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Some Current Developments in United States Control of International Shipping

Among the major trading nations of the maritime world, only the United States attempts to regulate the cost of transportation services performed "on the high seas."[1] In addition to being unique among maritime nations, this is a novel regulatory effort in U.S. administrative law, and deserves more critical comment than it has prompted heretofore.

Overland transportation by rail and motor carrier between the United States and the contiguous nations of Canada and Mexico, has received comparatively cautious interference from the Interstate Commerce Commission, due to the specific limitation in the ICA to "transportation within the U.S."[2] Transportation on the high seas, however, between the United States and foreign nations, has come under the aggressive control of the Federal Maritime Commission in all of its phases, *i.e.* within ports of the U.S., on the high seas and, most recently, within the borders of other nations.[3]

The original motive behind the enactment of the Shipping Act in 1916 was the single-minded purpose of clarifying the application of U.S. antitrust laws to combinations among steamship lines "in the foreign commerce of the United States." An investigation concluded in 1914 by the Committee on Merchant Marine and Fisheries had determined that many such combinations existed, many in secret.

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[1]"The Pacific Ocean belongs to no one nation but is the common property of all." Lord Goodall v. Steamship Co., 102 U.S. 225.

[2]Interstate Commerce Act, 49 U.S.C. § 1(2).

[3]Armement Deppe, S.A. v. U.S., 399 F.2d 794 (5th Cir., 1968). *Also see* FMC General Order No. 13, Amd't. No. 4, requiring filing with FMC of railroad and trucking charges abroad, and F.M.C. v. De Smedt, 366 F.2d 464 (2 Cir. 1966), sustaining FMC authority to subpoena documents regularly maintained abroad pursuant to statutory authority to subpoena documents "from any place in the U.S." Hence, the Commission demanded operating and loading costs from Calcutta in violation of Indian laws and decrees in East Coast of India and East Pakistan/U.S.A. Conference, 11 FMC 43 (1967).

It was the sense of the Committee that such combinations among competing lines served a valuable purpose in preventing cut-throat competition and that they should be permitted to continue, subject, however, to their being publicized and restrictions imposed against abuses revealed in the Committee's investigation.

The enactment of the Shipping Act in 1916 followed the Committee's recommendations, specifically exempting combinations from the U.S. antitrust laws, and setting up a new federal agency to police the combines so that their economic power would not be used to discriminate against American shippers and receivers of freight, nor against the entry into the trades of American shipping lines.[4]

For most of the period from 1916 to 1961, the Shipping Act was administered as it was intended: first, to encourage stabilized freight rates and services through combinations and rate-fixing agreements; and, second, through publication of all such arrangements and administrative policing against abusive practices. While, during that period, the Maritime Commission policed the shipping combinations to prevent their abusing their powers, the Merchant Marine Committee in the House of Representatives maintained its own policing over the Commission to prevent it from abusing its powers over the carriers. The Committee turned down all efforts of the Commission to secure broader powers over the level of freight rates and services in the foreign trades.[5]

U.S. Courts early ruled against the right of a state of the United States to regulate charges for transportation services performed outside the state's borders, as by statute applying "from and to points within the state from and to points without the state."[6] The Court of Appeals, however, has upheld United States regulation of freight rates and passenger fares for transportation services on international waters when "to and from U.S.

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[4]*See* REPORT OF COMMITTEE ON MERCHANT MARINE AND FISHERIES, (known as ALEXANDER COMMITTEE REPORT), House of Representatives, 63rd Congress.

[5]In 1931 a bill drafted by the Commission to give it control over freight rates in foreign and domestic commerce was introduced as S. 1963. It was returned to the Commission with instructions to delete "foreign commerce" from the bill. *See* 16th Annual Report of the U.S. Shipping Board, p. 21.

[6]Kaiser v. Illinois Central Rd., 18 F. 151. In this and other decisions, U.S. Courts laid down the doctrine that no political authority can lawfully regulate transportation services that do not begin and end within its own territorial jurisdiction. A new doctrine has emerged in Court review of Shipping Act decisions in order to sustain and encourage U.S. extraterritorial regulation. It is that commerce between the United States and other nations is the "foreign commerce of the U.S." The Courts have rationalized that any transaction "affecting the foreign commerce of the U.S." is subject to U.S. control—wherever it takes place. *See* Armement Deppe, *supra* note 3; Pacific Coast European Conference v. U.S., 350 F.2d 197 (9th Cir. 1965); and Pacific Seafarers, Inc. v. Pacific Far East Line, *et al.*, 404 F.2d 804 (D.C. Cir. 1968).

ports and foreign ports."[7] Despite an intentional omission from the U.S. Shipping Act of any power delegated to the FMC to control the level of freight rates in foreign commerce,[8] a member of the Commission was able to say in a recent speech:

> As a result of Court decisions, and the statute, we are now able to control the level of freight rates in foreign commerce.[9]

There have been but few attempts to analyze the development of U.S. regulatory measures for the control of transportation services in the United States export and import trades. The paucity of such efforts leaves the field in a murky state, thought by some to be avoided or, better yet, ignored. Regrettably, however, bad administrative law in one field soon rubs off on others, as more and more recent decisions evidence the efforts of other administrative agencies to follow the successes of the FMC in its usurpation of ever greater powers over international commerce.

All regulation of shipping services in the offshore export and import trades of the United States rests upon the U.S. Shipping Act, 1916, as amended.[10] Until amended in 1961,[11] the Act was characterized as a measure of "casual regulation" of international shipping, with due regard for the rights of other nations in the transportation of goods and passengers between the United States and other countries.[12] Before 1961, the Act called for fair and non-discriminatory shipping rates and practices by all "common carriers by water in the foreign commerce of the U.S."

It encouraged voluntary cooperation among competing carriers to avoid cut-throat competition and rate wars "harmful to shippers and carriers alike."[13] By and large, the U.S. Shipping Act, whose terms apply equally to United States and foreign shipowners, was administered before 1961 with sufficient impartiality between American and foreign shipowners to merit the acceptance, if not the respect, of other maritime nations whose shipowners sailed the seven seas between the United States and foreign ports.

Drastic change occurred in 1961. In that year, a new agency, the

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[7]U.S. v. Stephen Brothers Lines, 384 F.2d 118 (5th Cir., 1967); and *see* American-Export Isbrandtsen Lines v. FMC and U.S., 417 F.2d 749 (1969). The Court affirmed an FMC order reducing freight rates from the U.S. to the United Kingdom and raising rates in the reverse trade based on the Commission's "presumption" that American exports might thereby increase and reduce the United States adverse balance of trade.

[8]Senate Commerce Committee Report No. 860, 87th Cong., 1st Sess., p. 25.

[9]Commissioner Hearn in a speech before the Hampton Roads Foreign Commerce Club, March 15, 1972.

[10]46 U.S.C. 801, *et seq.*

[11]P.L. 87-346.

[12]Report of the U.S. Delegates to the Inter-American Maritime Conference of 1940, at 467.

[13]*Rates in Canadian Currency*, 1 U.S.S.B. 264, 281 (1933).

Federal Maritime Commission, was established by Reorganization Plan No. 7, and the Shipping Act was substantially amended to satisfy the Commission's ambitions for more "regulatory powers." Not all of the agency's power demands were granted, however, due almost entirely to the reluctance of Senator Clair Engle to impose upon international shipping services a high measure of unilateral control by the United States, which he, as a lawyer, thought to be inconsistent with international-law principles. Thus, Senator Engle succeeded in removing from the 1961 amendments those provisions inserted to give the Commission "the power to sit in judgment on the level of freight rates in foreign trade."[14]

The 1961 amendments, however, included a requirement that all "common carriers by water in the foreign commerce of the U.S." shall file their freight rates with the Federal Maritime Commission "in the form and manner" required by that Commission. The Commission was empowered to "reject" any tariff for non-compliance with its prescribed "form." A rejected tariff was made "unlawful." Another amendment gave the Commission authority

> to make such rules and regulations as may be necessary to carry out the provisions of this Act. (46 U.S.C. 841a)

Although this clause was merely a verbatim re-enactment of a similar provision in an earlier text of the Shipping Act,[15] nevertheless it was termed a "decision by Congress to give the Commission vastly enlarged rule-making power,"[16] and the new Commission immediately undertook to exercise its new "broad rule-making powers," to establish vastly increased restrictions upon international shipping.

In a decade, administrative-rule-making by the FMC has created sweeping changes in the terms of the Shipping Act itself; has added many new agency powers and broadened others. A new statute has emerged, bearing little resemblance to the works of the framers in Congress. It may be said that, by the end of 1961, the FMC succeeded through its rules, orders, "guide-lines," and opinions, in securing to itself the powers over the level of freight rates that were denied to it in the 1961 amendments to the Shipping Act, and many more. The Chairman of the Commission, in a year-end press conference on December 30, 1971, stated:

> As we've been applying the Act in the right manner, we've found we can do anything we want.

[14]*See* note 8 *supra*.

[15]46 U.S.C. 802.

[16]Pacific Coast European Conference v. FMC and U.S., 376 F.2d 785, 787 (D.C. Cir. 1967). A contrary construction of a similar statutory delegation of "rule-making power" was reached in the well-reasoned opinion of the District Court Judge in Nat'l. Petroleum Refiners Assn. v. F.T.C., 340 F. Supp. 1343 (1972).

The manner in which the Commission has been applying the Act has dismayed and provoked many foreign governments and their national-flag shipping companies. In numerous diplomatic protests to the United States, foreign governments have contended that international law and treaties forbid the unilateral control of international services. On similar grounds, they have resented and protested often and vigorously against repeated extraterritorial extension of FMC controls over commercial transactions between their nationals and shipping services in trade with the United States. It is not remiss, therefore, to examine the manner in which the FMC has applied the U.S. Shipping Act to foreign shipowners, to foreign importers and exporters, and to services, charges and practices in "the foreign commerce of the U.S.," but consummated outside the United States.

At the outset, it should be noted that the FMC's extraterritorial activities in the regulation of shipping services have not been without judicial approval. Many 19th and early 20th Century judicial decisions and opinions, upholding fundamental doctrines of international law in American jurisprudence, have been ignored or scrapped in a series of review decisions on FMC orders beginning in 1961 with *Montship Lines Ltd. v. Federal Maritime Board,* 295 F.2d 147, and *Kerr S.S. Co. v. Federal Maritime Board,* 284 F.2d 61.[17] In those cases, subpoenas *duces tecum* of the FMC were sustained against documents regularly maintained abroad under statutory subpoena powers governing the production of documents "from any place in the United States."

Following a plethora of intermediate Court of Appeals' decisions favorable to FMC's extraterritorial activities, the Court of Appeals for the 5th Circuit, in 1968, sustained a penalty suit brought by the United States Attorney General, "on reference from the FMC," against a group of European shipping companies, based on their alleged "carrying-out" of shipping contracts with European shippers that had not been approved by the FMC.

The Court's opinion noted the filing of numerous diplomatic protests by European governments in support of their respective shipowners, but rejected their views, saying:

> It seems clear that no principle of international law forbids full implementation of the Shipping Act as amended in 1961. Contrary to the protests of

[17] *Also, See* U.S. v. Stephen Bros., 384 F.2d 118 (1967); Outward Continental North Pacific Freight Conference v. FMC, 385 F.2d 981 (1967); Calcutta East Coast of India and East Pakistan/U.S.A. Conference v. FMC, 399 F.2d 994 (1968). On February 4, 1972, a U.S. District Court, on motion of the FMC, enjoined a rate increase imposed in Australia and approved by the Government of Australia. FMC v. Australia, U.S. Atlantic and Gulf Conference, USDC, SDNY, Civil 72-207.

> foreign shipowners that the United States lacks 'jurisdiction' to regulate extraterritorially, the trend of the law today upholds such regulation.[18]

The trend noted by the Court has continued through subsequent decisions upon review of FMC actions[19] leading to the question whether there remains any present trace of respect in American courts, so far as international trade is concerned, for the profound doctrines of international law, enunciated by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The doctrine of international law explained by the Chief Justice was that:

> If a domestic law of the United States may be interpreted in a manner consistent with international law or in a manner that is in conflict with international law, a court of the United States will interpret it in a manner that is consistent with international law.

We see in current decisions of the courts of the United States, in "the trend of the law today," only lip-service to the earlier doctrine.

Among many illustrations of mere lip-service to international law in Shipping Act cases on review of FMC activities, is the 1969 opinion of Senior Circuit Judge Prettyman in *American Export Isbrandtsen Lines v. FMC and U.S.*, 417 F.2d 749 (D.C. 1969). Involved in that case was the initial design of the FMC to manipulate the rates and charges of vessel-owners for an admittedly promotional purpose, viz., expansion of American exports and reduction of imports.[20]

A more biased administrative action under an ostensibly unbiased law would be difficult to imagine, nor one more offensive to other nations. Particularly is this true, in light of the Commission's order in the case directing British-flag shipowners, to adjust their charges to British exporters, to depress exports to the United States, and increase imports from the United States.

[18]Armement Deppe, S.A., *et al.* v. U.S., 399 F.2d 794 (5th Cir. 1968).

[19]As noted *supra*, note 17. *Also, See* the remarkable decision of the Court of Appeals in City of Portland, Oregon v. FMC, 433 F.2d 502 (1970). In these proceedings, the FMC claimed the right to "approve, disapprove or modify" an arrangement among Japanese shipping companies to transport Japanese goods to Seattle, Washington. The arrangement was made on orders from the Japanese Government. The City of Portland demanded that the FMC disapprove the arrangement unless the Japanese ships also called at Portland. The Court of Appeals enjoined the Commission from approving the arrangement, saying that an arrangement to serve Seattle implied an arrangement not to serve Portland. The latter had "antitrust ramifications," the Court said. The Court's *per curiam* opinion suggested that a Japanese shipping service to Seattle but not to Portland would be "contrary to the public interest" *unless* approved by the FMC!

[20]The FMC is directed by law to adjudicate impartially and leave promotional activities to other federal agencies organized for that purpose. (*See* Message of the President Transmitting Reorganization Plan No. 7 of 1961, Document No. 187, House of Rep., 87th Cong. 1st session.) The FMC Chairman, however, has stated: "I do not share that philosophy." (*See* Remarks of Helen Delich Bentley before the Propeller Club at Rayburn House, Washington, January 21, 1970).

Mr. Justice Prettyman, speaking for the Court of Appeals in the District of Columbia, said:

> Rate-making for ocean freight is a complex problem, involving the manifold intracacies of world trade. It involves many countries, many ports, many carriers, many shippers, many commodities and a fantastic interlacing of routes. The carriers are organized into 'Conferences', which carry on the administrative phases of the trade. They are exempt from the anti-trust laws in this country. By tradition ocean rates are fixed in large measure by the carriers. The factors which fix them are likewise in large measure the necessities of the situation. It is truly said they are what the traffic will bear. World trade is between buyers and sellers in different countries. Its movement is international. No one government controls it. So, if a producer has a product wanted in another country, its movement by ocean freight depends upon the interplay of the supply and the demand. (pp. 750-1)

Thereupon, the Court upheld the order of the FMC which clearly assumed to the United States the exclusive unilateral power, to control the measure of freight rates in both directions between the United States and Great Britain, and destroyed "the interplay of the supply and the demand."

The FMC's interpretation of the above decision has been, as noted above, that it "now has the power to control the level of freight rates in foreign commerce." Within the space of three years since the decision, the Commission has exercised control over the level of freight rates of all of the steamship lines engaged in service to and from the United States.[21]

In exercising control over the level of freight rates in foreign commerce, the Commission has abandoned completely established principles heretofore applicable in the regulation of public utility rates and charges. The Commission's admitted, single purpose has been the reduction of rates—whether they be fair and reasonable or not—as a means of promoting American exports, and thereby furthering the United States' domestic program enunciated in the Trade Expansion Act of 1968. Resentment abroad has been widespread and increasingly bitter.[22]

Although the FMC's extraterritorial activities have become common-place, and too numerous to detail exhaustively, some of the most provocative have been the following:

1. Routine, almost daily, service of FMC demands upon foreign

[21] *See* the Commission's Report on the "satisfactory result" obtained under its "program of surveillance over general freight rate increases . . . in the U.S. foreign trade." (FMC Eighth Annual Report Fiscal Year Ended June 30, 1969).

[22] When the FMC, in the *Dual Rate* Cases, 8 FMC 16, ordered all shipping contracts between European exporters and European steamship lines to be cancelled at midnight on March 3, 1964, diplomatic protests were filed with the United States by the governments of Sweden, Belgium, West Germany, and The Netherlands. At least six foreign governments have enacted legislation directed to prohibiting the removal from their jurisdiction of documents demanded by the FMC in its regulation of their nationals, viz., Great Britain, The Netherlands, West Germany, Italy, Canada and Japan. *See* FMC Docket No. 72-19.

shipowners by direct service upon them, through international mail service or cable, at their home offices abroad.[23]

2. The imposition upon foreign shipowners of restrictions on the number of their vessels that FMC will permit in American ports.[24]
3. FMC demands upon foreign shipowners for "justification" of their practices in foreign ports.[25]
4. FMC demands upon foreign shipowners to file with FMC:
   a) Negotiations with foreign shippers;
   b) Negotiations and arrangements between foreign shipowners and foreign railroads and motor carriers for transportation on foreign soil[26] or between foreign ports;[27]
   c) Operating costs, administrative costs, the names of company officers, gross and net profits, affiliates and shareholders;
   d) Transshipment arrangements with carriers serving foreign ports, including ports within the territorial jurisdiction of a single nation, as from one Indonesian port to another Indonesian port;[28]

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[23]The FMC has served hundreds of its official orders and demands upon foreigners mailed to their offices and residences abroad. Many contain threats of fines and reprisals if not obeyed immediately. A recent illustration is the 1972 proceeding of the FMC in its Docket No. 72-5. In that case, the Commission served a show-cause order on five foreign shipping companies demanding that they cancel a rate increase in Australia. Service was made by the Commission by mailing copies of the order to the "Respondents" at Goteborg, Sweden; Hamburg, West Germany; Haifa, Israel; London, England; Victoria and Sydney, Australia. It goes without saying that the Commission violated elementary principles of international law by extending its legal process into the territorial jurisdiction of five independent nations.

[24]An example is the Commission's order of April 11, 1972, on "Agreement No. 9973" among Danish, British, and Swedish shipping lines, for operation of new container ships. The order states:

> "IT IS ORDERED, that Agreement No. 9973 be, and the same is hereby approved pursuant to section 15 of the Shipping Act, 1916;
>
> "IT IS FURTHER ORDERED, that the total capacity in terms of 20-foot I.S.O. equivalent units of all the vessels employed by the parties in this service may not be increased either by substitution or modification without our prior approval, based on a showing that changed trade conditions require additional capacity;
>
> "IT IS FURTHER ORDERED, that the parties shall file annual reports showing the number of completed voyages, tons of cargo carried inbound and outbound, and freight revenues earned inbound and outbound;***."

[25]One of a profusion of such FMC demands, served upon steamship lines at their residence in Holland is referred to by the Commission in its case entitled *Admission, Withdrawal and Expulsion-Outward Continental North Pacific Freight Conference,* 10 FMC 349 (1967). In that proceeding, the FMC ordered the companies to adopt procedures for their dealings with European exporters, patterned upon procedures prescribed by the Commission for use in the United States. The Commission demanded quarterly, detailed reports of each negotiation in Europe, *in perpetuam.*

[26]FMC General Order 13, Amendment No. 4, 46 CFR 536.

[27]FMC General Order 24, 46 CFR 522.

[28]*Transshipment and Apportionment Agreements,* 10 FMC 183 (1966); *Transshipment*

e) Interoffice correspondence abroad, "memoranda of telephone conversations" abroad, and minutes and other records of meetings abroad.[29]

There are these and many other FMC filing requirements, literally too numerous to list and ranging from special reports demanded of particular shipowners, to general reporting demands on "all common carriers in the foreign commerce of the U.S.," one of which calls for *all* contractual arrangements wherever executed and performed.[30]

Thus, as the Commission regularly declares, it "maintains constant surveillance over the steamship lines to assure that they comply at all times with Commission policies and programs."[31] In addition to controlling foreign carriers' freight charges to promote American exports, and limiting foreign carriers' entry into United States ports to promote the American merchant marine, the Commission now has pending in Congress H.R. 15465, drafted by the Commission.

The bill would make it unlawful for any foreign-owned vessel to participate in "single-factor rates for transportation to or from a place within the United States, its territories, districts, or possessions, or the Commonwealth of Puerto Rico, to or from a place in a foreign country" unless

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and Through Billing Arrangement, 10 FMC 199 (1966). In the first case, the FMC held that a vessel-owner operating between two ports in Indonesia is a "common-carrier by water" subject to the jurisdiction of the U.S. Shipping Act. "The fact," said the Commission, "that in many instances the carrier or carriers on one side of the agreement do not touch United States territory is immaterial."

[29]FMC General Order 18, Amendment 3, 46 CFR 537, requires "certified reports" of all meetings of conference steamship lines, whether held in the United States or abroad, and defined to include "agents, principals, owners, committees or subcommittees," and "telephonic or personal polls."

[30]FMC General Order 20, entitled "Security for the Protection of the Public," 46 CFR 540, requires of all self-insurers, "A list of all contractual requirements or other encumbrances . . . relating to the maintenance of working capital and net worth."

[31]In its course of developing new agency policies and programs, the FMC has devised some remarkable legal theories.

To justify its non-statutory control over terminal charges, the Commission conceived the novel theory that anyone who deals with a common carrier is himself a public utility and must be regulated. The Supreme Court agreed in City of Oakland v. U.S., 320 U.S. 590.

The Commission established the proposition that any carrier participating in a through route with "a common carrier by water in the foreign commerce of the U.S." is also a "common carrier by water in the foreign commerce of the U.S." He is then regulated by the FMC, as are motor carriers in the U.S. (Common Carrier Status of Express Companies, 6 F.M.B. 245), and vessels engaged in service "exclusively between ports on the east coast of south Thailand and Singapore." (*Transshipment and Through Billing Arrangements*, 10 FMC 199).

The FMC explained its resolve to enforce the U.S. antitrust laws in its administration of the exemption from the antitrust laws in the Shipping Act, on the ingenious though confusing theory that an agreement exempt from the Sherman Act, by the terms of the Shipping Act, violates the Shipping Act if it would violate the Sherman Act except for the exemption in the Shipping Act. *Agreement No. 8660*, 12 FMC 149.

"such person holds a license issued by the Federal Maritime Commission to engage in such business."

H.R. 15465, which was sponsored in the House of Representatives by the Chairman of the Merchant Marine and Fisheries Committee, will be protested by other nations as another breach of outstanding treaties and violation of international law. It is generally believed that H.R. 15465 will not reach enactment in 1972, but that it will be reintroduced in 1973 with strong support for passage. It deserves explanation.

Since its enactment in 1916, the U.S. Shipping Act has applied only "to port-to-port" transportation in "the foreign commerce of the U.S."[32] The FMC's authority over rates and services of common carriers by water in foreign commerce, therefore, has been from port-to-port.[33]

The major purpose of H.R. 15465 is to extend the geographical scope of the U.S. Shipping Act, and consequently the FMC's powers thereunder, to all inland origins and destinations of cargo movements in the foreign (and domestic, offshore) commerce of the U.S. The bill stems from the growing practice of steamship lines to transport freight in large containers, packed at shippers' plants, sealed and ultimately delivered at consignees' plants.

Such transportation requires inland transportation in connection with ocean transport and encourages the use of "single-factor" rates and charges, composed of the charges of all carriers involved, combined for convenience into one charge and one contract of carriage. Since the advent of single-factor rates in foreign commerce on a broad scale, a development of the last decade, the FMC has aspired to regulate and control all carriers and services participating, at both ends of every shipment of goods between any place in the United States and any place in any other country.

The legal rationale of the FMC's claim to such far-reaching regulatory powers is merely a logical extension of the theory underlying its acquisition, through decisions of United States courts, of the power to control freight rates for transportation on the high seas, from port to port.

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[32]The U.S. Shipping Act relates only to "a common carrier by water in foreign commerce . . . on the high seas or Great Lakes on regular routes from port to port." (46 USC 801) Curiously, the FMC has interpreted this definition as not really meaning either "on the high seas," "on regular routes," or "from port to port." *See*, respectively, American Peanut Corp. v. M.M.&T. Co., *et al.*, 1 USSB 90 (1925); Transportation—U.S. Pacific Coast and Hawaii, 3 USMC 190 (1950); Bernard Ullmann Co., Inc. v. Porto Rico Express Co., 3 USMC 771 (1952). In fact, according to the FMC, the term "common carrier by water means railroads, trucks, railway express agencies, and freight forwarders. *See, Determination of Common Carrier Status*, 6 FMB 245 (1961).

[33]So the FMC acknowledged but, at the same time, decided to exercise control over transportation services beyond port areas, both in the U.S. and in foreign countries. *See, Disposition of Container Marine Lines*, 11 FMC 476 (1968) and FMC's General Order No. 13, Amendment No. 4, 46 CFR 536.

Essentially, the theory is that transportation between the United States and other nations is "American foreign commerce." Anyone who participates in "American foreign commerce" is "subject to the laws of the United States." The U.S. Constitution endows the U.S. Congress with the power to regulate the foreign commerce of the United States. The FMC is the instrument created by Congress to regulate "American foreign commerce." The Commission can carry out its programs and policies effectively "to protect American foreign commerce," only if it "controls all rates and practices of all persons involved," and maintains "constant surveillance" over them "wherever located."

In its full scope, H.R. 15465 would endow the FMC with powers over rates and services in foreign commerce, that far exceed the powers conferred upon the Interstate Commerce Commission in domestic commerce under the Interstate Commerce Act.

Under the bill, the FMC would determine the "reasonableness" of all charges for such services and would determine, under the licensing provisions in the bill, which carriers—rail, motor, air, or water—would be permitted to participate in every such "through route." The FMC would determine the "common carrier" status of each participating carrier, say the Trans-Siberian Railroad, in the transportation of American wheat from Lubbock, Texas, to Vladivostok or any place beyond Vladivostok.

The FMC would fix the reasonableness of the whole cost of the transportation, including the steamship line, the inland carriers at both ends and all intermediate services such as terminal and dock charges, loading and unloading, and storage costs. There could be no transfer between the participating carriers until the arrangement had been "filed" with the FMC.

Literally, the full scope of H.R. 15465 is staggering. Its impact upon the development of "containerization" and international transportation over "through routes," can be appreciated only upon an understanding of the mass of unnecessary restrictions which the FMC has created, in its regulation of "port to port" services of common carriers by water and "other persons subject to the Act." The FMC has enmeshed the shipping business in a mass of bureaucratic red tape that strangles initiative and destroys economic efficiency.

Reference has been made above to the FMC's singleminded objective of compelling regulated common carriers to reduce their charges. Conversely, the Commission prohibits efforts of the carriers to rationalize services through reduction in port time, elimination of duplicative and unnecessary loading and discharge berths, elimination of unnecessary and wasteful absorptions, competitive kickbacks and destructive rate-cutting practices.

The established, regular steamship lines are urged to invest in high cost, modern ships but shippers are encouraged to employ cheaper, chartered ships.

The FMC's non-statutory rules require "each common carrier subject to its jurisdiction" to obtain the Commission's prior approval for:

a) Leasing terminal facilities in any United States port;
b) Contracting for storage, car loading and unloading, pick-up and delivery, grain elevator and other shoreside services;
c) Arranging for the transfer of cargoes from or to trucks or rail cars; and
d) The transshipment of cargoes from or to other vessels, whether in U.S. ports or abroad, unless the arrangement is "non-exclusive," when it needs only to be filed but not approved before transshipment is performed.

Securing the FMC's approval of such routine business arrangements can take up to five years and, of course, approval is often denied or granted only upon restrictive and arbitrary conditions.

All of these and many more restrictions upon the shipping business have been imposed upon "port to port" transportation by the FMC, and may be expected to extend to the new shipping practices now developing in the use of containers and the evolution of single-factor rates and charges over through routes from and to places beyond port areas.

A most respected commentator has characterized American regulation in foreign commerce as "U.S.A.—A Rate Regulation Jungle."[34] The term is singularly appropriate. However, his view of national jurisdiction over transportation in foreign commerce is open to question when he states:

> Every nation has the right to control its own domestic and foreign commerce.

That commerce which begins and ends within the territorial jurisdiction of an independent nation is subject to no valid power other than that of the nation itself. Chief Justice Marshall expressed the point with uncompromising clarity in *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812):

> The jurisdiction of the nation, within its own territory, is necessarily

[34]Dr. Weldon B. Gibson, Executive Vice-President, Stanford Research Institute, in *Impediments to Intermodalism*, published in PACIFIC TRAFFIC, August 1972. On September 18, 1972, H.R. 15465 mentioned above, was the subject of a public appearance by the Chairman of the FMC. before the House Merchant Marine and Fisheries Committee. The FMC Chairman characterized the bill as urgently needed "if our international ocean commerce is to survive and grow." The State Department, however, took issue, under international law and treaties with the powers in the bill sought by the FMC over transportation services between places in other countries.

> exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from any external source, would imply a diminution of its sovereignty, to the same extent, in that power which could impose such restriction. All exceptions therefore, to the full and complete power of a nation within its own *territories,* must be traced up to the consent of the nation itself. (Emphasis supplied.)

If that proposition may be regarded as settled, then it must be equally settled law that national control of commerce among independent nations may not invade the territorial jurisdiction of any other. It is therefore an ancient and highly respected principle of international law that:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereign rights of any other nation, within its own jurisdiction.[35]

As a consequence, however, of the decision of Court of Appeals in the *Armement Deppe* case (*supra*), upholding United States jurisdiction to prescribe contract terms, "to the exclusion of all others," between foreign merchants and foreign carriers, each of the foreign carriers involved in that case paid a heavy fine to the United States Government. It is worthwhile to examine the Court's reasoning, for similar reasoning runs through many cases that reflect the "trend toward greater extraterritorial regulation" under the U.S. Shipping Act. It will be seen that the United States has not established a "right" to control foreign commerce but merely the power to get away with it.

The Court advanced three reasons for its result:

1). We have no difficulty, therefore, holding that under the power which Congress has to regulate commerce with foreign nations under Art. I, § 8 of the Constitution, it has authority to enact laws regulating the shipping contracts of foreign-owned shipping lines regardless of the fact that the contracts are executed in foreign countries with foreign nationals, inasmuch as the contracts are to be used, employed, and carried out in American foreign commerce in the delivery of goods to American ports. Consummation of the contracts is, therefore, by acts which are ultimately performed in the United States—thus making them subject to the laws of this nation. The only logical conclusion fairly to be reached is that foreign-owned ships which use our American ports must comply with the laws of the United States in connection with shipping contracts and specifically with the employing of the dual-rate contract system.

2). We observe no determination by Congress to limit the application of these regulatory provisions to American exporters or importers, as contended by appellants, or that Congress was concerned only with shippers and consignees contracting in the United States. The dual-rate contract system would be largely unworkable and impractical if so restricted. Foreign-flag shipowners dominate most conferences and it is said that American car-

[35] *The Apollon,* 22 U.S. (9 Wheat.) 362, 6 L.Ed. 111 (1824).

riers 'account for only a small vote in virtually every important conference serving our foreign trade.'

3). Regulation of the dual-rate contract system as it applies to *American* foreign commerce would be practically non-existent, therefore, if a majority of the carriers—the foreign shipowners—were thus without the scope of the law.

Plainly, the purpose of point number 1 was to establish the contact between the United States and the performance of the particular contracts in issue regarded as essential to the application of U.S. laws to foreign citizens.[36] The difficulty with the Court's reasoning is that the contracts involved did not cover "delivery of goods to American ports." By their terms, the contracts were fully performed upon the "tender" of a European shipper's goods to one of the European shipowner's vessels in a European port. "Delivery" at American ports was consummated under a separate contract—the bill-of-lading.

Point number 2 was equally incorrect. The Report of the Senate Commerce Committee on H.R. 6775, which became the 1961 Amendments to the Shipping Act, under which the case arose, carries the clearly expressed determination of Congress to limit the law to commercial transactions, which do not "take place and are documented abroad." See Senate Report No. 860, 87th Cong., 1st Sess. (1961) page 3.

The Court's third supporting reason for its decision was simply that the United States could not effectively control "American foreign commerce," without controlling the terms of transactions between foreign vessels and foreign shippers and consignees. This is but another way of saying that the United States cannot successfully impose its economic theories upon foreign nations, unless American laws are enforced abroad. The reasoning is bootstrap, and defies the more restrained views on the subject expressed in *Lauritzen v. Larsen,* 345 U.S. 571 (1953). In that case, the Supreme Court said:

> In dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contract which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction. 345 U.S. at 582.

No decision or determination in the "trend toward greater extraterritorial regulation under the Shipping Act" has come to this writer's attention that is justified under international law. None establishes a national "right" to extraterritorial jurisdiction. On the contrary, the course of

[36]However, not every contact between a foreign transaction and an American interest is, under international law, sufficient basis for the United States to regulate the foreign transaction. *See* Lauritzen v. Larsen, *infra* note 37.

the trend has been characterized by generous use of the "big stick," to enforce FMC orders overseas and on the seas.

The big stick is evident in the huge fines written into the U.S. Shipping Act for non-compliance with any of its terms—up to $1,000 a day for "each day the violation continues."[37] Penalties quickly reach staggering sums. In one suit against foreign shipowners, the U.S. Government's complaint claimed penalties aggregating over a billion dollars.[38]

It is common practice in the Commission to secure obedience to its demands upon foreign shipowners, by threatening suits in American courts for huge penalties, and in each of its annual reports the Commission particularly notes with satisfaction the amount of fines imposed and collected. Few dare to persist in any course or practice that is disapproved, or merely disliked, by the Commission, whether the practice is legal or illegal, consummated in the United States or abroad. Once burned, most foreign shipowners will prefer obedience to FMC demands rather than risk economic suicide through thousand-dollar-a-day fines.[39]

Similar extraterritorial FMC orders are legion. On August 4, 1972, the Commission served orders, by direct but unauthorized use of international mail service upon steamship lines, at their home offices in London, Hamburg, Rotterdam and Antwerp. The orders (FMC Docket No. 72-40) tell each of the European companies that the Commission's policy favors freight rates, fixed at levels that promote American exports to Europe and not European exports to the United States.

The companies are told to be guided by the Commission's policy and to so inform European exporters; to raise their freight rates from Europe to the United States, if necessary, as one means of carrying out the Federal Maritime Commission's policy of reducing shipments from European countries to the United States, and, obviously, their own revenues commensurately. In short, the European shipping companies are to be made unwilling instrumentalities of the U.S. Government, in opposition to their own homelands and their own shareholders.

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[37]46 U.S.C. 813a.

[38]U.S. v. Pacific Coast European Conference, Civil Case No. 46835, USDC ND Calif., 1967.

[39]Thus, to illustrate, European steamship lines have been compelled to prepare their tariff schedules, printed and published in Europe, "in the form and manner" prescribed by the FMC in its "General Order No. 13, as amended," and to sell them to "any person" in Europe for a price deemed reasonable by the FMC.

A group of foreign steamship lines obediently sought the FMC's "permission" "to meet and discuss the problems and their remedies." The permission was granted, "but giving them no authority to take action without prior Commission approval." FMC 10th Annual Report to Congress (1971), page 47. The permission granted by the FMC was conditioned upon the companies' reporting to the FMC "in detail" the substance of their discussions, wherever held.

According to the Commission's announcement, a hearing will be granted to the companies, but no testimony will be permitted for, as the Commission's Chairman recently explained, proof of guilt is no longer required in support of the Commission's orders:

> . . .we have developed a series of rules and presumptions which are designed to ameliorate the difficulties of developing adequate proof for disapproval of rates. (Mrs. H. D. Bentley, Chairman, FMC, in testimony before the House Merchant Marine and Fisheries Committee, June 14, 1971.)

A major difficulty with extraterritoral regulation of foreign commerce is the risk of emulation and retaliation. The risk is particularly great when the leading effort is put foward by a pre-eminent, powerful nation such as the United States. The temptation to follow the leader has been made irresistible in this instance, as a result of the FMC's boasting of its success in promoting American economic interest through extraterritorial control of competing foreign interests.

A significant illustration is the recurring praise in each FMC published annual report, of its success in forcing freight rates down on American exports and up on American imports, thereby fostering American exports and the American economy.[40]

Manifestly, claimed achievements of such successes in a nation's domestic economy through its exercise of control over foreign commerce appeal irresistibly to some other governments. The effect has been reflected in laws adopted by a substantial number of other countries, Latin America, in particular, some of which now reserve all or a large portion of their exports and imports to their own national-flag vessels. Mature maritime nations decry such practices. Once adopted, however, such measures—usually defended as "protective measures"—are not easily abrogated.

Repercussions from the FMC's extraterritorial activities are now evidenced in the United Nations. There, 77 of the so-called "Developing Nations" have recently copied the U.S. Shipping Act, as amended in 1961, and particularly the rate-control and other extraterritorial regulatory measures promulgated by the FMC.[41]

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[40]Also see *Investigation of Ocean Rate Structures, supra.* In this and other similar decisions therein cited, the FMC announced as its "policy" the elimination of all "rate disparities" in the "foreign commerce of the U.S." It declared that higher rates in the U.S. export trades than in the import trades are *prima facie* illegal. Conversely, higher rates in the import trades than in the export trades are *conclusively* legal.

In its annual reports to Congress for fiscal years 1969, 1970 and 1971, the FMC described its adjudicatory activities on freight rates as a "Commission Program", successful in fostering exports through the coordinated pressure of the FMC and United States embassies abroad, upon privately owned shipping companies.

[41]At the Third United Nations Conference on Trade and Development (UNCTAD III) at Santiago, Chile, April 13, 1972, the 77 lesser developed nations jointly sponsored an

The traditional maritime nations, with more experience in the disastrous consequences of extraterritorial interference with international trade, protest but are overwhelmed by the greater number of emerging nations, aspiring to their own enjoyment of the fruits of unilateral control over foreign commerce claimed by the United States.[42]

There is, however, no proof that United States controls over "American foreign commerce" have actually achieved the improvements claimed for them in the domestic economy of this country. Again and again, leading spokesmen of the FMC have gone before domestic associations and organizations in foreign trade, and before Congressional committees, to seek support and credit for the Commission's promotional policies. Seldom, if at all, has any such spokesman offered evidence of practical benefits in fact obtained.

Nevertheless, there is on the agenda of the next meeting of the U.N. General Assembly in October of this year, the resolution proposed by the 77 developing nations urging adoption, world-wide, of national laws and regulations patterned upon regulations issued by the FMC, for the promotion of American exports and American shipping companies. The latest annual report of the FMC to Congress, Tenth Annual Report, 1971, notes with obvious satisfaction the "Emulation of FMC Aims" by the Canadian Government.

There is no doubt at all that unilateral control of shipping rates and practices in foreign trade is spreading from the United States to other nations. It is questionable, however, whether this trend toward extraterritorial regulation among so many nations today, should be a source of satisfaction in the United States, or should be viewed with concern as in 1940, when a predecessor agency of the FMC wrote on the subject, saying:

> As the question of government control of freight rates in foreign trade is a recurring one, a discussion of the principal reasons which have led to consideration of government control and the major objections to such a course follows:
>
> *(1) Government control of freight rates in the interest of national economy.*—Governments have considered from time to time the question of establishing a control over freight rates in foreign trade in the interest of the national economy. Thus a nation might undertake to prescribe freight rates in the hope of accomplishing one or more of the following objectives: Increase

international code for regulation of international transport called UNCTAD Document TD/III/C. 4/2. Its provisions call for strict, comprehensive control by all nations of shipping rates and services among them, to advance each nation's domestic economy. The Code closely follows FMC regulations and decisions, devised unilaterally for the advancement of local U.S. economic objectives.

[42]*Journal of Commerce*, Friday, April 7, 1972.

> its export trade; reduce the exporter's loss when competition from other sources of supply or other factors have forced sale prices of goods to unprofitable levels; reduce the cost to the consumer of essential imports . . .
>
> To have any appreciable effect on the national economy, therefore, it is almost certain that a government would have to prescribe rates which were either entirely unremunerative or so low as to reduce the earning capacities below those which shipowners could make in other trades. Either result would have the effect of driving ships and services away from the trade routes of that country. Some government efforts at rate manipulation have had precisely this effect. (p. 179)

The above quotation, taken from the official Report on the Inter-American Maritime Conference of 1940, presented the United States position at that time, on national regulation of international commerce. It served then to deter a number of Latin American nations from pursuing unilateral measures for the control of their foreign commerce, in order to advance their own economic interests. The same Report went on to say:

> Every shipment in foreign trade begins within the territorial jurisdiction of one nation and ends within the jurisdiction of another. The country of origin and the country of destination both possess the equal right to prescribe or control the freight rates for that shipment. However, should both countries choose to exercise this right, conflicting regulations might result which would make trade practically impossible. . . . However, the prescription by the Government of either maximum or minimum rates for a given trade might well have the effect of driving a carrier out of that trade. Any governmental action which would result in reducing the legitimate competitive opportunities of a carrier of another nation would almost certainly cause international discord. Moreover, the United States has entered into treaties of friendship and commerce with many foreign nations under which foreign shipping has been granted the right of free access to United States ports and through which, in return, there has been obtained for United States vessels the right of free access to foreign ports. For this Government to prescribe the rates to be charged by foreign vessels on cargoes which they carry between the United States and foreign ports would not be in harmony with the basic principles of these treaties. Presumably the same situation would be true with respect to other of the American Republics. (p. 181)

As shown in this paper, the position of the U.S. Government has been completely reversed since the Inter-American Maritime Conference of 1940. Instead of leading away from extraterritorial regulation of foreign commerce, the United States is now leading toward such regulation. The undesirable consequences foreseen by the U.S. Government in 1940, have already begun with the elimination from "American foreign commerce," of some of the oldest and most reliable foreign-flag steamship lines. As further "Emulation of FMC Aims" proceeds, the inevitable result must be more and more conflicting regulations among nations until international shipping founders in a sea of red tape.

Conclusion

It has been truly said that, "Undoubtedly, no single nation can change the law of the sea."[43] It might also be said that hardly a single nation has failed to change the law of the sea, and the greater the nation, the greater the changes it makes and has made since trade and commerce began. In modern times, there has been no greater national change wrought in international law, and on international trade, than United States regulation of international transportation upon the high seas.

How permanent the changes will be in international law, resting, as it does, upon the consent of all civilized nations, remains to be seen. A gleam of light and hope for more restraint in the future appears in a decision on June 12, 1972, of the U.S. Supreme Court:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.[44]

[43]Mr. Justice Strong in *The Scotia*, 81 U.S. 170 (1871).

[44]The Bremen, *et al.* v. Zapata Off-Shore Company, 1972 AMC 1407 (June 12, 1972).