximum demand greater than 100 kilowatts, registered in the Registry of Market Agents and End Users.

In the unregulated market, the conditions and prices of electricity are free and are established by agreement and free contracting between the commercial agent and the large electricity user.

The General Electricity Law regulates the opening of investment to the private sector, the role of the State is to establish the policies of the electricity subsector and regulate it, the governing body is the Ministry of Energy and Mines and the regulatory body is the National Electric Energy Commission whose provisions regulate the electricity subsector, the Wholesale Market Administrator schedules the dispatch of the electricity load, in the wholesale market participate the electricity market agents and large users.

Investment

The increased investment of the private sector in infrastructure and electric energy projects is due to the de-monopolization of the sub-sector and the opening of the market, the participating entities must be registered in the Registry of Market Agents and Large Users, the generating agents are those that produce electric energy from renewable and non-renewable energy sources.

Market Agents

The National Electrification Institute (INDE) participates through the Electric Power Generation Company, registered as a market agent in the electric power generation activity, participates in the transportation activity through the Electric Power Transportation and Control Company, registered as a transportation agent, and in the commercialization of electric power through the Electric Power Commercialization Company, registered as a commercializing agent.

Empresa Eléctrica de Guatemala, S.A. (EEGSA) is registered as an electricity distributor, with operations in the departments of Guatemala, Sacatepéquez and Escuintla.

Related to the electric company is Comercializadora Eléctrica de Guatemala, S.A. (COMEGSA), a market agent that trades blocks of energy and electric power.

The role of the State

Before the change in the legislation, the State intervened in the market and in the electricity sub-sector through INDE and EEGSA, of which, through INDE, it was the majority shareholder.

With the change in legislation due to the enactment of the General Electricity Law, the State now has a regulatory role in the electricity subsector, with the Ministry of Energy and Mines in charge of directing policies in the electricity subsector.

Public sector and private sector participation in electricity generation

Private sector investment in electricity generation has been growing during the years under study, while public investment has tended to remain constant and decrease.

Private sector participation before and after the change in electricity legislation

Prior to the change in the electricity legislation, the private sector participated in an emerging manner in contracts granted by the State, although no private capital was invested in the electricity sub-sector to commercialize in any of the stages of the electricity process.

After the change in the legislation, private capital was invested, through registered market agents, in the Wholesale Market Administrator, the different transactions of

electric energy and power in the wholesale market are made, the market structure changed with the monopolistic practices in the electric market to not having protected monopolistic entities, nor vertical integration of the electric process.

End-users with regulated tariffs defined by the State, went to the regulated market with the tariffs authorized by the National Electric Energy Commission according to the prices established in the operations related to the generation, transmission and distribution of electric energy.

Increased investment

Next question: is the increase in investment in electricity generation in Guatemala related to the change in electricity legislation?

Table 1

Answer to the question

Yes	No
10%	0%

Table 1 shows the result of the question on the growth of investment and electricity generation, due to the change in legislation since the General Electricity Law came into force, with 100% affirmative answers.

Response Comments

Expert 1 states that the increase in electricity generation is related to the change in electricity legislation in Guatemala, and the increased participation of the private sector in the electricity generation activity.

Expert 2 mentions that, with the change in legislation following the entry into force of the General Electricity Law, electricity generation was improved due to the liberalization of the Guatemalan electricity market, in order to promote investment in electricity generation in the other activities of the electricity production process, which includes the supply of electricity to the end user

The answer of experts 1 and 2 is in accordance with the purpose of the General Electricity Law in that aspect, so that the increase in electricity generation is higher.

Expert 3 comments that the installed capacity has been improved because the legislation allows the existence of an open and competitive electricity market, but it is necessary to carry out the bidding processes carried out by the electricity distributors and to use the incentives established in the regulation that encourages the operation of renewable generators.

Results of electric power generation by the private sector and by the public sector

The results in relation to the years in comparison and mainly to private generation and public generation are shown in Table 2, together with information on maximum demand, installed capacity, exports, imports and electricity coverage, in which the comparison between 1996 and 2017 of maximum demand, installed capacity, public

generation of electricity, private generation of electricity, exports of electricity, imports of electricity and coverage are observed for those years.

Table 2

Quantitative results

Year	Maximum demand KW	Installed capacity KW	Public generation GWH	Private generation GWH	Export GWH	Import GWH	Cober- Tura % Tura % Tura % Tura % Tura % Tura % Tura
1996	733.	1145.5	2409.5	1286.	42.5	20.	53.30%
2017	1749.5	4597	2149.	9340.	1857.	891.	92.
Change	1016.1	3451.5	-260.2	8054.	1815.	871.	39.

Table 3 shows the market participants, in 1996, the entities that participated with vertical integration in the electricity process were Empresa Eléctrica de Guatemala, S. A., (EEGSA) and Instituto Nacional de Electrificación (INDE), in 2017 the participating persons were 159, each market agent only participates in one category, generation, transmission, distributor and marketer.

Table 3

Market participants

Year	Participants	Quantity
1996	INDE	1
	EEGSA	1
Total		2
Year	Participants	
2017	Large users	9
	Generating agent	114
	Marketing agent	21
	Forwarding agent	12
	Marketing agent	3
Total		159

Note: Source: Own elaboration with data from the Wholesale Market Administrator http://www.amm.org.gt/pdfs2/Listado_Agentes.pdf

Private equity participation

In the first recital of the General Law of Electricity it expresses the insufficient installed capacity to satisfy the maximum demand, this situation prevents development, for this situation the electric sub-sector is released to increase electric production, then in the other recitals it expresses the need to invest in electric projects, through the opening of the market to private investment, to the de-monopolization, which is established by means of articles 1 and 7 of the General Law of Electricity.

With the quantitative data for the period under study, corresponding to the generation of electricity by sector, and the international electricity transactions carried out, it can be deduced that there are private sector electricity market agents that participate in transactions in the electricity market, after having satisfied the local demand.

The private sector has invested in power generation projects, increasing installed capacity to meet peak demand and allowing market agents, mostly from the private sector, to export electricity to neighboring countries through the Wholesale Market Administrator.

Private and public investment

The General Electricity Law, in accordance with the Political Constitution of the Republic, establishes equal conditions for those who invest in the electricity sub-sector, the private sector invests in electricity projects, under equal conditions as state entities registered as market agents.

The experts consulted mentioned that the opening of the market to private capital has led to an increase in the project in the stages of the electricity process, while the State has maintained its investment in the electricity sub-sector without growth.

The information obtained with respect to electricity generation shows that private investment has had a sustained growth during the period under study as a result of the change in legislation, while private sector investment remains at a constant level or tends to decrease.

Discussion and conclusions

Legal effects

According to the legal analysis of the law, from the change in the electricity legislation, the legal effects were the elimination of monopolistic practices, vertical integration, the opening of the electricity market to the investment of private capital, the liberation of the electricity market, the State stopped intervening in the market, the Ministry of Energy and Mines governs the electricity subsector, the National Electricity Commission is the regulatory body with provisions issued by means of resolutions published on its website, the participants in the electric process are called market agents, among which are the generating agents, transporters, distributors and marketers who participate under equal conditions, with freedom to perform one of the joint activities in which it is authorized according to the General Law of Electricity and its regulations, the transactions between electric market agents and large users are made through the Wholesale Market Administrator.

Electric power generation

According to Table 1, from the consultation with experts it is clear that there is greater generation of electric power due to the change in the legislation, according to the statistics found, Table 2 shows that in 2017 there is greater generation of electric power than in 1996, also with respect to the base data of 1996, that private generation increased by 626.16%, while public generation decreased by 10.79%

The information is complemented based on 1996 data, it is found that the maximum demand increased by 138.54%, electricity imports by 43.18%, exports by 42.71% and coverage increased by 73.36%

Table 3 shows that in 1996 two entities participate with vertical integration practices, while in 2017 there are 119 agents of which 114 are electricity generating agents.

According to article 1 of the General Law of Electricity, the generation of electric energy is released, to which in the 12-04-2005 sentence it affirms:

> The purpose of the General Electricity Law, as can be seen in its recitals and Article 1, is to promote the production, transmission and distribution of electricity, optimize the growth of the electricity sub-sector, as well as decentralize and de-monopolize the electricity transmission and distribution systems in order to speed up the growth of the supply and satisfy the social and productive needs of the inhabitants of the Republic. Gaceta Jurisprudencial No. 76, joined cases No. 1932-2004 and 2157-2004, judgment: 12-04-2005.

Discussion

Vay et al. (2014, p. 55) describe that before privatization, INDE generated almost all of the electricity with which the domestic market was satisfied, while at present, this entity generates almost 30% of the total electricity. During this period of privatization, INDE transferred 7.3 billion Quetzals for social tariffs, but this aid did not reach the poorest users in rural areas.

Investment in the electricity market

Prior to the change in legislation, investment in electricity projects was controlled by the State, through the monopolistic entities, INDE at the national level and EEGSA, which operated in the departments of Guatemala, Sacatepéquez and Escuintla.

After the change in the electricity legislation, with the enactment of the General Electricity Law, the electricity market was opened, together with the national and international situation, private sector investment in electricity projects increased, which resulted in greater installed capacity, an increase in electricity coverage and the satisfaction of the maximum demand.

Vay et al. (2014, p. 16-17) quotes CEPAL (2012, p.53) and states that electricity generation increased 234% of which 215% is from hydraulic sources, "growth in net electricity generation implied two inevitable factors in any basic reading of the subject: First, the loss of energy sovereignty of the State of Guatemala; second, the growing aggravation of socio-environmental conflicts."

Urizar Hernández (2016, p.79) mentions as results the increase in private investments, which represents 80% of electric power generation, the installed capacity increased by more than 280%, almost double the maximum demand, so the risk of power outages is null, coverage increased to 90% by 2015, on the other hand, Guatemala has been the only country in the region without rationing since the 1996 reform, while tariffs were no longer established with political criteria, through the electricity laws, the way to calculate transmission and distribution prices is defined, the transmission tariffs are set every 2 years and the distribution value added, every 5 years. Electricity tariffs between large users and market agents are free, the reform eliminates barriers to entry for the private sector and opens the market to competition.

Conclusions

The Organic Law of INDE Decree 64-94, with the necessary reforms to harmonize it with the Political Constitution of the Republic of Guatemala of 1985, allows changing the role of the State, which was responsible for the investment in the infrastructure for the supply of electricity to the population, to stop intervening in the electricity market, according to the General Law of Electricity that allows participation in a free and open market for investment with private capital.

Articles 129 and 130 of the Constitution establish the priority of national electrification with the participation of the private sector and the prohibition of monopolies, in harmony with the General Electricity Law, which regulates the liberalization of electric power generation.

The General Electricity Law repeals the Geothermal Law, the Law of Easements for electrical works and installations and any other provision that opposes it according to the legal hierarchy, and the Regulations of the General Electricity Law and the Wholesale Market Administrator were issued to develop the law.

Due to changes in electricity regulation in 1996, the joint activities of the electricity process were liberalized, monopolistic practices and vertical integration were eliminated, and the participation of electricity market agents in the generation, transmission, distribution and commercialization of electricity was observed.

The investment of private entities in electricity generation increased, while public generation decreased in the years studied, due to the motivation of the private sector to participate in electricity generation projects, which allow the satisfaction of the maximum demand during peak hours and the export of electricity to neighboring countries.

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ANALYSIS OF THE CONSTITUTIONAL AND REGULATORY FRAMEWORK FOR THE DELEGATION OF MARITIME PORTS IN ECUADOR

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Summary. Delegation is a legitimate way for centralized or sectional States to transfer legal, administrative, operational and management capacities in general to decentralized entities of the State itself or private sector entities. In Ecuador there are several ways of delegating financial, administrative and operational competencies and management to foreign state-owned companies, national or foreign private companies and even through public-private partnerships. Ecuador's maritime ports are part of the State's strategic sectors due to their infrastructure conditions, geopolitical location and connectivity facilities, elements that make them attractive to national and international investors specialized in maritime business, a situation that transforms them into valuable allies for international trade and the transit of tourist passengers. The fundamental legal structure that supports the action of concessioning or delegating areas of strategic sectors of the Ecuadorian State -in this case the maritime ports- has legal support in the Constitution of the Republic, the Organic Code of Production, Commerce and Investment, the Organic Law of Incentives for Public-Private Partnerships, the Organic Administrative Code and the Organic Law of the Comptroller General of the State, among other legal bodies. The fundamental objective for the delegation and even the concession of seaports in Ecuador is the search for an efficient and effective management to create a competitive environment, supported by a legal system that allows it to achieve an effective dynamic that encourages multilateral trade. The Ecuadorian State intends that the comparative and competitive advantages of infrastructure and strategic positioning serve to generate sustained development based on the capacity to provide agile, safe and cost-competitive port services.

Key words: Delegation, strategic sectors, seaports, connectivity, exceptionality.

ANÁLISIS DEL MARCO CONSTITUCIONAL Y NORMATIVO PARA LA DELEGACIÓN DE PUERTOS MARÍTIMOS EN EL ECUADOR

Resumen. La delegación es una forma legítima que tienen los Estados centralizados o seccionales de transferir capacidades jurídicas, administrativas, operacionales y de gestión en general a entidades descentralizadas del propio Estado o entes del sector privado. En el Ecuador existen varias formas de delegar competencias y gestiones financieras, administrativas y operativas a cargo de empresas estatales extranjeras, privadas nacionales o extranjeras e incluso por medio de alianzas público-privadas. Los puertos marítimos del Ecuador forman parte de los sectores estratégicos del Estado por sus condiciones de infraestructura, ubicación geopolítica y facilidades de conectividad, elementos que los hacen atractivos para los inversionistas nacionales e internacionales especializados en los negocios marítimos, situación que los transforma en aliados valiosos para el comercio internacional y el tránsito de pasajeros turísticos. La estructura jurídica fundamental que soporta la acción de concesionar o delegar áreas de sectores estratégicos del Estado ecuatoriano —en este caso los puertos marítimos— tiene sustento legal en la Constitución de la República, el Código Orgánico de la Producción Comercio e Inversiones, la Ley Orgánica de Incentivos Para Asociaciones Público Privadas, el Código Orgánico Administrativo y Ley Orgánica de la Contraloría General del Estado, entre otros cuerpos legales. El objetivo fundamental para la delegación e incluso la concesión de los puertos marítimos en el Ecuador obedece a la búsqueda de una gestión eficiente y eficaz para crear un entorno competitivo, sostenido en un ordenamiento jurídico que le permite lograr una dinámica efectiva que incentiva el comercio multilateral. El Estado ecuatoriano pretende que las ventajas comparativas y competitivas de infraestructuras y posicionamiento estratégico sirvan para generar un desarrollo sostenido basado en la capacidad de brindar servicios portuarios ágiles, seguros y con costes competitivos.

Palabras clave: Delegación, sectores estratégicos, puertos marítimos, conectividad, excepcionalidad.

Introduction and basic premises

The Ecuadorian government, like other countries, encourages domestic and foreign private investment not only for the purpose of improving its monetary reserves or reducing the fiscal deficit, but also to optimize and promote growth and consolidation in strategic areas that promote sustained development. Since trade, industry and the supply of goods and services in our globalized world are closely linked to maritime traffic, the world's economies depend primarily on the flow of large-scale imports and exports.

Ecuador has a port infrastructure with the potential to expand, specialize and even generate strategic alliances to consolidate regional development. The provinces of Esmeraldas, Manabí, Santa Elena, Guayas and El Oro have coasts and fluvial accessibility conditions as highlighted in the Official Statistical Bulletin of the Undersecretary of Ports and Maritime and Fluvial Transportation, and due to such conditions, specialized schemes are developed in these areas for commercial, fishing, industrial, tourist and military operations, among others (2021)due to these conditions, specialized schemes are developed in these areas for commercial, fishing, industrial, tourist and military operations, among others.

It should be noted that most of the most important ports in Ecuador are under the administration and operation of national or foreign private agents, as can be seen in the Port Statistics Bulletin of the year 2021, either through delegation or by virtue of concessions granted by the State due to the need to improve their operational and infrastructure conditions.

In order to deepen the analysis of the figures we have been referring to, it is necessary to establish and identify the subtle differences that exist between the concession and the

delegation. From a legal perspective and based on the regulations on the subject, we can say that the concession is the legal act by virtue of which the State cedes to a person - atits own risk - the temporary control of a public patrimony for its exploitation, stipulating certain conditions, especially the factor of economic retribution, which can be translated into a percentage participation of the revenues obtained (Franco Peláez, 2022).

For many scholars, delegation becomes an act, with a double nature: political and administrative, of the State through which competencies and responsibilities that are normally the responsibility of the State itself, such as the provision of public services or the exploration and exploitation of non-renewable natural resources, are temporarily transferred to joint or private companies, always taking into account sustainability. Porras Villagómez, P (2022) and Villareal López, J (2022).

It is important to consider the relevance of the possibility of establishing delegations and concessions in the strategic sectors of the State, except in areas or aspects related to national security, with the primary idea of improving the conditions of the goods or services that are obtained as a result of such transfers and that limit the public patrimony, but that at the same time imply the possibility of improving the conditions of development.

Ecuadorian ports: typology and characteristics

The port system in Ecuador consists of state-owned commercial ports, authorized private port terminals and specialized ports. There are four public ports or port entities administered by the State: Port Authority of Guayaquil, Port Authority of Manta, Port Authority of Puerto Bolivar and Port Authority of Esmeraldas.

It is also important to note that there are specialized ports in the country, such as the Superintendence of the Balao Oil Terminal, the Superintendence of the La Libertad Oil Terminal and the Superintendence of the El Salitral Oil Terminal.

According to the Official Statistical Bulletin of the Undersecretariat of Ports and Maritime and River Transportation, there are 62 authorized port terminals (2021)there are 62 authorized port terminals, which means that the State has granted by concession aquatic spaces for the construction and operation of these private infrastructure with official regulation, which are part of the national port operational spectrum.

There is also an assessment based on simplicity criteria, i.e., a classification based only on collateral elements derived from the ports, through which general groups are established based on similarities such as geopolitical location and economic scope. This apparent simplicity, however, has given rise to a large and varied classification that correlates with the financial and environmental sustainability objectives described in goals 9, 10, 11 and 12 of the 2030 development agenda. It is stated that ports are in a globalized synergy that is rigorously framed in the international regulations related to the care of the environment under which international shipping can be characterized from elements such as the type of cargo, location, size and structure (Sage-Fuller, 2018).

According to Arzate et al. (2012)under the simple criterion of typology, ports can be grouped according to their location on the sea or coastal ports, tidal ports, scope of activities, customs regime, owners and/or operators, type of maritime traffic, type or structure of goods transshipped, diversification, inland traffic to and from the port, type of charterer, direction of

cargo flow, generation of development and distribution of the international physical distribution chain.

Table 1
Port typology under simplicity criteria

Group	Nomination
Coastal ports	From bay
	River estuary
	Fjord
	Fluvial
	Lake and/or
	Channel
	Open
Tidal harbors	High tide
	Of dike
	Lock
	Deep draft
By scope of activities	World Cup
	Regional
	Local
By customs regime	Free port
	Port with customs
For owners and operators	Federal
	State
	Municipal
	City
	Private
By type of maritime traffic	Line
	Tramp
	Terminal
	Intermediate / transit
By the type or structure of the goods being transshipped.	General cargo / bulk
	Passengers
	Containers
	Lash Ro/Ro
	Ferries
For its diversification	Specialized
	Universal
For inland traffic to and from the port.	Railroad
	Inland waterways and inland waterways
	Traffic on railroads
	Pipelines
By type of charterer	Commercial
	Industrial
	Expedition
By direction of load flow	Import
	Export
	Transit
For the generation of development	First
	Second
	Third
	Fourth
For the distribution of the international physical distribution chain.	Location between nodes
	Home
	Term

Note: Taken from port typology under simplicity criteria (Arzate et al., 2012).

In addition to the simple typologies of ports described and detailed in the previous chart, according to Panžić (2010) we can point out several types of special ports such as (i) marinas: those aquatic spaces whose facilities are intended for the operations of accommodation, provisioning, minor repairs and other maneuvers for vessels intended for leisure, the practice of sport fishing and other similar activities; (ii) naval ports: those that have adequate infrastructure for the repair and/or construction of vessels; and (iii) commercial ports: responsible for the handling of perishable goods and the unloading of fish, for such purposes they have adequate facilities for the commercialization of this type of products.

As we can see, and despite the fact that there is no unanimity regarding the classification of ports and their facilities, it is necessary to have references that shed light on the leading role they play in trade and the attraction they represent in terms of investment, contributing to sustainable development and encouraging the State to generate mechanisms for their better use and exploitation.

Constitutional regulations and strategic sectors

The Constitution of the Republic of Ecuador (2008) incorporates in Chapter Five the "Strategic sectors, services and public enterprises" as a segment of enormous value for the socioeconomic development of the country, the third paragraph of article 313 is broad in defining the elements or components of the strategic sectors, the constituent legislator establishes a reasonable breadth in the scope of the norm by integrating as strategic sectors "the others determined by law", thus anticipating the possibility that for political, social, historical, economic or circumstantial reasons, areas may arise that acquire special importance and acquire the qualification of strategic.

We should note that Ecuador is a State of rights and justice and the Magna Carta states this from the first of its articles and later within the same order in paragraph 82 provides that the protection of legal certainty is a primordial right, which specifically provides for respect for the constitutional rule and other laws and regulatory bodies according to their hierarchy - Article425 -insynergy with the philosophical principles of law enshrined by Hans Kelsen in 1934 (Bedoya, 2019).

In this same context, the fundamental norm of the State, in the second paragraph of Article 314, singles out the scope of the constituent elements for economic development, stipulating textually that "the State shall be responsible for the provision of public services of drinking water and irrigation, sanitation, electric power, telecommunications, roads, port and airport infrastructures and the others determined by law", port and airport infrastructures and others determined by law", a provision that is complemented by the second paragraph of said supreme provision, which highlights the State's obligation to guarantee the provision of these public services in accordance with the principles of obligatory nature, accessibility, regularity, continuity and quality.

On the other hand, we must take into account that the National Port Administrative Regime Law, in its pertinent part, establishes that "the existing maritime and fluvial ports and those that may be established in the future (1976) in its pertinent part establishes that "the existing maritime and fluvial ports and those to be established in the future, whose characteristics do not justify the creation of Port Authorities, shall be administered, maintained and operated directly by the Directorate of the Merchant Marine and the Coastline, through Port

Administrations and shall be governed by the provisions of the present law as applicable and by the respective Regulations to be issued by the Directorate of the Merchant Marine and the Coastline".

This consideration is diametrically different for the Province of Galapagos, since its special regime grants it different competencies from those of continental Ecuador, as long as they do not contravene the regulations on the matter and making it clear that the maritime authority is the Directorate of the Merchant Marine and Coastal, as is clearly stated in numbers 6, 7 and 14 of Article 5 of the Special Regime Law of the Province of Galapagos in relation to the provisions of Executive Decree 1,111 issued on May 27, 2022 in Official Gazette No. 358.

In October 2013, a Resolution was issued under No. SPTMF165/13, published in the Official Gazette No. 133 of November 28 of the same year, through which the rules for the provision of port services and activities within the port terminals authorized and licensed to operate in our country were issued.

The referred regulation is applied to port services and other activities carried out in all port entities or their delegates, and authorized port terminals and/or private port facilities authorized to operate in national and international traffic.

Ibidem to the preceding article, port operators and shipping agencies with registration to operate as such, which provide services in the port entities or their delegates and others are subject to these regulations, observing the regulatory provisions, will be the port entities or their delegates responsible for exercising control for compliance with the provisions of this regulatory framework,

In reference to the aforementioned norms, the meaning of port activity in the country is explicit, which can be appreciated or conceived in different forms or mechanisms according to the provision of port services in the ports of the Republic of Ecuador, being able to be administered and operated.

Directly, through the Port Authorities, their delegates or concessionaires, special ports, authorized port terminals and/or private port facilities, when they are operating entities, i.e., they provide port services themselves.

a) Indirectly, through port operators in the following terms:

- By granting the respective operating permit to legal entities that have complied with all the requirements demanded by the competent authority.
- By delegation under the terms and conditions established in the law applicable to the processes of delegation of public port and transportation services in general; and, of the "Regulations for the application of the Exceptional Regime of Delegation of Public Transportation Services", for those services that, for their provision, indispensably require the use and exploitation of pre-existing public port infrastructures.
- Subsidiarily by the Port Authorities, their delegates or concessionaires, special ports, authorized port terminals and/or private port facilities, when the demand for port services is not covered by the port operators that have been authorized for this purpose.

It is worth noting the types of services provided by the Port Authorities and Special Ports in Ecuador, which are shown in the following table.

Table 2
Services provided by Port Authorities and Special Ports in Ecuador

Services	Description of services
Maritime and/or river port access.	Communications, dredging of the common navigation area and coordination of the operation of the navigation aid with the competent authority.
Port maritime traffic.	Management, coordination and control
Anchorage.	Commercial and non-commercial
Services to the ship or naval vessel.	Management and execution of activities that allow and facilitate access, safe transit, operation and maneuvering of vessels or naval artifacts in maritime or fluvial ports or terminals, including their approach and anchorage areas. The following services may be provided directly or indirectly to the vessel or naval vessel, including pilotage, towing, mooring and unmooring (including the operation of gangways)
Support and cargo services.	Management and execution of activities 'for the transfer, storage and handling of cargoes and related work within the port premises or inside the vessels or naval artifacts. Example loading and unloading, stevedoring, re-stowage and unstowage, lashing and unlashing, tarpaulin, porterage, storage, weighing (scale operation), packing, palletizing and container power supplies.
Passenger services.	Activities of embarkation and disembarkation of passengers between the national or international maritime or fluvial terminal and the specialized vessels for the transportation of people, as well as for the entrance or exit of the terminal, transfers and/or permanence in the same, as well as direct or indirect services of embarkation and disembarkation, transportation of passengers, loading and unloading of luggage and passenger vehicles.
Related services.	Support or complementary management for port services provided in the operational area to the vessel, naval vessel, passengers or cargo, which may include surveillance and security, physical security and cleaning.

Note: Taken from Reglamento General de la Actividad Portuaria en el Ecuador (General Regulations for Port Activity in Ecuador) (2000).

The General Regulations of Port Activity in Ecuador, Executive Decree No. 467, states in Article 3, paragraph 1, the definition of the port model derived from the application of the criteria of delegation and privatization (2000)article 3, paragraph 1, sets forth the definition of the port model derived from the application of the delegation and privatization criteria and establishes that the state-owned commercial ports of Ecuador will be state-owned and will be governed by the model internationally known as *Landlord* or proprietary port, in which the port entities do not directly operate any service or facility and their functions are reduced to the administration, maintenance and development of the ports in all matters related to their infrastructure and common use areas that are not delegated to the private sector. Likewise, the port owner is awarded the control and monitoring of contracts entered into with third parties

without interfering in the development of the business of private persons who operate in them or are responsible for the construction, administration and management of infrastructure or spaces as long as these are carried out within the contractual legal framework in which they are registered.

The Ecuadorian State, through public companies, reserves the right to provide port services on a subsidiary basis, in the event that the market demand is not adequately covered by the operating companies and upon specific request for a port whose needs have not been met despite having requested a service, as described in Article 4 of the legal framework in force.

In accordance with the provisions of Article 287 of the Constitution of the Republic, the public companies have the legal authority to charge the corresponding port tariffs, for which purpose they must break down the services of the contracted private company, without this being perceived as an outsourcing or labor precariousness of any kind.

Paragraph 3 of Article 5 of the instrument in question specifies the requirement for public companies that enter into delegation contracts with the private sector to include specific clauses stating the principle that governs them and also the guarantee of their compliance through controls and powers dedicated to verification that will be in charge of the public companies, which are also required to establish minimum standards of efficiency and maximum prices that must be in line with competing ports in third countries and taking into account the national reality and that of each port. In view of the above, the priority of establishing a pricing system for the provision of services in such a way as to guarantee competitive conditions is evident.

On the other hand, the Port Activity Regulations (2011)article 33 of this legal body defines the Port Public Domain as the "set of goods, lands and waters required for the exercise of port activity, the approach of vessels to ports, quarantine and maneuvering areas, as well as the corresponding signaling, beaconing and safety systems".

Regarding the conditions and modalities of use of all that which forms part of the public port domain defined in the preceding paragraph, Article 34 of the same Regulation establishes that the port entities holding the same may involve the concessionaires with whom they enter into a contract for the exclusive occupation and use of parts of the same public domain for purposes related to port activities. Additionally, it should be pointed out that the granting of these rights may be made in favor of private sector persons registered as port operators, when they have the corresponding authorization from the state port entity with jurisdiction in the corresponding port.

With regard to the construction of works in port facilities, the Port Activity Regulation (2011)the Port Activity Regulations state that the private use of the port public domain -in all cases in which private sector persons require the construction of works or fixed installations or the realization of any investments that increase their quantitative value or useful surface- will require the granting of a concession in the established manner. Therefore, any intervention of this nature to be carried out in Ecuador's ports must be authorized by the competent authorities.

Similarly, research conducted by Guasch, Suárez-Alemán and Trujillo (2016) analyzes the specific characteristics that mega ports introduce in the traditional port concession models and the relevance of the construction of these large-scale civil works such as the construction of breakwaters.

The research by Guasch *et al*. (2016)the study was based on a forward-looking study in which it was projected that the nominal local capacity of the Chilean port system would be exhausted by 2025 and demand in central Chile would require additional container capacity, which is why the research topic of developing a large-scale port was proposed. The proposal of this research was to sequentially implement two mega ports and given the specialized technical specifications develop one in San Antonio and another in Valparaiso.

As a result, Guasch *et al*. (2016)in addition, they proposed four schemes for the construction of the ports, all of them dependent on the port law, which establishes that the new docks can only be developed by private companies through concessions. At this point it is important to point out that in Latin America favorable results have been obtained by entering into port concession contracts, a situation that provides viability and security to this type of legal relationship.

It is concluded in the research work of Guasch *et al.* (2016)the key objective of mega ports is to increase port capacity, for which several options should be adopted, such as awarding the concession to a single entity, building a breakwater financed by the public sector, which has the authority to tender the works for its construction. Therefore, and due to the intermodal connections -particularlythe railroad- it is advisable to build the first mega port in San Antonio, considering the logistical advantages and better value for money compared to Valparaíso. The research work to which we have been referring has provided a broad overview of the particularities that must be taken into account to establish the elements that large-scale concession projects must meet.

In the context of the above ideas and as most of the port terminals in Ecuador are managed by private companies, we can affirm that private administrations are more efficient than state ones; hence, the constant growth of international trade requires ports to modernize, expand their capacities and in this scenario, to have accessible and competitive port policies for the entire sector and compatible with its reality.

On the other hand, various problems can also be perceived in the ports of Ecuador and based on the descriptions of Aguilar Miranda, G (2017)the problems are mainly due to the following factors:

- Physical space for cargo storage is limited and insufficient.
- The maximum draft in Ecuador's ports is 12 meters while the handling of deep-draft container ships requires at least 14 meters to reach a cargo capacity of 18,000 TEUs.
- Lack of port infrastructure to meet the demand for dock space in less time.
- Lack of modern machinery and equipment for management.
- The scarcity of advanced technology aimed at streamlining user care.
- The insufficiency and extreme non-existence of tax incentives and solid policies in the interest of productivity and profitability for the sector.

Based on the difficulties we have mentioned, we can see the daily reality of the Ecuadorian ports, a situation that the concessioned companies must attend to with special care and interest, in order to identify the appropriate guidelines and be able to include reforms and investments with the support of the pertinent authorities. We can argue that Ecuador needs to review these aspects that translate into areas of opportunity in order to make its ports and port services more efficient to achieve highly competitive standards worldwide, especially if we assume that an adequate port administration and management are necessary to face the great challenges posed by the economic development of the nation.

To continue with this analysis it is necessary to have as a basis the fundamental norms of Ecuadorian law and to consider the interpretative judgments of constitutional order dedicated to establish with precision the scope of a delegation of goods and services of the strategic sectors of the State. In this sense, Article 313 of the Magna Carta postulates the reservation in favor of the State "of the right to administer, regulate, control and manage strategic sectors, in accordance with the principles of environmental sustainability, precaution, prevention and efficiency" in accordance with the State's power to constitute public companies to carry out the

task of managing "strategic sectors, the provision of public services, the sustainable use of natural resources or public goods and the development of other economic activities" of Article 315 of the Constitution.

All the premises of state ownership of the strategic sectors and the management attributions through public companies are complemented by the provision established in Article 316 of the same law, which contemplates the possibility for the State to delegate "the participation in the strategic sectors and public services to joint ventures in which it has a majority shareholding". This power will depend on the national interest and compliance with the obligation to respect the deadlines and limits established by law for each strategic sector. Finally, the ownership and management framework we have been talking about is also integrated with the exceptional possibility for the State to delegate such functions to private initiative and the popular economy.

By virtue of the foregoing, we have considered the imperative need to carry out a joint interpretation of the constitutional provisions in question (articles 313, 315 and 316), regarding the principle of exclusivity that in general terms they attribute to the State in the administration, regulation and control of the strategic sectors and the provision of public services, since at the same time they grant powers to the State itself to develop such functions in conjunction with public companies or the alternative of exceptional character to entrust their functions to private companies as long as the national interest is safeguarded.

The Constitutional Court of Ecuador in the interpretative judgment 001-12-SIC-CCEs (2012)is very precise when analyzing the conditions that the State must fulfill in terms of the exceptionality to delegate its functions and literally establishes that:

> "The cases of exceptionality should be established for each strategic sector and/or for each public service, since they are very broad conceptual areas that could merit specific distinctions or particularities for each sector, and if some special laws of a sector do not establish these cases of exceptionality, at present, because they are normative bodies prior to the Constitution of the Republic of 2008, a legal reform could be feasible, or, in any case, it will be the laws that regulate and mandate each sector, where the cases of exception and the corresponding requirements are determined. However, the Organic Code of Production, Commerce and Investment, in Book V, Title I, regulates the development and promotion of strategic sectors, and Article 96 states: "The State may exceptionally delegate, to the private initiative and to the popular and solidarity economy, the investments in the strategic sectors in the cases established in the laws of each sector and, subsidiarily, in this Code"; and the delegation of the management of the strategic sectors and/or the rendering of public services to the private initiative or to the popular and solidarity economy is made exceptionally, in the cases provided in Article 100 of this body of law, which, in the pertinent part, provides: "Art. 100.-Exceptionality Exceptionally, duly decreed by the President of the Republic when it is necessary and appropriate to satisfy the public, collective or general interest, when there is no technical or economic capacity or when the demand for the service cannot be covered by public or mixed companies, the State or its institutions may delegate to the private initiative or to the popular and solidary economy, the management of the strategic sectors and the provision of the public services of electricity, roads, port or airport infrastructure, railroads and others...."; this legal provision could well be applied, until the law of the matter or of the corresponding sector determines the exceptional cases of delegation to the private initiative or to the popular and solidary economy in each matter or sector" (p. 9).

Conclusions

(i) Despite not being described in an exhaustive manner in the regulatory provisions, we must affirm that the ports in Ecuador are part of the strategic sectors of the State, not only in terms of the provision of fully identified services, but also because their use and exploitation is closely linked to the main economic activities of the country such as hydrocarbons and national defense, a circumstance that places the ports and the sector in general, in a strategic position for the harmonious and sustainable development of Ecuador.

(ii) The reservation of strategic sectors and private services of the State may be delegated due to the lack of technical, financial, logistical, and professional resources, among others, which Ecuador lacks. In such circumstances, private or public national and/or foreign companies, as well as those of mixed economy, could intervene -under the figure of delegation - through strategic agreements embodied in Public-Private Alliances, as suitable alternatives to improve the conditions and capacities of the ports and their facilities and contribute with better conditions for development.

(iii) In order to allow for the legal, technical, financial and administrative possibility of delegating the ports, the State must prove the condition of exceptionality in such a way that the delegation obeys a criterion attached to development and does not become a way of transferring the provision of public services in order to benefit the private sector, since it is due to reasons of the State's inability to organize and manage the port sector effectively for the benefit of the common interest.

(iv) The delegation of the ports must be carried out in a non-extendable manner and in accordance with the provisions of the specific regulations dedicated to the management of port activities. The Ecuadorian State cedes through delegation part of its attributions, but it will never cease to be the exclusive holder and absolute controller of the management of goods and services in those strategic sectors delegated; as well as for reasons of national interest it has the power to delegate, upon finding that such interest is not taken care of, then it could proceed to withdraw such assignment.

(v) The legal instrument necessary for the delegation of a port to operate is the execution of a contract and the State, through the relevant authorities or Public Companies, is responsible for regulating, controlling and promoting the services within the framework of the national development plan.

(vi) A delegation is only justified in specific situations of the State: that it does not have the technical resources to provide an efficient service; that it does not have the management capacity to internationalize and develop strategies for global positioning in foreign trade; that it lacks the financial resources for investments that generate a development in port infrastructure; and when there is the possibility of an alliance with global operators in port matters suitable for positioning the port to be delegated and the region as strategic areas of services and efficient logistics for foreign trade.

Recommendations

1. The Ecuadorian State has the possibility of promoting an integral development of port activity, capable of establishing a concept of specialization and complementary management among all state ports.
2. Based on the functions of the Legislative Branch, the regulations related to port activity must be harmonized and regulations that contribute to the sustainable development of the port sector in Ecuador must be incorporated.

3. It is necessary to generate management schemes with administrative, financial and functional autonomy, except in cases where aspects inherent to the security of the State are compromised, based on general considerations, but at the same time those that focus especially on the differentiation arising from their individual characteristics and capabilities that are the result of their comparative and competitive advantages.
4. The delegations of the ports in the current legal framework must maintain triggers based on quantitative and qualitative goals in an ascending manner, provided that these justify the delegation, that is to say that the delegatee by obligation must generate a greater functional capacity than was the case with the state administration, a situation that must be evaluated through management indicators that demonstrate the efficiency, effectiveness and efficacy related to the sustainability delimited in the objectives of the 2030 agenda for development conceived within the United Nations.

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