

Protectionism and Maritime Policy in Latin America Countries

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라틴 아메리카의 해운정책 개관

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국문요약

라틴 아메리카의 상황을 세부적으로 분석하기에 앞서 해운산업의 보호주의에 관련된 주요 개념들을 가지고 개요를 말하는 것은 유용하며, 이것은 필수적인 것이다.

국가선단들의 발전에 관계하여 대부분의 국가 입법들의 분석은 우리에게 국가 개입의 약간의 정도를 보여 줄 것이다. 그 같은 개입의 성질과 정도는 우리가 보호주의자에 혹은 자유법에 직면하고 있는지를 결정하기 위해 고려하고 평가해야할 요소들이다.

반면에, 우리가 보게 되듯이, 우리가 상선에 관계된 보호주의가 법을 발견해야만 할지라도 이것이 우리가 닫힌 경제에 직면하고 있다는 것을 필연적으로 의미하는 것은 아니다. 이 보고서에서의 사건들은 상선에 관계하고 보호주의가 입법을 여전히 건설하는 개방경제의 모범에 들이 되는 세계와 미국에서의 사건들이다.

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I . Introduction

Prior to the particular analysis of the situation in Latin America, it seems useful to present a summary with the main concepts involved in protectionism in the shipping business. This seems necessary, because the analysis of most national legislations regarding the development of national fleets will show us some degree of State intervention. The nature and degree of such intervention are the elements to consider and assess in order to determine whether we are facing a protectionist or a liberal law.

On the other hand, as we will see, should we find a protectionist law regarding merchant marine, this does not necessarily mean that we are facing a close economy: Cases are in the World -the United States being a paradigmatic example- of open economies which still house a protectionist legislation regarding merchant marine.

II . Some Mechanisms already used to Protect Merchant Shipping Industries - Flag Preference

1. General

It has been described as a "State shipping policy that discriminates between different flags in giving cargo by preferring or giving priority to the domestic flag in giving cargoes and/or granting privileges".

The expression "Flag preference", however, is a generic denomination for quite a number of specific discriminatory practises. For the purposes of this research paper, we will follow the scheme proposed by ODEKE making no question on its validity. Hence, we can distinguish the following categories and sub-categories:

- 1.-Cargo reservation
 - a.- Cargo sharing
 - b.- Cargo preference
 - c.- Cargo reservation
- 2.- Exclusions and Trade Arrangements
 - a.- Cabotage restrictions
 - b.- Bilateralism and Multilateralism
- 3.- State-financed cargoes
 - a.- Foreign aid cargoes
 - b.- Agricultural relief cargoes
 - c.- State-financed cargoes

- 4.- Miscellaneous flag preferences
 - a.- Foreign-parity flag preference
 - b.- Inland-parity flag preference
 - c.- Miscellaneous flag preference

We will summarily review each of these forms of flag preference, only to provide the general framework for what is the central part of our research: A study on the Latin American situation regarding flag discrimination, and especially Chilean and Korean Laws regarding National Merchant Marine.

2. Cargo reservation

(1) Cargo sharing

Cargo sharing was the original idea at the inception of restrictive shipping policies and although it has derived into a distinct practice, it is still often confused with flag discrimination practises.

The distinctive elements of cargo sharing are:

Firstly, it is not intended to be discriminatory, and secondly, it may only be preferential in the sense that the State "A" may prefer, for whichever reasons there might be, to share her cargoes with flags of State "B" rather than those of State "C". Thirdly, Cargo sharing may contain an element of cargo reservation, but only insofar as it applies to that State's portion of a given cargo. I.e.: A certain State could reserve -let us say- 50% of the cargo for her own national flag, and still participate the remaining 50% with other countries.

The principles behind cargo sharing may involve a number of parties, and a variety of other different proportions, such as the proposed by the UN Code of Conduct for liner Conferences, on a 40-40-20 basis.

(2) Cargo preference

Cargo preference is very often confused with cargo sharing, for the differences between them, on a practical level, seem almost "cosmetic". However, from a theoretical point of view, these systems are based upon different principles: While both of them involve a State intervention in the maritime system, cargo preference seeks to reserve a portion of the volume of cargo flowing between the trading partners, with the object of directly favouring certain shipowners, usually adopting the flag as a selective criterion. The principle underlying cargo preference is that the cargo is to be allocated not according to a market selection, but instead, according to a State decision, which is to prefer national carriers before "ordinary carriers".

Another forms of Cargo Preference is to award high-freight ("expensive") cargo to national

carriers and bulky low-freight cargo to other carriers.

(3) Cargo reservation

Cargo reservation is a form of Flag Discrimination, within the subdivision of Flag Preference.

The reasons behind Cargo Reservation are those common to all the other protectionist methods: To ensure the establishment and development of national merchant marine fleets.

Cargo reservation could be defined -or, better, explained- in the following terms:

Cargo reservation is a form of State intervention by means of which the State reserves a certain portion of the export/import cargo for vessels flying the national flag, regardless of economic of other considerations.

Both cargo preference and cargo reservation may take the form of percentages, fractions, freights or tonnage of cargoes.

3. Exclusions and Trade Arrangements

This form of protection consists of excluding either all foreign vessels from a certain area (Cabotage restrictions), while the other two result from specific trade agreements either with one country (Bilateralism) or a group of them (Multilateralism)

(1) Cabotage restrictions

Cabotage restrictions apply to coastal navigation, between the ports thereof.

Cabotage restrictions are discriminatory in the sense that they exclude foreign flag vessels from coastal trade as a means to protect national carriers. In this sense, Cabotage restrictions are a form of Flag Preference, which effects go as far as Flag Discrimination.

Cabotage could somewhat be compared with cargo reservation, however, in this case, the reservation is 100% of the cargo.

(2) Bilateralism and Multilateralism

The term is generally used to refer to trade agreements between two or more countries.

It has been pointed out by Dr. ODEKE that"(...) one of the disadvantages of bilateralism is that it tends to be reduced at the level at which the value of goods moving in one direction exactly equals the value of goods moving in the other direction".

Bilateralism seems to have been widely accepted during the 70's and the 80's, but now is considered an "old-fashioned" practice, with very few countries in the world still adhering to it: Moreover, Brazilian bilateral agreements with Chile and Argentina should be considered an anachronism, for these kind of practice has progressively disappeared from world trade practice: The European Union explicitly prohibits its Member Countries from entering into such

agreements, which are considered nothing more than a "reminiscent" from the times of general cargo reservation.

Multilateralism, on the other hand, has been found to be a much more adjustable form of protection: In recent years, it has adopted the form of Regional Agreements, together with other forms of economic or commercial integration.

In theory, it is supposed to be the means of extracting the maximum gains out of international trade and the division of labour.

One of the oldest attempts for Multilateralism was the British Commonwealth Merchant Shipping Agreement, of 1931, while in recent times, the European Union has already developed such a policy, by establishing a regime that allows all shipping lines flagged and operated from a member State to provide cabotage services within any other member State. This allows European carriers to combine two or more cabotage services with international routes, using the same vessels, thus having an advantage over the non-union competitors.

Similar agreements, with all their benefits, could be reached in regional markets such as ASEAN, NAFTA or MERCOSUR.

4. State-financed cargoes

(1) Foreign aid cargoes

This form of protection to merchant shipping fleets is based on the "right" of an international-aid-donor Country to embark that aid cargo in its own national vessels.

While this marine clauses had been usually included in trade agreements, in 1954 the OEEC Maritime Transport Committee noted that preferential shipping regulations applicable to foreign-aid cargoes had been applied also to the carriage of cargo financed by US private banks against US Government guarantee. This case was considered to be an unjustifiable extension of the US "Public Resolution N. 17", which enacted such benefits for US merchant marine lines.

A relevant detail of this Resolution is that it applies either if cargo has been produced in the US or abroad, which allows US flagged vessels into a wider market in addition to guaranteeing the domestic market.

(2) Agricultural relief cargoes

This is just a specific form of Foreign aid cargoes flag preference. It is too a creation of the United States.

The Law (Public Law N. 17) states that "(...) the exports of agricultural products fostered by government loans are to be carried exclusively in vessels of US registry unless it is determined by MARAD that such vessels are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedules, or at reasonable rates".

The situation boosted during the early 50's, when the agricultural surplus in the US built up to alarming proportions. The US Government decided to promote the export of such produce, and -at the same time- the use of its national merchant marine lines. Such export was effected through international aid programmes, relief packages, etc., according to the idea of "We give you the food, but on our plates".

(3) State-financed cargoes

This category is in many ways similar to the aforementioned, in the sense that they involve the obligation to use the cargo provider's State's vessels. That is why this kind of cargo has been called "Aid with strings". Again, here one of the main promoters of such regime is the United States. The operative legislation is "Public Law N. 17", which stipulates that "(...) shipments financed by the Export-Import Bank of Washington will include in their credit agreements a requirement that cargo shipments be made in US flag vessels (...)"

5. Miscellaneous flag preferences

(1) Foreign-parity flag preference

In international trade terminology this is also known as the "Most Favoured Nation Clause".

In a way, it is related to Bilateralism and Multilateralism, and is used in international trade agreements in which tariff privileges accorded by a country to any other countries are automatically extended to any all other countries with which it has treaties, awarding Most Favoured Nation or national treatment.

Under this scheme, the two countries receive in principle an assurance of treatment in tariffs at least as good as the one enjoyed by any other country and a safeguard against tariff discrimination and flag preference.

This, however, only applies when the unconditional Most Favoured Nation treatment applies, which automatically extends the benefits of tariff and maritime concessions to all the countries enjoying foreign parity.

It must be remembered, however, that this criterion has weakened ever since the Second World War, by the use of conditional forms of Most favoured Nation Clauses and the growth of quotas.

(2) Inland-parity flag preference

Inland-parity, also known as "National treatment" or "Reciprocity" means that the parties agree to grant each other's nationals the same treatment they accord their own nationals.

This has been the standard predominantly applied to shipping during all the Modern Era, and has been the basis for bilateral and multilateral agreement systems, and has been widely

accepted that this is the most equitable standard for shipping.

In order to extend the applicability of Inland-parity, attempts have been made to add an agreement clause providing that no State could claim inland parity in order to receive rights which reach farther than those granted to its own nationals.

(3) Flag Discrimination

Flag discrimination is a further development of flag preference practise. It is less liberal and more protectionist, and can be defined as: "A measure employed by a State which interferes with international maritime transport and provides less favourable treatment for other flags than it does for the national flag".

Flag discrimination may present several forms, some of which are very evident forms of discrimination, some others which are more sophisticated, but in the end, all of them are forms of discrimination against foreign-flagged vessels.

A short revision of the most common forms of flag discrimination will save us further comments:

1) Discriminatory fees and port discrimination

Is probably one of the most unpopular forms of discrimination, for it is one of the most clearly unfair. It consists of discriminatory fees or surcharges for berthing.

Port discrimination is an unequal treatment to foreign vessels which consists in deliberate delay in the loading/unloading operations, thus making the foreign operator to incur in demurrage costs.

2) Scheduled cargoes

In this case, flag discrimination implies that the country's national carrier is to transport most or all of the import/export cargoes generated by that country's international trade.

This form of discrimination is based upon the belief that such cargoes, if directed to the home carrier, would alone manage to sustain an economically viable national fleet.

3) Essential trade routes discrimination

Here we find a restriction to foreign vessels based -again- on non-economic reasons: The "Essential trade routes" appeal either to strategic-military reasons or to the adequate supply for isolated provinces of the country.

4) CIF, FOB and other discriminations

Here -again- we find a preference for national carriers in those CIF cargoes, so that they can benefit from the already-paid-for freight, while foreign carriers are left with FOB shipments.

In a CIF shipment it is the shipper (consignor) who decides both upon the carrier and the

insurer for the cargo, and if there is flag discrimination, the only choice will be his national carrier. This means a loss for the consignee's national carriers, that will not be able to transport this merchandise.

The opposite figure occurs with FOB shipments.

Countries which employ flag discrimination policies have taken advantage of this purely commercial circumstance to their own benefit in the way depicted above.

III. Analysis on the Chilean Law as to Maritime Policy

Since the 19th Century, Chilean Governments have paid special attention to Merchant Marine, until today, with the new Law to promote the National Merchant Marine.

The legal sources regulating this matter are, mainly, the "Ley de Marina Mercante", which was enforced through the Decree-Law 3059 of 1979 and its modifications.

If we bear in mind that Chile is not really a Shipping Nation, but instead aligns rather on the side of the cargo, it is understandable that there would be some concern to create an adequate merchant marine.

Article 1 of the "Ley de Marina Mercante" has a declaration which reads:

"The permanent shipping policy of Chile is to support the development and growth of its merchant marine, as well as the general interests of our Nation. With that purpose, the Government will support Chilean shipping companies to access the international markets in order for them to effectively transport a significant proportion of the inbound-outbound cargo".

As for as the Chilean Shipping Law is concerned, a shipping company will be considered to be "Chilean" if she meets the following requirements:

- a.- That either the natural or juristic person acting as such company may gather the conditions required to register a vessel in Chile, according to article 11 of the Chilean Law of Navigation, and
- b.- Must dedicate itself to the shipping business, and be owner or charterer of vessels duly registered in Chile and manned with Chilean crewmen.

According to the classification of protectionist practises in the first part of this paper, we may see that Chilean Law contains the following elements:

The cabotage transport is reserved for national flagged vessels, and foreign flagged vessels may only participate in it subject to the conditions in article 3 of the Law, which considers mostly the tonnage to be carried, and makes a different provision if the tonnage is over or under 900 metric tons.

Should the cargo be larger than 900 metric tons, the shipper should call a public bid in which

foreign companies are allowed to participate.

Chilean shipping lines may appeal from such adjudication to the Maritime Authority, and the Authority has a 30-day term to determine whether the bid and the adjudication has been lawful or not.

As for cargoes smaller than 900 metric tons, they can be transported by foreign carriers as long as there is no availability of Chilean vessels. The availability of Chilean vessels will be determined by the Maritime Authority according to the relevant rules.

Nevertheless, the Law allows the Authority to ban certain vessels from cabotage subject to certain conditions, such as reciprocity to countries that ban Chilean vessels.

As for foreign trade, the Chilean Law does not adhere to the protectionist scheme provided for cabotage, but instead, makes the provisions for a competitive system based on efficiency and reciprocity criteria.

Thus, article 4 of the Law provides that the access proportion of foreign vessels to Chilean cargo inbound or outbound will depend directly on the access granted by those nations to Chilean vessels.

A practical consequence of this is that the Law reserves 50% of the cargo to national shipping companies only in those cases where the counterpart country reserves its cargo to their national fleet, in whole or in part.

The rules in this Law also apply in the case of agreements between shipping companies. This point seems very interesting, since this is the way most traffics are organised nowadays.

To that effect, the companies members to such agreements must compensate equivalent cargoes in their home countries for the corresponding traffic.

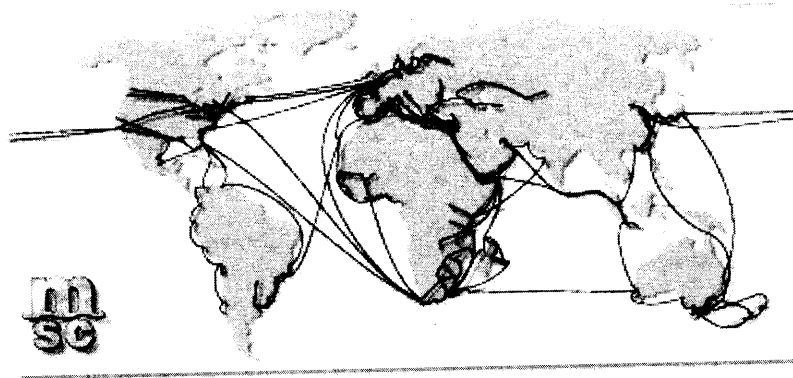
Finally, the terms of such agreements must be registered in the Chilean Ministry of Transport.

IV. Actual Situation in Latin America

1. General

Carriers have followed the process of globalisation by offering global networks of liner shipping services. Mainly through mergers and alliances, today, the majority of the top 20 shipping companies is in a position to offer regular services from and to almost any region in the world. Up to a decade ago, even the biggest liner shipping companies had some specialization concerning their main routes. There still exists a need to cooperate with some regional carriers (see example below, where Mediterranean Shipping Company MSC itself does not cover the Caribbean islands or Southern Chile and the Patagonia).

(Picture-1) Example of a global shipping network



It is important to note that in many countries, international shipping lines call in more than just one national port.

Between these national ports, it is often not possible for carriers without a national flag to transport domestic cargo because of cargo reservation for "cabotage" services. The following illustrations show examples of such international routes that call at several national Latin American ports.

(Picture-2)¹⁾

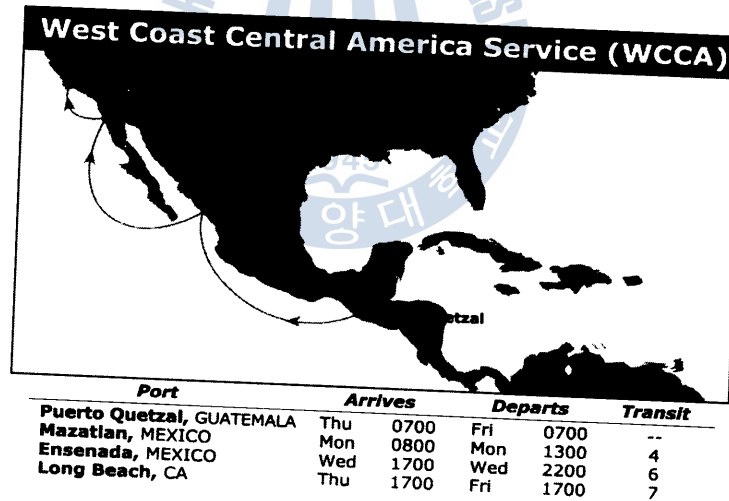


1) Lykes lines calls at three Chilean ports, but is not allowed to take cargo, for example, from Iquique to San Antonio.

(Picture-3)²⁾

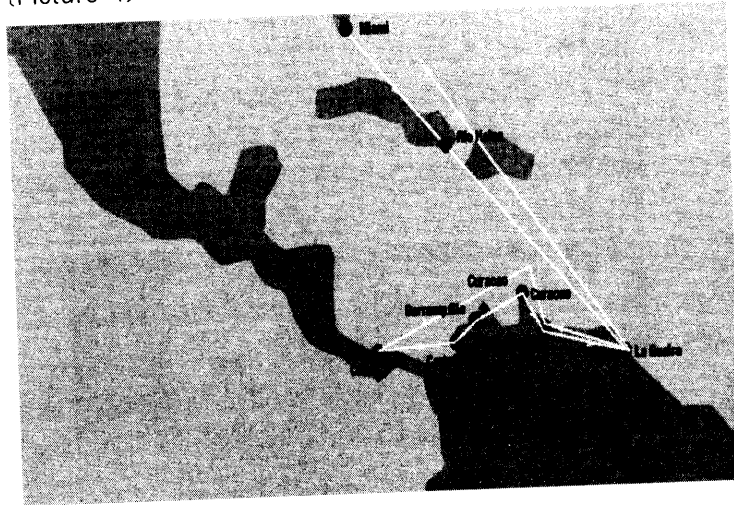


(Picture-4)³⁾



- 2) American President Lines APL, on its MERCOSUR service, calls at six Brazilian ports, but is not allowed to use any potential spare capacity to move cargo from Rio Grande to Fortaleza.
- 3) Maersk-Sealand vessels go from Mazatlan to Ensenada in Mexico, but need to pay for a special waiver if they want to move containers on that route.

(Picture-4)⁴⁾



Probably the best known - and one of the most restrictive - cabotage cargo reservation regimes is the Jones Act in the United States, which restricts intra-US maritime transport to ships that are US-built, manned, and flagged. Most Latin American countries insist on the national flag, allowing sometimes foreign-owned bare boat charters (e.g. Venezuela), or the extensive use of waivers (e.g. Argentina, Mexico).

2. Differences between global shipping and national shipping

From a strictly economic point of view, there is no difference between global and national shipping. None of the above sample illustrations contains national borders, and economically it is simply inefficient to prohibit the use of existing capacity on the national portions of liner shipping companies' international routes. Whereas production processes are increasingly being integrated globally, existing limitations on the integration of cabotage and international shipping services directly lead to an increase in transport costs, fewer options for the shippers, and a loss of economic competitiveness.

3. Competitiveness with land transport

The negative externalities of moving cargo by truck, such as contamination, congestion, noise, and accidents, are far bigger than those of maritime transportation. Nevertheless, when concessioning toll roads, bridges or tunnels, very often the concessionaire is obliged to maintain a previously determined fixed relation between the toll for light vehicles and heavy trucks. For

4) Evergreen offers its own feeder service along the South American Caribbean coast, but is not allowed to move cargo between La Guaira and Puerto Cabello.

example, in the case of Chile, the average toll for heavy trucks only covers half of the costs of deterioration the truck is causing to the road

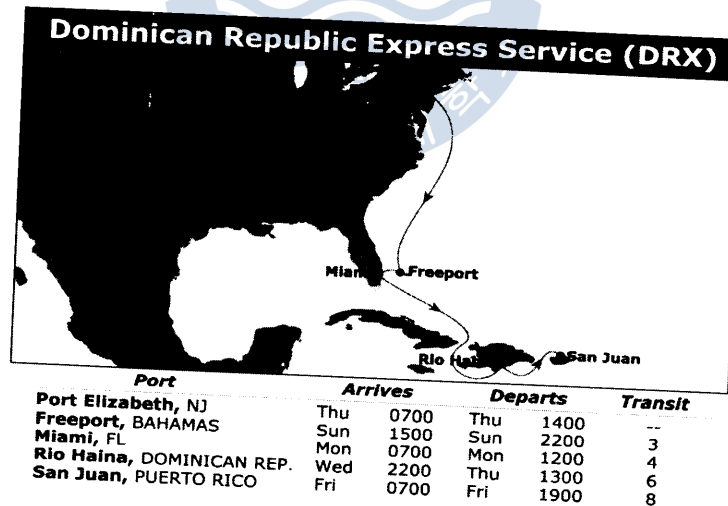
4. Facilitation

Controls, inspections, and paperwork requirements for many international transactions are often in excess of real needs. For cabotage cargo, many of these bureaucratic and administrative hurdles are even less necessary, and a first step for many countries wishing to promote coastal national shipping should be to reduce such requisites for domestic cargo. Even within the same economic block, such as NAFTA, CAN, or MERCOSUR, such requisites could and should be reduced.

5. Feeder services

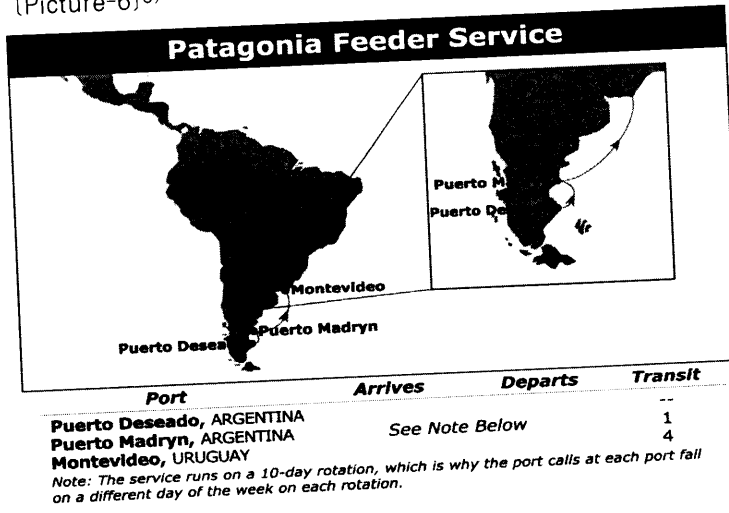
In many countries, feeder services are still considered as cabotage, and, even though the cargo may have its origin or final destination in a foreign country, the feeder leg needs to be undertaken by a national flagged vessel. The ports that benefit from this restriction are transshipment centres in neighbouring countries, as the following two service routes illustrate.

(Picture-5)⁵⁾



5) Maersk-Sealand does some of its US feeder services via Freeport in Bahamas and via the CSX terminal in Rio Haina, thus avoiding restrictions of the US Jones Act.

(Picture-6)⁶⁾



6) Maersk-Sealand tranships cargo from Southern Argentina in Montevideo, this avoiding the obligation to use Argentinean flagged vessels for cabotage transport, which would have been necessary if Buenos Aires had been chosen as transshipment port.