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FACILITATION OF TRANSPORT AND TRADE IN LATIN AMERICA AND THE CARIBBEAN

# Transport facilitation from the perspective of the Rotterdam Rules

## Introduction

Transport and logistics play a pivotal role in the competitiveness of globalized economies. According to official figures, transport and logistics services in Latin America and the Caribbean generate approximately 10% of GDP and account for the direct creation of between 5% and 9% of all jobs. Despite its importance, in Latin America public policies and corporate business plans often fail to place logistics at the centre of national and corporate competitiveness policy.

Latin America's relative lag in developing competitive transport and logistics infrastructure and services is exacerbated by persistent traditional facilitation problems (both trade and transport facilitation). These problems are responsible for significant cost overruns, measured both in terms of time and money, which significantly hinder the competitiveness of exports and increase the prices domestic consumers must pay for products. Therefore, it is essential that institutional barriers that significantly impair facilitation of domestic logistical chains and hinder future regional development be quickly identified and removed.

## I. Transport facilitation

Transport facilitation seeks to reduce the time and cost of logistics (which include transport, of course) involved in moving cargo and persons within a territory, in order to increase the competitiveness and productive of the economy, while being attentive to the social and environmental aspects involved. Defined this way, the scope of transport facilitation encompasses physical, monetary and documentary flows, both locally and internationally. Transport facilitation is often complicated by a lack of long-term vision among the many actors involved in these chains and by the lack of active and ongoing engagement by institutional

*This document takes a look at the important role transport facilitation plays in regional development and considers the implications of adopting the Rotterdam Rules for the transport sector. It also provides a summary of the background and findings of a seminar, which was organized jointly by the Andrés Bello University's College of Maritime Interests and the Infrastructure Services Unit of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), to analyse the specific case for Chile. The authors of this bulletin are: María Angélica Uribe, Paul Maxwell, Maricel Ulloa and Gabriel Pérez Salas. For more information, please contact [gabriel.perez@cepal.org](mailto:gabriel.perez@cepal.org).*



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and private actors. The main obstacles that stand in the way of effective, shared and participative coordination in this area can be grouped into the following factors:

- The myriad government agencies, laws and regulations that cover different action areas and have differing aims, often at cross-purposes with each other and defined exclusively to meet the exigencies of a single entity, make it difficult to integrate administrative procedures and to add value to logistics chains. The introduction of logistics or multimodal transport operators requires new types of rules and procedures that include and make explicit the responsibilities of each actor in the logistics chain (internationally and locally). To this end, the establishment of a vision that is coordinated throughout the Government and enjoys the consensus of the private sector because of its effect on the competitiveness and productivity of the economy would resolve existing asymmetries in how legislation and taxation are treated among transport modes and users, thus improving national competitiveness.
- The traditional lack of investment in physical infrastructure, which would strengthen the connectivity of domestic and regional transport networks, restricts the real supply of thoroughfares that can provide reliable services at internationally competitive costs. It is also observed that new investments made by the State, either directly or indirectly (as is the case with outsourcing to the private sector), have often performed below expectations in terms of improving connectivity and boosting sub-national economies. One of the reasons for this is that the planning of these infrastructures has failed to integrate transport and logistics services that utilize them.
- Regional regulatory and transport operations issues also are factors that influence transport facilitation. The fact that regional infrastructure lacks harmonization in matters such as size and weight per axle, bridge dimensions, rail gauges or depths of ports along a single route make it difficult to develop economies of scale at the regional level. Furthermore, the difficulties involved in implementing regional regulations that would effectively organize and harmonize the operational aspects of transport (maximum age of the fleet, civil liability, driver training, vehicle operation requirements, etc.) hinder multimodal integration and stymie growth in interregional trade.
- Additionally, long-standing transport and trade facilitation problems persist in the region. Problems

at border crossings or along multinational waterways and the extensive array of dissimilar control forms and procedures significantly delay border entries. Furthermore, lack of awareness of current agreements or unclear specifications create bureaucratic snags that may even be discriminatory towards some transporters, hampering and artificially inflating transport costs.

In order to move forward with these improvements in Latin America, the Infrastructure Services Unit has written a series of papers on the implementation of integrated policies<sup>1</sup> for infrastructure, transport and logistics. These papers address complex and “multi-ministerial” problems, such as transport facilitation, regarding which the following policy recommendations arise:

### 1. Policy recommendations:

- Attain political will and **Government support** at the highest levels, which would be capable of leading and undertaking the redesign of systems and procedures, making improvements at the national level, overarching the legitimate requirements of each institution. To achieve this, the engagement and support of Parliament would be essential.
- Establish a **lead agency** that would serve as visible head of the effort and take the lead with a long-term view of the country, unaffected by economic ups and downs and election cycles.
- Ensure the existence of **consultative and coordinating** bodies so the private sector (in particular, those who generate cargo, transporters and users), alongside the ministries and Government agencies, will have a genuine bodies through which to participate in the process and through which consideration can be given to the various existing interests in the matter. These bodies should also serve as the forum for discussing and solving coordination problems that arise in the daily operation of the processes, taking a continuous improvement approach.

### 2. Strategic recommendations:

- Implement policies that are conceived with **integration in mind**, not as the sum of sector plans, and that are conceived to **promote the competitiveness and**

<sup>1</sup> See, for example, *FAL Bulletin 282, February 2010: “Toward an integrated transport policy: institutionalism, infrastructure and logistics –the case in Chile”*; *Bulletin 269, August 2009: “Trade facilitation as an element of competitiveness for Latin America and the Caribbean”*; and *Bulletin 263, July 2008: “The need to establish comprehensive policies for infrastructure, transport and logistics.”*

**productivity of goods and services** a country exports or imports.

- Transport facilitation issues involve **continuous improvement processes** that require periodic modification and that must take into consideration the domestic and foreign settings into which they will be inserted.
- There must be a **transparent and collaborative approach** that engenders the participation and support of human resources and foreign users.
- Draw on **international experiences** in transport facilitation; identifying best practices such as phasing-in the modernization of systems and processes.
- Ensure the inclusion of information and communications technology, particularly Intelligent Transport Systems. The integration and inter-operability of these systems on a regional level will provide essential support for decision-making.

### 3. Legal recommendations:

- Establish clear and consistent legislation that is condensed into a single body of laws. This will make it easier to implement (as an all-inclusive policy) and will ensure cohesiveness and consistency across national and regional policies, while generating synergies.
- Laws must be written to facilitate transport and logistics, not to prescribe which modes of transport are to be employed or which borders are to be used for entering and leaving the country.
- Regulatory frameworks need to be modern and flexibly structured, leaving room for new developments in logistics and efficient multimodal transport. Such developments might be the result of revisions and modifications of laws and other legal instruments, so as to ensure compatibility with new procedures, particularly the electronic presentation of shipment-related data and the introduction of a single administrative document, or they might result from the introduction of international conventions, rules and other instruments that simplify and standardize processes.

The adoption of conventions, rules or other international instruments is exclusively within the domain of each country and it is not the intent of this document to influence each State's sovereign decision about ratifying the United Nations Convention on Contracts for the International

Carriage of Goods Wholly or Partly by Sea, better known as the Rotterdam Rules. As the ECLAC Infrastructure Services Unit, we view the process of adoption of this international document as an important catalyst for dialogue between the public and private sectors on matters that significantly affect each country's development. It is clear to us that both the Rotterdam Rules and prior bodies of law have benefits and drawbacks, with some sectors benefitting or harmed more by one or another of the rules. However, the dialogue that could arise around whether or not to adopt these rules seems to us, on its own right, to be an important milestone for the economic and social development of Latin America and the Caribbean.

## II. About the Rotterdam Rules

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, better known as "The Rotterdam Rules", has been open for signature by the international community since 23 September 2009, following approval by the United Nations Commission on International Trade Law (UNCITRAL) in July 2008 and adoption by the United Nations General Assembly. To date, 21 countries have signed the convention, which accounts for, according to official figures, about 25% of the current volume of international trade. The signatory nations include Denmark, Spain, the United States of America, France, the Netherlands, Norway, Greece, Poland and Switzerland and others. At the time this document was written, no country from Latin America and the Caribbean had signed the document. Still, the convention will only enter into force one year after the 20th ratifying, accepting, approving or assenting instrument is filed.

The major factors that went into formulating the Rotterdam Rules were:

- Provide international maritime transport with concrete, uniform and internationally accepted rules that encompass all contracts of carriage.
- Precisely define duties, responsibilities, rights and obligations of the parties involved in door-to-door transport, including non-ship-operating carriers, ports and other inland service providers.
- Modernize existing conventions on the issue of liability and establish a balance between the interests of the shipping industry and shippers. Ever present was the fact that existing conventions fail to meet current transport requirements, or at least have not managed to garner acceptance by the international community.

- Improve rules for delivery of shipments, incorporating provisions aimed at preventing the fraudulent use of transport documents.
- Close loopholes in domestic legislation and in international conventions that hamper the free circulation of goods, and draft uniform provisions that specifically address new technologies and the use of electronic communications media.

One of the essential principles of the Rotterdam Rules is the establishment of a globalized, uniform and modern regime for regulating the rights and obligations of stakeholders in the maritime industry, with a single contract of carriage from door to door.

### III. General scope of the Rotterdam Rules

#### 1. Establish a system of liability from door to door

The new rules provide a liability system that covers the entire period of transport, not just the port-to-port phase. The first article of the Convention determines that the **contract of carriage** is any by virtue of which “a carrier, against the payment of freight, undertakes to carry goods from one place to another,” which “shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.”

#### 2. Subjects that intervene in the execution of a contract of carriage

A **carrier** means “means a person that enters into a contract of carriage with a shipper”. The term includes not only vessel-operating common carriers (VOCCs), but also any non-vessel-operating common carrier (NVOCC), whether they enter into a port-to-port contract or carriage or a door-to-door contract of carriage. This inclusion removes the need to have specialised rules for multimodal transport operators because they are covered under the definition of a carrier.

The Convention incorporates two parties into the regime for liability. The first is the **performing party**, defined as “a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control”, stating specifically that the term does not include any person that is retained, directly or indirectly, by a shipper, by a

documentary shipper, by the controlling party or by the consignee instead of by the carrier.

The second party to be included in the liability regime is the **maritime performing party**, defined as “a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship”, specifying that “An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.”

The inclusion of these two new actors introduces important consequences in matters of liability. For one thing, maritime performing parties, including ports and ship and loading agencies, will have the same obligations and responsibilities as carriers and will enjoy the same exemptions and limitations to liability, insofar as the event that causes the loss, damage or delay of goods occurs within the period that falls between a shipment’s arrival at the port of loading and its discharge at the port of discharge, while the shipment is under their custody, or at any other time in which said maritime performing party is participating in the performance of the activities provided in the contract of carriage. Furthermore, in those cases when a carrier and one or more maritime performing parties are found liable, that liability is joint and several. There is no similar rule for the non-maritime performing parties, and in cases of breach that can be imputed against said party or its employees, Master or employees of the carrier, the carrier will be directly liable.

The **shipper** is defined as “a person that enters into a contract of carriage with a carrier”, which is different from the **documentary shipper**, defined as “a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.”

The **consignee** is specified according to the type of document that legitimizes him/her, and is defined as “a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.” Separately, a **holder** is defined as “(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or (b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.”

The Convention applies common practices aimed at preventing maritime trade fraud. It incorporates clear and precise rules about how control should be exerted over transported goods and about the person who is legitimized to exert control over the goods. Thus, the **right of control** of the goods means “the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10,” and the controlling party is defined as “the person that pursuant to article 51 is entitled to exercise the right of control.” Complementing these definitions, the convention states that the exercise of this right includes the right to modify instructions regarding goods, insofar as the contract of carriage is not modified; to take delivery of goods at any port of call along the maritime route or at any place along the inland route; or to replace the consignee with another person, including the **controlling party**, with the carrier obligated to comply with those instructions, insofar as the person that issues the instructions is legitimized to exert the right of control, insofar as compliance with the instructions can be reasonably done and insofar as compliance does not interfere with the normal course of the carrier’s operations. The controller shall reimburse expenses and indemnify any losses or damages caused.

### 3. Modernization of existing conventions on rights, obligations and responsibilities of the parties in contracts of carriage

#### (a) Length of the custody period:

There are two important aspects to consider:

- The parties may stipulate times and places for receipt and delivery, but with certain restrictions, under penalty of nullification of any clause that states that:
  - The moment of receipt of goods is after the start of the initial loading operation,
  - The moment of delivery of goods is prior to the final discharging operation.
- The obligations related to the shipment are implicit in the responsibilities of the carrier, who is liable for loss or damage to goods or for delays in delivery.

The current interpretation given by shipping insurers, shippers and consignees is that the freight conditions (FI, FIO, FILO, FIOS, FIOST, etc.) determine who bears the costs for the respective operations, but not who assumes the risk of loss or damage, because this risk would always be assumed by the carrier. However, the Rotterdam Rules

establish that the carrier and the shipper can stipulate that the shipper, the documentary shipper or the consignee will perform all shipping, handling, loading or discharging operations, and that any such stipulation must appear in the contract.

#### (b) Exemption from liability of the carrier:

Under the Rotterdam Rules, the carrier will be exempt from liability if he/she proves that he/she cannot be held at fault and neither can any performing party, Master or crew, employees of the carrier or performing party, etc. be held at fault for the cause or for any of the causes of the loss, damage or delay. Perhaps the most relevant point about this is the inclusion of a list of facts or circumstances that would have caused or contributed to cause the loss, damage or delay, the consequence of which would make it so the carrier is not, in principle, liable for the loss, damage or delay.

#### (c) Weight of evidence:

Under the Rotterdam Rules, the carrier is liable only if the claimant proves one of the following circumstances:

- That the fault of the carrier (performing party, Master, crew, employees) caused or contributed to cause the event or circumstance alleged by the carrier in his/her response to the complaint;
- That a fact other than those indicated in the catalogue of exemptions caused the loss, damage or delay and the carrier cannot prove that he/she is not at fault;
- That the loss, damage or delay are the result of:
  - The ship being unseaworthy;
  - Deficiencies in provisioning, victualing or crew;
  - Inadequacy of the holds, parts of the ship or containers for receiving, transporting and preserving the goods.
- If the carrier is unable to prove that those facts did not cause the loss, damage or delay, or that he/she complied with due diligence to ensure the adequacy of the ship and its holds for sailing and preserving the goods.

#### (d) Liability of the performing party:

Maritime performing parties have a characteristic that merits special attention, because they will be joint and severally liable with the carrier for performing their



obligations as set forth in the contract of transport. This joint-and-several liability between the carrier and the maritime performing parties will only reach as far as the limits of liability provided in the Convention.

According to how the maritime performing party is conceived, determination of its liability will be subject to interpretation, given that the interpretation courts give to the expression “to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control”, will eventually determine in each case whether a port, port operator or terminal operator can actually be considered a maritime performing party and, consequently, whether he/she will be jointly and severally liable with the carrier.

The foregoing notwithstanding, the maritime performing party will enjoy the same limits to liability as the carrier, insofar as:

- He/she received or delivered the goods in a signatory State or has performed his/her duties related to the goods in a port located in a signatory State; and
- The event that caused the loss, damage or delay to the delivery occurred:
  - During the period that falls between the arrival of goods at the port of loading and their discharge from the port of discharge;
  - While the goods were under his/her custody; or
  - At any other time during which he/she was involved in performing the duties specified in the contract of carriage.

#### 4. Improvements to the rules of delivery of shipments to the destination

One important modification has to do with the safeguards established to ensure proper delivery of shipments to their destinations. Although the obligation is on the carrier to deliver the shipment at the time and place stipulated, the new regime also addresses the conduct of the consignee.

For one thing, the rules require the active involvement of the consignee in the delivery of the shipment at its destination, by establishing the carrier’s right to demand that the consignee present the document that attests to his/her ownership of the shipment and by establishing that the consignee’s obligation to accept the goods and confirm their receipt from the carrier or the performing party. This regime authorizes a carrier or performing party to deny delivery to a consignee that does not meet those requirements.

Furthermore, in cases where the carrier cannot make delivery, either because the shipment is unclaimed or because the consignee fails to provide adequate data about the person to whom the goods are to be delivered at the destination, the rules set forth procedures that release the carrier from any liability on that delivery. To this end, the circumstances under which goods are understood to be pending delivery are specified. These circumstances are: when the consignee does not accept the goods at the destination; when the controlling party, holder, shipper or documentary shipper cannot be located or give no instructions to the carrier; when the carrier can or must deny delivery; or when the carrier is not authorised to make the delivery or when it is impossible for the carrier to make the delivery.

Lastly, the rules address various measures the carrier can take regarding goods pending delivery, among which are: storing the goods in an appropriate place; unpacking goods that are in containers or vehicles or take other measures, even if this presumes moving them and selling the goods or destroying them.

### IV. Analysis of the legal implications for Chile

In order to analyse the role of transport facilitation in the competitiveness of Chile’s economy by generating a discussion on the adoption of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, better known as the Rotterdam Rules, and the impact this adoption would have on the transport sector, the Andrés Bello University’s College of Maritime Interests and Services together with the Infrastructure Services Unit of the Natural Resources and Infrastructure Division of ECLAC, held two seminars, the first on 26 November 2009, at ECLAC Headquarters in Santiago, Chile, and the second on 1 December 2009, at the Andrés Bello University (UNAB) in Concepción, Chile. The seminars were held in order to analyse, along with the various actors in the maritime transport industry

that are linked to the port, logistics, legal and academic sectors, both from the public and private sectors, the possible benefits and drawbacks to adoption of the Rotterdam Rules, specifically in Chile's case. Particular attention was paid to the way ports and other inland actors are affected by the liability regime contained in the rules.

### 1. Implications of a door-to-door liability system

Book III of Chile's Commercial Code treats contracts of carriage by sea separately from contracts of multimodal carriage. Thus, if the country adopts and ratifies the Rotterdam Rules it will have to modify the laws of Paragraph 3 of Title V, concerning contracts of carriage by sea, to these new rules, and repeal as superfluous the rules of Paragraph 4 of Title V, concerning contracts of multimodal carriage. It might be the right time, also, to introduce a modification to the law that would recognize the existence of non-vessel-operating common carriers, granting them the legal standing they currently do not have, which would enable them to be attributed the liability called for in the Rotterdam Rules.

Inclusion of the list of events or circumstances that have caused or contributed to cause losses, damage or delays means, for Chile, the inclusion of events and circumstances that could be invoked by a carrier for the purpose of exempting him/herself from liability.

Another important modification to Chile's current law has to do with the safeguards established in the Rotterdam Rules to ensure proper delivery of shipments to their destinations. Current law will have to be modified to address the requirement that the consignee be actively involved in the act of delivery at the destination, with the rules affording the carrier the right to demand presentation of a document that attests to the consignee's ownership, a right only precariously acknowledged in Chile, as well as the requirement that the consignee is obligated to accept the goods and confirm their receipt from the carrier or performing party, with carriers and performing party's authorized to deny delivery if the consignee fails to do so.

The various measures addressed by the rules concerning goods pending delivery do not receive similar recognition in Chilean law. Furthermore, the rights of carriers are seriously damaged by the rule that prohibits them from retaining merchandise at the destination, even if the reason is for non-payment of freight.

Lastly, if Chile ratifies the Rotterdam Rules its current legislation will be affected in a variety of ways, mainly the legislation contained in Book III of the Commercial Code, which is largely based on the Hamburg Rules of 1978. Thus, legislative reform will be necessary to modify Book III so it aligns with the changes called for by adoption of the Rotterdam Rules.