

Cabotage in the Andean Community: The Rebirth of the Merchant Marine?

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ABSTRACT

In the past, cargo reservation and the restriction of foreign participation in the shipping activity, were mechanisms intended to foster the merchant marines of Andean countries. In practice, however, these measures proved useless to achieve that goal.

On the contrary, following enactment of Decision 314, the Andean Community adopted a different approach to the matter, leading to the liberalization of shipping activities and urging members (Bolivia, Colombia, Ecuador, Peru and Venezuela) to review their legislation accordingly. In fact, countries like Venezuela have managed to revise their whole shipping legislation, with the aim of ensuring the development of the national merchant marine. Cabotage, nevertheless, was not within the scope of the said Decision 314.

This paper deals with the feasibility, for Andean countries, individually to establish a merchant marine able to compete in the containerised traffic of international trade; what are the main constraints in the achievement of this, and how cabotage could ensure for the Andean Community, the rebirth of a merchant marine fleet to support the movement of domestic cargoes.

Keywords

Andean Community, CAATA, cargo reservation, cabotage, liner shipping, transshipment.

INTRODUCTION

In the past, cargo reservation and restrictions for foreign participation in the shipping activity, were mechanisms intended to fostering merchant marines of developing countries, and Latin America was not the exception to this trend. According to the cargo reservation system —also known as cargo preference— national flag vessels may have the right to carry either the total or just a percentage of the cargo imports and exports of the flag State, those cargoes purchased by the State (at central, regional and municipal level including the different governmental agencies), even those private cargoes involved in international trade and those cargoes purchased with the aid of public import-export banks. It can be unilaterally imposed by the flag State, but in some cases its application may involve two or more countries by means of bilateral or multilateral agreements. On the other hand, restrictions for foreign participation may take the shape of a maximum foreign capital participation in the ownership of the shipping company, prohibition for foreign participation in activities such as shipbuilding, crewing, etc.

Originated first in Argentina in 1948 when enacted the Law 6,087, cargo reservation was regarded then as an important tool to promote a merchant fleet by reserving the State cargo imports and exports to the Argentinean flag vessels. In 1956 Chile went on by enacting the Law 12,041, applying the cargo reservation mechanism to commercial cargoes engaged in international trade, i.e. private cargoes, requiring that at least 50% of the cargo imports and exports were carried in Chilean flag vessels. The experience proved soon to be successful as the Chilean Line as well as Interoceánica embarked on large fleet expansions, while many of the smaller companies ordered new vessels, backed by the cargo reserved in the light of the said legislation. (Roquero, 1990)

Following the Chilean experience, countries such as Bolivia, Brazil, Colombia, Ecuador, Paraguay, Perú, México and Venezuela, among others, implemented similar legislations aimed to develop a national merchant fleet. In some cases, as it was the Brazilian experience, cargo preference was accompanied by a gigantic shipbuilding program. Cargo reservation, therefore, spread rapidly throughout Latin America as a protectionist measure, becoming as De La Pedraja (1999) rightly points out “a major foundation for the Latin American merchant fleets whose greatest expansion came in the 1960s and the 1970s”.

At international level the cargo reservation scheme was embodied in the UNCTAD Liner Code of Conduct or the 40-40-20 rule, that was adopted in 1974 and entered into force in 1983 after ratification by more than 70 countries. Its aim was to ensure that developing countries had a mechanism to facilitate them the access to their trade dominated by liner conferences, by suggesting to divide the cargo transported according to the following rule: 40% for ships belonging to the exporting country, 40% for ships belonging to the importing country, and 20% for ships belonging to other countries. Despite the number of signatory countries, in practice the UN Liner Code has had little effect on the organisation of the shipping liner sector or in the relatively free participation by vessels of all flags in the carriage of world trade.

It might seem contradictory that cargo preference first intended as an attempt to bring greater competition to markets, ended up by penalizing shippers and consumers as a whole by imposing to domestic importers and exporters to pay higher freights for the carriage of cargo than what they would have to pay in a free market. On this point, a World Bank report argues: “The gains to balance of payments from using domestic shipping are much less than their freight revenues because the maintenance and operation of a national fleet is usually very foreign exchange-intensive. Without domestic oil resources, steel making and an efficient shipbuilding industry, the only savings that materialize are the cost of crewing and vessel management—assuming that these functions would be fulfilled by nationals. In a study of Venezuela, it was concluded that freight rates were about 30 percent higher than would have been the case in a free market. On annual freight expenditures of US\$800 million, the cost to the economy was US\$287 million. Since 70 percent of the freight payments were to foreign carriers, the extra foreign exchange cost was US\$187 million. The balance of payments gain from reserved cargo, once allowance was made for all inputs purchased abroad, was only US\$20 million. Losses were, therefore, 9.4 times as high as gains”. (World Bank, 2000)

As a result of the liberalisation policies, most cargo preference laws were reformed or repealed in Latin American countries in the late 1980s and early 1990s. Consequently, Decision 288 adopted by the Andean Community in 1991 declared the freedom of access to cargo originated in and intended for shipment by sea within the Subregion, requiring the Member Countries to modify their national rules and regulations in order to eliminate any restriction. Afterwards, Decision 314 was adopted by the Andean Community to complete the new legal framework governing shipping policy in the Subregion, urging the Member Countries to review its domestic legislation to that end, but also stating that *Cabotage* would be outside its scope.

Liberalisation of shipping has paid its benefits as today more shipping companies from outside the region came to serve Latin American trade, for the advantage of local shippers who benefit from increasing shipping opportunities and considerably reduced freight charges. Nevertheless, following lifting of cargo preference the merchant fleets of the Andean countries decreased, pushed by the winding up of state-owned shipping companies unable to cope with the capital intensive nature of containerisation, as well as bad management and corruption, paying little attention to cabotage as a niche that could ensure the rebirth of the merchant marine.

I. ANDEAN COMMUNITY AND LIBERALIZATION OF SHIPPING

Background on the Andean Community

Originally established in 1969 following the signature of the Cartagena Agreement, the Andean Pact sought to set a customs union for a period of ten years among several South American countries. Three decades later, the experience proved to be complex in the achievement of the main objectives set by the Cartagena Agreement, such as the liberalization of trade in goods within the region, the adoption of a common external tariff and the harmonization of foreign trade instruments and policies, for which reason it became

necessary the need for both institutional and policy reforms resulting in the establishment of the Andean Community (CAN) and the Andean Integration System, which started to working on 1 August 1997 with a General Secretariat, whose headquarters are in Lima (Peru), as its executive body. The CAN Member Countries are: Bolivia, Colombia, Ecuador, Peru and Venezuela. (Figure 1)



Figure 1: Map of Andean Community Member Countries
Source: Andean Community Website

The CAN represents an important market under a Customs Union which allows the goods of its Member Countries to circulate throughout its territory free of duties, while imports from outside the Subregion pay a common tariff. It is expected that by 2005 a Common Market can be established in the region, in order to achieve free circulation of goods, services, capital, and people. However, it is important to point out that goods have been circulating freely within the Andean Community since 1993, when the tariffs and all other

duties on trade between CAN Member Countries were eliminated and a Free Trade Area was established.

From the institutional point of view, the current structure of the CAN is the result of the changes introduced in 1996, when the Member Countries signed the Trujillo Protocol that modified the Cartagena Agreement. Among the main bodies and institutions comprising the so-called Andean Integration System are: The Andean Presidential Council; the Andean Council of Foreign Ministers; the Commission of the Andean Community; the General Secretariat of the Andean Community; the Court of Justice of the Andean Community and the Andean Parliament.

Apart from the Agreement of Cartagena, its Protocols and Additional Instruments as well as the Treaty Creating the Court of Justice of the Andean Community and its Amending Protocols, the regulations and policies within the CAN are embodied in *Decisions and Resolutions* both characterized by its supranationality and pre-eminence. Thus, according to articles 2 and 3 of the Court Treaty in force and in the Cochabamba Protocol amending that Treaty, "the *Decisions* are binding on the Member Countries as of the date of their approval by the Commission", and "the *Decisions* of the Commission shall be directly applicable in the Member Countries as of the date they appear in the Official Publication of the Agreement, unless those Decisions stipulate a later date...". In practice, this means that Community laws do not require reception procedures in the domestic laws of the Member Countries in order to become fully effective. Andean provisions require compulsory and immediate compliance by Member Countries at all jurisdictional levels, the bodies of the Andean Community, and private individuals. On the other hand, the Court of Justice has repeatedly emphasized the pre-eminence of Andean Community Law, pointing out that its application prevails over domestic or national provisions. This principle of the pre-eminence of the CAN provisions means that the member countries may not invoke provisions of their domestic law as a reason for failing to comply with the obligations they have assumed in the context of the integration process.

Regarding the size of this market, suffice it is to say that the CAN comprises more than 115 million inhabitants with an Intra-Community and bilateral trade showing a steady growth in the last years. For instance, Intra-Community exports rose 10 percent in 2001 to a level of 5 billion 680 million dollars, whereas bilateral trade in the same year shows that Colombia's exports to Venezuela reached the important figure of 1 billion 727 million dollars (Table 1). Besides, the statistics compiled by the General Secretariat of the CAN reveals that the Andean Community is becoming an important destination market for the exports of the Andean countries. "In 2001, Bolivia allocated 27 percent of its exports to the Andean Community, up from 21 percent in 2000. Colombia exported 22 percent, as compared with 16 percent in 2000. Ecuador sold 18 percent, 4 percent more than in 2000. Peru allocated 8 percent, up from 6 percent in 2000, while Venezuela's exports followed a steady trend of two years' standing at 5 percent".

Table 1: Intra-Community Exports (Million of dollars)

Countries	2000	2001	% of Change
Andean Community	5,174.3	5,679.8	9.8%
Bolivia	340.3	350.9	15.3%
Colombia	2,166.4	2,744.3	26.7%
Ecuador	662.4	778.7	17.5%
Peru	446.4	518.0	16.0%
Venezuela	1,594.6	1,287.9	-19.2%

Source: *Andean Community Website*

Most of this Intra-Community trade takes place through land and maritime transportation as shown in a *Statistic Report* on the commercial flows per mode of transport (1997-1999) prepared by the CAN. Thus, from the 7.5 million tonnes handled during 1999 within the Andean countries, 55% was carried by sea (4.1 million tonnes), 33% was carried by land (2.4 million tonnes), 10% was carried by river (0.7 million tonnes) and the rest 2% moved through other modes of transport. (Table 2) A noticeable point is that these figures do not comprise petroleum and related products as well as steel products exported by Venezuela to Andean countries, otherwise, the pre-eminence of maritime transportation would be higher as these goods are mainly carried by sea. (CAN, *Flujos Comerciales Intracomunitarios por Modos de Transporte 1997 – 1999*)

Table 2: Intra-Community Exports per Mode of Transport

Mode	Million of Dollars USD			Million of Tons		
	1997	1998	1999	1997	1998	1999
Maritime	38.5%	36.5%	39.9%	55.6%	61.9%	55.3%
Rail	0.5%	0.3%	0.7%	0.9%	0.8%	1.3%
Land	49.5%	51.0%	45.7%	31.7%	30.6%	32.6%
Air	5.7%	8.7%	9.2%	0.2%	0.3%	0.3%
Multimodal	0.1%	0.0%	0.0%	1.4%	0.0%	0.0%
River	5.6%	2.9%	4.4%	10.1%	5.1%	9.6%
Lake	0.0%	0.5%	0.0%	0.0%	0.8%	0.0%
Others	0.0%	0.01%	0.1%	0.0%	0.5%	0.8%

Source: *CAN, Flujos Comerciales Intracomunitarios por Modos de Transporte*

The *Report* referred to also leads to the conclusion that in terms of volume, shipping is the main mode of transport for Intra-Community exports for all Andean countries, with the exception of Bolivia (Table 3). In this context, the domination of maritime transportation is highlighted if it is borne in mind that 35% of the Colombian exports to the Andean countries for the period under analysis (1997 – 1999) moved through maritime transport; whereas this figure in the case of Peru is 58% and Venezuela 39%. It is true that in the case

of neighbouring countries (Colombia – Venezuela) the supremacy of land transportation is evident (77%), but again some commercial flows, e.g. Colombia – Bolivia, Peru – Colombia, Venezuela – Peru, confirm the fact that shipping is the main mode of transport with 82%, 75% and 86% respectively. The predominance of shipping as the main mode of transport is particularly significant in the case of Bolivia – Venezuela since 77% of the Venezuelan exports to this country moved through maritime transport and 88% of the Venezuelan imports from Bolivia moved through the same mode of transport.

Table 3: Intra-Community Exports per Mode of Transport

Mode	Million of Dollars USD			Million of Tons		
	1998	1999	2000	1998	1999	2000
Intra-Community	5,450	3,980	5,253	12,880	9,800	11,078
No especificed	5	4	1	54	62	5
Maritime	1,929	1,585	2,192	8,959	6,466	6,674
Rail	19	27	51	85	97	201
Land	2,884	1,818	2,413	3,150	2,431	3,121
Air	429	367	304	26	25	23
Interior waters	185	178	289	605	718	1,054
Not applicable	0	1	3	0	0	1

Source: CAN, Flujos Comerciales Intracomunitarios por Modos de Transporte

The cargoes involved in these commercial flows are both general (containerised/break-bulk) and bulk cargo, among them: petroleum and related materials, plastic resins, soy, sugar, cotton, coffee, fish flour, frozen fish, zinc, corn, malt, rubber, aluminium, cooper, steel products, to name just a few.

Liberalization of Shipping

It has been the goal of the Andean Community the liberalization of the different modes of transportation services, including the carriage by sea. Insofar as maritime transport is concerned, the Andean Committee of Aquatic Transport Authorities (CAATA) is the community body in charge to monitor the compliance and application of the CAN policy for this sector.

Thus, in 1991 Decision 288 was adopted in order to declare the freedom of access to cargo originated in and intended for carriage by sea within the Subregion, such cargo being transported in vessels owned, chartered or operated by shipping companies of the Member Countries and of third countries. (art. 1)

On the other hand, art. 2 of the said Decision 288 required the Member Countries, within a period of ninety (90) calendar days, to review their national rules and regulations in order to eliminate:

- a) Existing restrictions on the chartering of vessels by shipowners from the Member Countries;
- b) The allocation of routes within the Subregion; and
- c) Systems used by the respective authorities to set or authorize intra-subregional freight charges, replacing them with simple registries of shipping rates.

Besides, in 1992 the Andean Community enhanced the freedom of access to cargo carried by sea, generated by the international trade of the countries within the Subregion by adopting Decision 314. (art. 1) However, this freedom of access would take place under reciprocity basis, in such a way that the existing restrictions, exclusions or cargo preference would be lifted according to the following calendar:

- a) The transport between ports of the Member Countries, subject to the prescribed by the Decision 288;
- b) The transport between ports of the Member Countries and ports of third countries carried out in vessels owned, chartered or operated by shipping companies of the Member Countries, the latest on 31 December 1991; and,
- c) The transport between ports of the Member Countries and ports of third countries carried out by shipping companies of third countries, the latest on 31 December 1992.

It is important to point out that the scope of Decision 314 does not comprise the national traffic of *cabotage* of each Member Country.

Chapter II of Decision 314 also prescribed general *policies* for the development of the merchant marine of the Andean countries, urging the implementation of actions such as introduction of flexible rules for shipping registration, granting of long-term loans for acquisition of suitable vessels, implementation of legislation freeing the shipping companies of the Subregion of labour and taxation requirements affecting the operational costs, and the increase of foreign capital participation in shipping companies.

The Decision also required (Article 10) the Member Countries to review their national legislation, in order to set up clear rules to allow shipping companies of the Subregion consolidating the basis for its competitiveness.

Despite of the freedom of access prescribed by Decision 314, in 1996 Decision 390 and Resolution 422 would be adopted to temporarily establish at Community level if required, restrictions, exclusions of traffics or any other measures needed to shipping companies of third countries or community countries that at the same time may restrict or discriminate the vessels owned, chartered or operated by shipping companies of Member Countries.

Generally speaking the CAN has been strict when dealing with the compliance of the communitarian provisions, as a matter of fact in the past, the General Secretariat brought an action for non compliance against Venezuela for the alleged implementation of the Law for the Protection and Development of the National Merchant Marine passed in 1998. (PROCESS 17-AI-2000) Although this piece of legislation had been originally passed in 1973, in 1998 this legal instrument was amended to lift foreign capital restriction in shipping companies; nevertheless, some provisions prescribing cargo preference rules remained there. The Court of Justice of the CAN when delivering the judgment stated that Venezuela instead of adjusting its internal legislation, with the amendment of 1998 just ratified the cargo preference as a unilateral mechanism for protection of Venezuelan flag vessels to the detriment of Decisions 288, 314 and 399. Therefore, the Court of Justice ordered to Venezuela to adopt the necessary measures to eliminate the rules restricting the free access to cargo.

The elimination of cargo preference within the Andean Community left the shipping companies of the Member Countries to the adversity of free trade and new technology in the shipping business. De la Pedraja (2000) has pointed out: “As containerization spread throughout Latin America, the goal became no longer just to replace break-bulk cargoes with containers, but rather to use containers as the opening wedge for a new system of intermodal transportation. The ideal of containers moving effortlessly over ships, railroads, and trucks became a reality in the United States by the last decade of the twentieth century, but in Latin America a sadly deficient internal transportation network placed formidable obstacles to the incipient plans for intermodalism”.

Therefore, reserved cargo was no longer the gold asset upon which traffic could rely and, instead, public and private shipping companies had to face the evolution of a traffic dominated by the main shipping lines of the world, such as *Maersk Sealand*, *Evergreen*, *P&O Nedlloyd* and many others organised in joint-services, alliances and consortia.

II. VENEZUELA: A CASE STUDY ON SHIPPING REFORMS

The Law for Reactivation of the National Merchant Marine and the New Aquatic Legislation

The above mentioned Andean Community *Decisions* on shipping liberalization, would be finally incorporated into domestic legislation by Venezuela with surprising speed. On 26 June 2000 the “Law for Reactivation of the National Merchant Marine” was published in the Official Gazette No. 36,980; this short piece of legislation has had significant impact on shipping business, taking into consideration that its provisions complemented the changes already introduced back in 1998 in the “Law for Navigation” as well as the “Law for the Protection and Development of the Merchant Marine”, through which 100% foreign participation in national flag vessels and the inscription in the national registry of vessels under bareboat charter or leasing were then introduced in Venezuela.

From the Law for Reactivation of the National Merchant Marine, articles 4 and 5 deserve particular attention, since temporal or definitive importation of ships are declared exempt of payment of Tax on Added Value (IVA), as well as investments in the shipping sector are entitled to a rebate on Income Tax equivalent to seventy five percent (75%) of the amount assigned to new investment for the acquisition or leasing of new ships, for a period up to three (3) years. These benefits equally apply to accessories for navigation (e.g. barges), including drilling platforms. These rules were intended to reduce the registration costs, since conservative estimates for vessel registration costs in Venezuela were in the order of 25% of the vessel value.

A relevant aspect of the Law for Reactivation which is worth to mention has to do with the content of article 8, giving rise to the complete review of the aquatic legislation by committees appointed by the Ministry of Infrastructure, in order to update it and to draft the general policies for the maritime sector. Thus, it could be said that almost overnight the out of date and obsolete maritime laws were replaced by a comprehensive set of laws; the new legal framework, enacted between September and November 2001, comprises the following: Organic Law of Aquatic Spaces, General Law on Merchant Marine, General Law on Ports, Law on Maritime Commerce, Fishing Law, Coastal Law, Law on Maritime Procedures and the adoption of the 1965 Facilitation Convention. Besides, significant improvements were introduced in respect of ship's arrest, maritime liens and mortgages, as the Andean Community adopted Decision 487 on Maritime Guarantees and Arrest of Ships, based on the 1993 International Convention on Maritime Liens and Mortgages, as well as the 1999 International Convention of Arrest of Ships.

There is no doubt that this new maritime legal framework is an important step for Venezuela, but even more significant will be to see how is it work in practice, something that is subject to the enactment of the regulations many of which still are being drafted; however, a brief review of the main laws seems to be appropriate:

The Organic Law of Aquatic Spaces (Official Gazette No. 37,330 of 22-11-01) reorganises the Maritime Administration and create the aquatic jurisdiction, setting the general principles governing the shipping and port business throughout the country. The law states that the aquatic authority will rest with the Ministry of Infrastructure through a national body named "Instituto Nacional de los Espacios Acuáticos" (INEA), based in Caracas, that will exercise its functions locally through the Port Captaincies. An important issue prescribed by this law, is the creation of the maritime courts (3 superior courts and 5 courts of first instance to be located in the main ports, such as Puerto Cabello, La Guaira, Maracaibo, etc.) that are expected to be opened before the end of the year, where proceedings will be heart according to the rules of the Law on Maritime Procedures, whose main features are oral and abbreviated proceedings.

The General Law on Merchant Marine and Related Activities (Official Gazette No. 37,321 of 9-11-01) set up rules for the administrative regime of navigation and seafarers, activities of national ships in domestic and international waters, the general principles applicable to the merchant marine, and the co-ordination of public and private sectors' involvement.. It is important to point out that for the purposes of this law (art. 17), a "ship" is deemed to be

any floating construction able to sail by water, whatever its classification and dimension might be. Consequently, in the light of the domestic legislation now the term also includes barges as well as any other accessory of navigation. On the other hand, from the administrative point of view the shipping registration process has improved, since the dual registration procedure (requiring inscription of documentation before the maritime authority as well as the public registry) was repealed by the new legislation. Thus, the Venezuelan Shipping Registry, the so-called RENAVER office, is located within the National Institute of Aquatic Spaces (Ministry of Infrastructure), with branch offices in the different port captaincies throughout the country. Venezuelan registry is fully opened to foreign investors, since a ship may be wholly owned by foreign interest, the only requirement is the incorporation of a domestic company but, once again, 100% of the shares may be wholly owned by foreigners.

The Law on Maritime Commerce (Official Gazette No. 5,551 of 9-11-01) incorporates into domestic legislation main international conventions, repealing the old maritime rules inserted in the Commercial Code. It incorporates the provisions governing aspects of private law, such as maritime jurisdiction, carriage of goods, limitation of liability, arrest of vessels, salvage, etc., based on the international conventions not yet ratified by Venezuela. A noticeable feature of the Law on Maritime Commerce is that dealing with the jurisdiction issue. In the light of article 2, the provisions of the law in question apply to national or foreign vessels and to hydroplanes that are within jurisdictional waters of the Republic. Besides, article 10 states that it pertains to the Venezuelan jurisdiction to hear without derogation whatsoever about the actions on the contracts of carriage of goods or persons that enter the Venezuelan territory; this means that a foreign jurisdiction clause inserted in a liner bill of lading will not be enforceable.

The General Law on Ports (Official Gazette No. 37,331 of 23-11-01) seeks to shape a national port system, by introducing general principles related to the Ports Regime and Infrastructure, governing public and private ports nationwide, to ensure co-ordination between central and regional governments (States) in order to consolidate a modern and efficient port system. Title IV of the law introduces provisions related to the liability regime of port operators and port administrators, based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to our particular domestic port practices, whereas others have been introduced to prescribe situations that the Convention does not deal with.

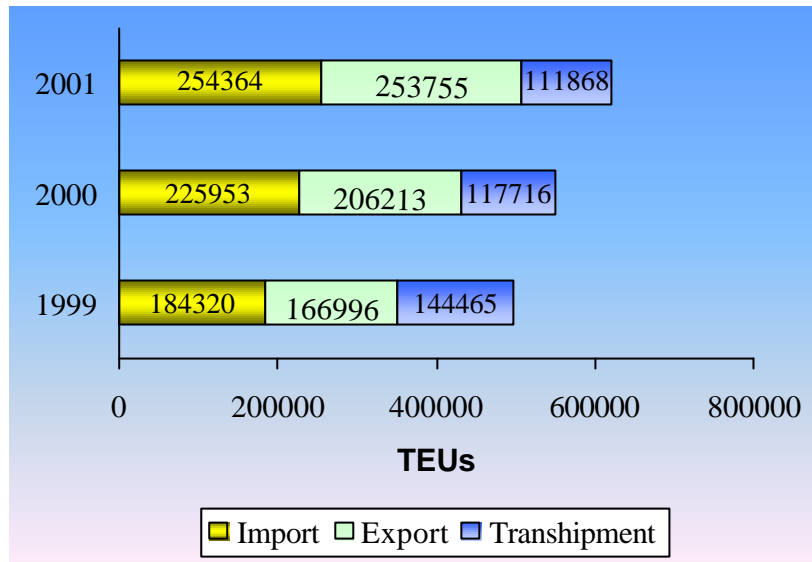
Transshipment and Cabotage under Venezuelan Law: A Brief Review

A review of the transshipment and cabotage concept under Venezuelan legislation clearly reveals the importance to have appropriate legislation for legal and business certainty, particularly, if it is borne in mind that both activities (transshipment and cabotage) are governed by sometimes non-harmonised shipping and customs laws.

For instance, by application of article 40 of the 1978 Customs Law, transshipment operations at Venezuelan ports, in connection with cargo in transit, had to be done in ships of national flags, unless an authorization or waiver from the Ministry of Finance, through the national body in charge of collecting internal revenues (SENIAT) was obtained. In practice, this meant that shipping agents should obtain the said authorisation in the capital of the republic (Caracas), and in a period of time that in many cases exceeded the necessary time for the arrival of the ship, reason for which many times the cargo in transit had to remain in port awaiting the following ship, while obtained the authorization that used to be granted for period of three to six months with indication of the vessels' names and ports of call. *Transshipment*, therefore, was not banned for foreign vessels under the provisions of the Customs Law but subject to express authorisation granted by the customs administration. *Cabotage*, on the other hand, had under such provisions a specific meaning, i.e. The traffic by sea, river and lake of national or nationalised cargo and baggage between different ports of the country, traffic that under the terms of the customs legislation had to be necessarily carried out by national flag vessels.

Taking into account that cabotage from the customs point of view was restricted to movement of national or nationalised cargo, it was generally accepted by the customs administration that an import container discharged at a Venezuelan port with final destination to another national port was a transshipment, the only requirement being to have the authorisation from the administration to carry out such movement. Similarly, an export container loaded at a Venezuelan port with destination to another domestic port in order to be transhipped to an ocean-going vessel was an activity that could be carried out by a foreign flag vessel, provided it had the proper authorisation. Based on this interpretation, foreign shipping liners were able to carry out transshipment operations in domestic ports such as Puerto Cabello which took advantage of an important additional number of boxes as port of transshipment, although it is clear that this movement started to decrease from year 2000 onwards following the enactment of the new regulations. (Figure 2)

Figure 2: Containers handled through Puerto Cabello



Source: IPAPC, Análisis Estadístico 2000 and 2001

Nevertheless, foreign liners had to face many times either changes of criteria by the customs administration or allegations by national shipping companies who claimed that transshipment operations between national ports were a cabotage operation under the terms of article 3 of the Law for the Protection and Development of the Merchant Marine, and so reserved to national flag ships no matter what was the nature of the cargo.

The practice by foreign shipping liners to request authorisation from the SENIAT to carry out transshipment operations has ceased, following enactment of the Law for Reactivation of the National Merchant Marine, since article 2 restricted cabotage and transshipment operations of nationalised and non nationalised transit cargo between domestic ports only to national flag vessels. This principle was further incorporated within the Organic Law of Aquatic Spaces (art. 121) whereby cabotage is defined as the transport of nationalised or non-nationalised cargo, national cargo and passengers between Venezuelan ports, activity restricted to national flag vessels. Consequently, in the light of this provision transshipment of imports and exports cargo between Venezuelan ports was confined to national flag vessels as it falls in the non-nationalised cargo category. Similar effect has on transshipment the content of article 15 of the Colombian Decree No. 804 of 8 May 2001 (Maritime Transport Regime of Colombia) according to which the transport of discharged import cargo or export cargo between Colombian ports is considered cabotage, and so it has to be carried out by national flag vessels.

On the other hand, a tariff incentive has been incorporated within the new legislation for domestic transportation, since vessels and cargoes engaged in cabotage activity, are entitled to a rebate of 50% in the applicable port dues, according to article 75 of the General Law on Ports. However, this incentive would appear to be worthless when cabotage is

performed by foreign flag vessels by way of exception under the terms of the legislation, due to the fact that an additional charge is imposed. Thus, the Organic Law of Aquatic Spaces assigns to the INEA (Maritime Authority) a fund (Art. 93), the so-called Fund for the Development of Aquatic Spaces, aimed to finance projects to fostering the shipping and port industry, as well as related activities such as constructions of ports, purchase of port equipment, construction and repairs of ships, training, etc. As per art. 99 the fund will receive, among others revenues, those monies arising in connection with a percentage based on the gross tonnage of national and foreign ships engaged in international traffic, and the foreign flag ships that by way of exception may be engaged in cabotage traffic (Art. 99, numeral 3). The relevant percentages to be paid are set in article 100: however, Venezuelan flag ships engage in international trade are subject to a rebate of 50% of this payment, and in all cases it is needed to obtain authorization to set sail from the Port Captaincy. It is important to point out that this is a one payment per voyage to the country, irrespective of the number of national ports the vessel is calling at.

By the time transshipment was restricted to the meaning of cabotage, the National Shipping Association and a number of foreign carriers made a petition to the National Council of the Merchant Marine, in order to obtain temporal waivers to carry out transshipment operations in foreign flag ships, particularly, for the export cargoes of frozen products that were being affected by higher freights in the feeding leg; however, it was only possible to get authorisation just to move remaining containers up to October 2000, since the National Council for the Merchant Marine argued that there was national tonnage able to perform domestic container transportation. Nevertheless, on 22 November 2000 the maritime administration (Dirección General de Transporte Acuático) issued an *Opinion* stating that foreign vessels are allowed to perform domestic empty container transportation, for logistic purposes, if boxes are owned or leased by the shipping line.

Current Status of the Merchant Marine

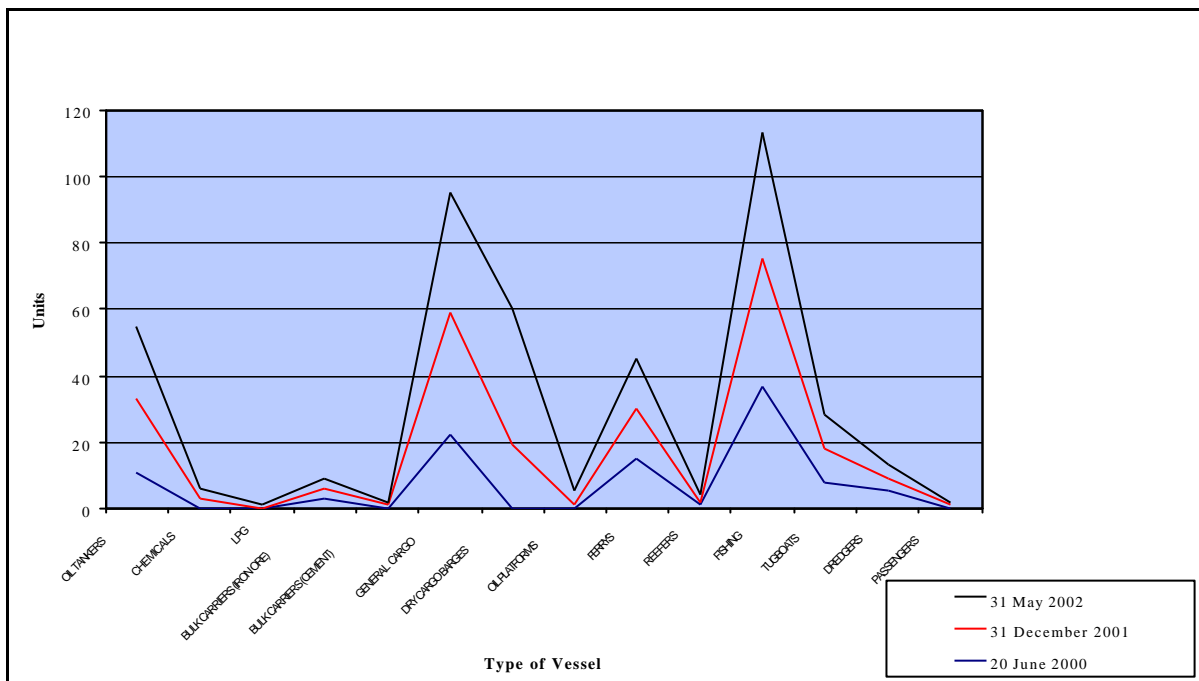
Undoubtedly the Law for Reactivation of the National Merchant Marine was of paramount importance to the Venezuelan maritime sector; however, it would be *naive* to think that this legal instrument alone would ensure the development of a national fleet in the short term. It is by all means a good first step since it has been able to gather all the players within the maritime activity, realising the importance of the topic, and moving all in one direction, i.e. the need to develop the merchant marine. But it is not enough!

Despite the amendments to the Law for Navigation and the Law for the Protection and Development of the Merchant Marine made back in 1998, intended to open the national flag to foreign investors, this by lifting foreign participation restrictions, allowing the flagging of bareboat chartered vessels and those under leasing agreements and exonerating the payment of VAT and other taxes, between 1998 and 2000 the national flag registry did not growth at all. In practice, the VAT exoneration prescribed by article 152 of the Law for Navigation in the event of inscription in the national flag registry was useless, being the reason that for the drafting of this amendment the SENIAT (Customs Authority) opinion

was not taken into account by the law drafters, bringing as a result that the customs procedures operated against the registry of vessels. Even in the case of the Law for Reactivation of the National Merchant Marine (2000), although the taxation incentives were duly discussed with the SENIAT customs treatment for foreign vessels coming to the Venezuelan flag are cumbersome indeed.

It is true that following enactment of the new aquatic legislation the Venezuelan tonnage has growth; however, it could be argued that not to acceptable levels, taking into account the current incentives put into place. (Figure 3) Perhaps the mistake for the policy makers was not to understand that the Law for Reactivation needed to be accompanied by others elements, namely a set of clear policies by the government, the pursue of specific objectives as well as the updating of related legislation, particularly, the employment law, clear rules to access important cargoes such as steel and oil and, above all, political stability.

Figure 3: Growth of Venezuelan Fleet



Source: INEA, Department of Statistics

It is important to stress the negative effect that the restriction imposed to foreign shipping liners to carry out transshipment operations has had on some Venezuelan ports, e.g. Puerto Cabello, whose boxes shifted to Curazao and Cartagena due to the impossibility to get connection services as well as reasonable freights in the cabotage services. It was clear that the policy makers made a mistake thinking that by giving to the feeding services the same treatment than to cabotage, foreign shipping liners would be forced to use national flag vessels; instead, foreign shipping liners changed to more convenient ports of transshipment overseas.

III. CABOTAGE: THE REBIRTH OF THE MERCHANT MARINE?

CAATA Resolutions and other Proposals on Cabotage

On 5 April 1989, the CAATA adopted the Resolution N° I-04 on Andean Cabotage, recommending that the Andean cabotage of cargo transported by shipping companies that do not belong to Andean countries be carried by ships duly registered under Andean flags and duly authorized to perform that subregional transportation, pursuant to the national legislation in force. During the 54 Period of Extraordinary Meetings of the Commission of the Cartagena Agreement, held on 1 May 1989 the delegates, taking into account the high volumes of intra subregional trade that was being carried by sea and the resolutions adopted by the Ministries of Transport, Communications and Public Works, as well as the Authorities of Aquatic Transportation, recommended the development of an Andean cabotage transportation system, to benefit those countries within the Subregion, a system that at the same time would include preferential treatment of national character to those ships and shipowners of Member Countries. Consequently, a substantial and concrete improvement would be achieved in reducing freight costs for the subregional trade, as well as the improvements in frequencies and operations of ships.

The topic of cabotage would be dealt with by the CAATA a year later when the Resolution N° II-14 was adopted. It was then considered that the Andean cabotage of cargo was one of the means of physical integration for the countries within the Subregion, for which reason the CAATA approved the draft of the Decision on Andean Cabotage of Cargo (JUN/Propuesta 214), requesting its formal approval by the Commission of the Cartagena Agreement.

The proposal of Decision on Andean Cabotage of Cargo introduced the concept of *Andean Shipowner*, i.e. A shipowner from any of the Member Countries which is incorporated according to the regulations of the Andean Multinational Companies (Empresa Multinacionales Andinas). The Decision defines *Andean Cabotage of Cargo* as the carriage by sea which takes place between ports belonging to different Member Countries, to differentiate this from the *National Cabotage*, i.e. the carriage by water which takes place between ports of the same Member Country, according to its respective legislation. Article 2 of the drafted Decision stated that “it would apply to carriage by sea of general cargo, performed by shipowners of Member Countries and Andean shipowners, between different ports of the Member Countries”, ratifying the right for any of the Member Countries to regulate the National Cabotage as well as the carriage of goods by sea to and from third countries. Article 4, on the other hand, stated that the ships owned by the shipowners of the Member Countries and Andean shipowners, nominated by the respective Authorities of Aquatic Transport to serve the Andean Cabotage of cargo, will have the same rights and treatment of nationals in the Member Countries. The Decision in order to guarantee a fair participation of the Member Countries, prescribed the subscription of agreements for the operations, joint services and slot chartering, in those cases where there was no suitable ships or the cargo volume does not allow the use of the nominated ships of the Member Countries. (Article 6) Moreover, for the *Andean Cabotage* shipowners of the Member Countries as well as Andean shipowners would use owned ships of national flags

duly nominated by the governmental authorities, but also chartered ships for which it would have preference those ships owned by shipowners of the Member Countries and Andean shipowners. (Article 8)

The Decision dealt with the possibility to extent the regime of *Andean Cabotage of Cargo* to other Latinamerican countries, under reciprocity basis this for recommendation of the CAATA, requiring also that the nominated ships and the cargo moving between ports of the Subregion would be subject to the same tariffs regime applicable to the *National Cabotage*. (Article 10) Freight levels would be freely discussed by the Member Country shipowners and Andean shipowners and approved by the respective national authorities, all these decisions duly notified to the CAATA, the body in charge to regulate, evaluate and monitor the efficiency of the Andean Cabotage of Cargo. (Articles 11 and 15)

Unfortunately, Resolution II-14 was annulled by the Resolution N° IRE-21. The decision was taken based on the argument by the CAATA at the I Extraordinary Meeting of September 1990, in the sense that elimination of cargo preference in intra subregional cabotage was needed. Therefore, the Commission of the Cartagena Agreement was notified about this new resolution in order to stop any further consideration on the proposed draft on Andean cabotage previously submitted for its consideration.

The attempt to set up an Andean legal framework on cabotage was definitely swept away when the CAATA adopted the Resolution N° III-25, this on April 1991, whereby it is decided that taking into consideration the CAATA Resolution IRE-21 on elimination of cargo preference in the sea transportation within the Subregion, both for ships owned by the Member Countries as well as third countries, then cabotage should be set aside, particularly if it is borne in mind that Decision 288 on freedom of access to cargo had been adopted one month before. Consequently, Resolutions I-04 (Andean Cabotage of Cargo) and I-08 (Establishment of Freights and Rationalisation of Subregional Aquatic Transportation Services) were repealed in a move that does not seem logical if considered that cabotage could have been regarded as an important niche to promote the merchant marine of the Subregion, taking into account that cargo originated in and intended for carriage by sea within the CAN —provided other measures such as financing and flexible employment rules were also implemented— could well be the cornerstone for that development.

IV. CONCLUSIONS AND RECOMMENDATIONS

A decade later since the liberalization of shipping activities was proclaimed by the Andean Community, the Member Countries have reviewed their respective legislations to incorporate measures seeking to set aside barriers that may affect international trade, among them, elimination of cargo preference and foreign participation restrictions in shipping activities, as well as implementation of flexible shipping registration rules, including the possibility to flag in vessels under bareboat charters. Surprisingly, the Andean tonnage has not increased in proportion to the implemented measures. Why is it? An explanation is attempt by De La Pedraja (2000) who suggests that the major Latin

American shipping companies disappeared under the pressure from containers in the last two decades, since the new technology shifted the competition to *capital*, the weakest point of Latin American companies. The lack of understanding of this reality by governmental leaders and the failure to implement complementary measures, in particular, financing programs for the modernisation of the fleet led to the forces of free market the modelling of Andean merchant marines without a coherent set of goals, but above all without capital resources to face the huge players (*Maersk Sealand, Evergreen, P&O Nedlloyd, Hamburg Sud, etc.*) dominating the containerised traffic of international trade.

Conversely, the situation appears to be rather different in the cabotage field, where Member Countries of the Andean Community could take advantage of it in order to shape a modest fleet, at least, in an early stage.

Extensive literature has been written to support the advantages of shipping over land transportation. Hoffmann (2001) argues that there are two main reasons for promoting shipping over road transport option in regional transport and cabotage, namely: The negative externalities of congestion, pollution and deterioration of highways associated with road transport that could be reduced if road transport is shifted to shipping, and the availability of cheaper freight rates in shipping than those found in land or air transportation. This author claims for the liberalization of regional transport and cabotage to foster competitiveness in foreign trade and domestic transport, and enhance the economic integration of the countries in Latin America and the Caribbean. From this perspective, international liner shipping services would be allowed to move cabotage cargo when calling at more than one national port, whereas feeder services would be part of international trade, rather than considering it equivalent to cabotage, resulting all this in lower freight rates, better use of spare capacity, more frequent services, less need for waivers, greater competition in the market and greater volumes of sea-borne cargo. The New Zealand experience seems to confirm the former, since amendments in 1994 to cabotage regulations allowing foreign ships to compete for domestic cargo provided they were shipping imports or exports, brought positive results such as reduction in transit time and cost, as well as improvements in efficiency and service. (Cleghorn, 2001)

However, total liberalization of cabotage and regional maritime transport seems not be an option for particular markets. For instance, it has been said that in Central America the volume of passing traffic is not so great and the total potential cargo pool for regional coastal movements is itself limited, so that complete liberalization would probably provide a somewhat sporadic service that may affect the establishment of a true shipping regional services. (COCATRAM/POC/DRI-WEFA, 2001)

There clearly appears to exist elements to justify the implementation of an Andean Cabotage policy, although further research needs to be done. The intra-community commercial flows show some potential cargo to fostering a fleet able to provide maritime transport services; among this cargo, the movement of containerised plastic resins and steel products exported by Venezuela to the CAN and the soy exported by Bolivia to Ecuador and Venezuela may well be mentioned. It could be also said that the implementation of an Andean cabotage policy would be in line with the provisions of Decision 439 dealing with

the General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community, whose liberalised services should be in place within the Subregion by year 2005. According to this Decision (Article 14) the Commission of the Andean Community would adopt through another Decision an inventory of the measures maintained by each Member Country that are contrary to the principles of liberalization of services. That inventory was listed through Decision 510 (2001) within which maritime services, including cabotage, are now included. In other words, by year 2005 Member Countries should have eliminated measures contrary to the cabotage as they will be a barrier to the liberalization of transport services; this means that an Andean Cabotage policy would set the principles to comply with the communitarian decision referred to.

Therefore, the author fully endorses Hoffmann's views (2001a/2001b), and in order to advance in this further research, the following recommendations would appear to be appropriate:

- ✍✍ The Andean Community, through the CAATA must carry out an up to date analysis of commercial flows within the Subregion, so as to be able to identify potential cargoes for cabotage services, specially those that at the moment are moved by land transportation and could be diverted to sea transportation.
- ✍✍ The Andean Community should again consider the *Decision on Andean Cabotage of Cargo*, in order to update it in the light of new experiences such as that of the European Union (Regulation No. 4055/86 and 3577/92) where all international trade, i.e. trade between Member States and third countries, including trade between two Member States, is open to free international competition, and cabotage is open to all shipping companies of member States, with few restrictions. Nevertheless, for the Andean countries it would appear advisable to set a chronogram before cabotage is open to international competition.
- ✍✍ The Decision should differentiate the feeder operations from those related to cabotage, allowing that cargo that may have its origin or final destination in a foreign country completes the voyage by using a foreign flag vessel through transshipment in a particular port. Otherwise, the compulsory requirement to complete the feeder leg by using a national flag vessel, will work to the detriment of domestic ports that may see this potential transshipment cargo to shift onto another transshipment centres in neighbouring countries.
- ✍✍ Harmonization between maritime, port and customs legislation is needed to guarantee the free movement of cargo by sea, including the effective application of tariff incentives.
- ✍✍ Implementation of a financing programme for the modernization of the fleet, especially the acquisition of new vessels should be carefully considered by the Andean Community, to back cabotage services within the Subregion.

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