

Europe

Mare Liberum or Mare Clausum? How Cabotage Laws Can Stifle Fair Competition in Global Shipping

By Cecilia Borelli & Daniel Favoretto



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Introduction

In a world driven by the principles of free trade and global competition, alongside concerns with national security, the debate over maritime cabotage laws brings forth a classic clash: should the seas be open to all, as argued by Hugo Grotius in his 17th-century treatise *Mare Liberum* ("The Free Sea"),⁴ or should they be closed, controlled by national interests, as countered a few years later by John Selden's *Mare Clausum* ("The Closed Sea")?⁵

This tension remains relevant today, particularly in the context of maritime cabotage laws, which restrict coastal shipping to domestically built vessels, domestic-flagged vessels – i.e. vessels registered in the country – and/or vessels operated by a national crew. These laws, once justified by the need to protect national security, domestic industries, and employment, are now at odds with the principles of fair competition in an era of globalization.

What is Cabotage and What Is the Motivation Behind It?

Cabotage refers to the waterway transportation of goods (or passengers) between two domestic ports or locations within the same country, often with restrictions on foreign vessels providing these services. Under a broader concept, it can also include waterway transportation between neighboring countries bonded by a free trade agreement. It derives from the French term *caboter*, meaning "to sail along a coast", and it

has deep roots in maritime law dating back to the early protectionist policies of nation-states seeking to safeguard their domestic shipping industries.⁶

The definition and application of cabotage laws vary significantly across jurisdictions. In some countries, cabotage encompasses all coastal shipping and includes services like ferry operations, while in others, it is more narrowly applied to commercial freight services. Strict cabotage policies usually require that domestic shipping trade is restricted to ships built, owned, crewed or operated by citizens of a country.

The nationalist mindset over cabotage is not so hard to understand when seen from the perspective of centuries ago, when coastlines were common battlegrounds and avenues for invasion by foreign forces travelling on ships. Nowadays, pipelining foreign ships towards specific locations and limiting entities that operate along the coasts to domestic (more controlled) companies has a claimed rationale of protecting national security and defense readiness, enhancing supply chain resiliency, and ensuring the continuity of essential public services in case of unforeseen disruption. Beyond defense and security policy objectives, other common justifications for cabotage policies are the promotion of domestic shipbuilding and the protection of local maritime jobs – especially in countries with extensive coastlines.

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² Competition lawyer. Legal counsel (in-house) of a maritime shipping company. Former associate of international law firms in Brussels (Belgium) and Rome (Italy).

³ Competition lawyer. Legal counsel (in-house) of a maritime shipping company. Former consultant of a national competition authority under the United Nations Development Programme (UNDP) and advisor at the International Competition Network (ICN). Former associate of law firms in Brussels (Belgium) and São Paulo (Brazil).

⁴ Grotius, H., *Mare Liberum sive De iure quod Batavis competit ad Indicana commercia dissertatio*, 1609.

⁵ Selden, J., *Mare clausum seu de dominio maris*, 1635.

⁶ The first legal norm to impose restrictions on domestic shipping is not subject to clarity, but references are commonly made to England in the 14th century, Portugal in the 15th century or France in the 16th century. American Maritime Partnership, *Cabotage laws of the world*, 2018, 24-28, <https://www.americanmaritimepartnership.com/studies/world-cabotage-study/>.

How is Cabotage Regulated Worldwide?

Globally, cabotage is subject to a patchwork of regulations that reflect the economic priorities and political considerations of each country. In most cases, maritime regulators are responsible for overseeing cabotage laws typically designed to protect domestic shipping industries. These laws often include restrictions on foreign ownership of vessels, crew nationality requirements, and licensing mandates.

The degree of regulation varies widely. Some countries have stringent rules that heavily favor national carriers. This is the case in the United States, which currently maintains strict cabotage rules through the Jones Act (1920), mandating that only American-built, owned, and crewed vessels can participate in domestic maritime transport, unless very exceptional conditions are met. Other countries, such as Brazil,⁷ have moved towards more liberal frameworks, allowing foreign-flagged vessels to participate in domestic shipping under certain conditions. The European Union (“EU”) too has progressively liberalized cabotage, although EU Member States retain some discretion to regulate labor and environmental aspects.

Similarly, China started a pilot program in 2021 to open its cabotage market to foreign shipping companies using foreign-flagged vessels between certain ports,⁸ as a result, in part, of national ports seeking higher throughputs of cargo.⁹ Despite this apparent movement, there are still dozens of jurisdictions across the globe and with different levels of economic development that still impose restrictions for foreign vessel operators in cabotage. Indeed, a 2018 report by Seafarers’ Right International found that cabotage policies and laws are applied along nearly 80 percent of the world.¹⁰

Competition authorities usually have little room to change this legal framework, as their mandate is often limited to antitrust infringements, even when State-owned entities

are subject to competition law. Rulemaking activities from governmental entities, even when restrictive to competition, are commonly covered by an antitrust exemption (known as the Pervasive Power and State Action doctrines). In practice, this means that competition authorities are left playing the advocacy role, persuading – on a non-binding basis – rulemaking bodies to change the legal framework.

Why is Cabotage Relevant for Competition?

Cabotage is particularly significant to competition law due to the inherent barriers to entry that these regulations create. By limiting access to domestic markets, cabotage laws can reduce or block competition from foreign operators, which might otherwise drive down prices and improve service quality.

The competition implications of cabotage are complex. On the one hand, domestic shipping monopolies or oligopolies may develop, potentially leading to higher prices and reduced innovation. On the other hand, the rationale behind cabotage laws often includes non-economic factors, such as maintaining a domestic merchant fleet for defense purposes or ensuring continuity of supply during emergencies.

The trade-off between protecting national interests and fostering competition is not unique to the maritime sector. Similar tensions exist in industries such as airlines, defense, and oil & gas, where national security or strategic economic concerns often take precedence over competitive considerations. In the airline industry, for example, many countries restrict foreign ownership of carriers to maintain control over their national airspace and safeguard jobs. Likewise, in the defense sector, strict public procurement conditions lead to a highly concentrated market, as exemplified by the

⁷ As exemplified in Brazil by Federal Law n. 14.301/2022, which lightened the requirements for registering foreign vessels destined to cabotage.

⁸ Dalian Port, Qingdao Port and Tianjin Port. There is an ongoing consultation to extend the pilot project also to the Lianyungang Port.

⁹ Xingguo Cao, Yen-Chiang Chang, *The opening of cabotage: China’s trials and challenges*, 143 Marine Policy, <https://doi.org/10.1016/j.marpol.2022.105174>.

¹⁰ American Maritime Partnership, *supra* note 6, at 54.

U.S.¹¹ In the oil & gas sector, governments frequently impose local content requirements or limit foreign participation in resource extraction to preserve economic sovereignty.

However, the maritime sector is distinct in the sense that it is inherently global in nature.¹² While the protection of national maritime interests through cabotage laws may benefit domestic industries in the short term, it can also create inefficiencies by insulating local operators from international competition. In a deeply interconnected global economy, striking the right balance between protectionism and competition remains a central challenge for policymakers.

In the context of international commerce, fair competition is the cornerstone of globalized markets. It encourages innovation, improves efficiency, and, crucially, drives down costs for businesses and consumers. In this sense, the removal of unnecessary barriers for a *Mare Liberum* is closely aligned with the contemporary principles of free market economies. Shipping companies – whether domestic or foreign – must compete on equal terms based on merit, service quality, and cost efficiency.

The “National Security” Argument: Outdated in the Modern Era

As seen above, proponents of cabotage laws often cite national security as a key justification – although other national interests also play a role. The argument is that by protecting a strong domestic fleet, countries ensure that they can rely on their own vessels during times of conflict or emergency. While this rationale held merit during earlier times of global instability, it is increasingly outdated in a world where military logistics are highly diversified and integrated across allied nations.

Today, the majority of maritime trade, including critical supply chains for food, energy, and

goods, is global in nature. Countries often rely on international shipping companies and global alliances for their logistical needs. National ports would also gain more volume of cargo if cabotage is fostered by competition. In this context, maintaining strict maritime cabotage laws under the guise of national security becomes less relevant, particularly when the economic and competitive costs of these laws tend to far outweigh the potential benefits.

As in other areas of economic activity, antitrust goals are only plainly achieved when the State finds non-conflicting forms of preserving other values (in this case, national security) without limiting competition. Enhanced naval and air force surveillance, as well as foreign direct investment regulations, are examples of alternative solutions that can mitigate the anticompetitive effects of national cabotage legislation.

Concluding Remarks

The interplay between competition law and other societal priorities often sparks debate, particularly in industries pivotal to global trade and security. While much attention has focused on the digital economy, the challenges of balancing competition with broader values extend well beyond high-tech markets. In secular markets, such as shipping, the tension between competition and national security is hardly an ingredient to this antitrust debate, despite its expanding relevance in a world with growing concerns of armed conflicts and investments in national defense.

The principles of competition and free access in the shipping sector are more relevant today than ever before. In a globalized world, maritime cabotage laws appear increasingly anachronistic as they can limit competition, inflate costs, stifle innovation, and fragment international trade. By clinging to outdated protectionist policies, countries risk not only

¹¹ Department of Defense report: state of competition within the defense industrial base, 2022, <https://media.defense.gov/2022/feb/15/2002939087/-1/-1/1/state-of-competition-within-the-defense-industrial-base.pdf>.

¹² Even coastal trades between national ports are significantly connected to international trades, as demonstrated by so-called feeder movements, which consist of transfers between barges and large vessels, typically serving as a connection between international deep-sea shipping and cabotage services.

harming their domestic economies but also missing out on the efficiencies and innovations that come with a truly open and competitive maritime sector.

The choice between *Mare Liberum* and *Mare Clausum* – between open seas and closed seas – speaks to more than just maritime policy. It is a choice between protectionism and progress,

between inefficiency and innovation, and between economic stagnation and global competitiveness. In a globalized and integrated world constantly shifting between multilateralism and nationalism, it may be time to reconsider the role of cabotage laws and embrace the principles of fair competition for the benefit of all.