

INTERNATIONAL ORGANIZATION OF SHIPPING

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I

A WELL-KNOWN British authority on shipping, writing in 1927, stated, "In no department of human activities is the contact between nations so close and continuous as in shipping; in few lie greater possibilities of friction. . . . More than this, it is destined to play no small part in promoting the recognition of economic interdependence and the habit of everyday, practical cooperation, on which alone can be established a real Society of Nations."¹ Unfortunately, no permanent inter-governmental organization exists to handle the more controversial maritime matters.

There is at present a temporary body, the United Maritime Consultative Council, to which fourteen maritime nations have subscribed, but whose existence has only been provided for until the end of October 1946. The Council, which is primarily concerned with the allocation of tonnage for relief cargoes, is composed of national delegations of the member countries and has no administrative staff.² With the exception of this body, the functions of all standing inter-governmental organizations are restricted in character, *e.g.*, the International Hydrographic Bureau and the International Commission of the Cape Spartel Light. There have been numerous international *ad hoc* conventions dealing with shipping problems, particularly with legal questions and such technical matters as safety of life at sea, tonnage measurements, oil pollution of the seas, etc.³ In addition there are a few intergovernmental bodies, such as the International Labor Organization and the Pan-American Union, which consider limited phases of the maritime industry as a part of their other functions.⁴

The main international shipping problem, however, is not the coordination of technical matters and legal practices but the coordination

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1. FAYLE, *THE WAR AND THE SHIPPING INDUSTRY* (1927) 400.

2. The Temporary Transport and Communications Commission of the United Nations Economic and Social Council has recommended that the United Maritime Consultative Council consider the possibility of transforming itself into a permanent body to handle "technical" questions. *FIRST REPORT SUBMITTED TO THE ECONOMIC AND SOCIAL COUNCIL* (May 25, 1946) (mimeographed) 27.

3. These included among others: construction of passenger ships, lifesaving appliances, radiotelegraphy, load-lines, Atlantic ice patrol, buoyage and lighting of coasts. See MANCE and WHEELER, *INTERNATIONAL SEA TRANSPORT* (1945) 37-48.

4. For a description of these organizations, see *ibid.*

of political and economic objectives. The problem has been complicated by the fact that international shipping competition, which was largely commercial at the end of the 19th century, has become increasingly political during the present century. The importance of merchant shipping in national defense has encouraged governments to use protective measures and subsidies in an attempt to obtain incompatible shares of the world's carrying trade for their own flag vessels. Although such an outgrowth of uncontrolled nationalism cannot be satisfactorily handled by private agreements, numerous non-governmental organizations have come into existence, seeking to regulate international competition in the industry. Almost every liner trade has organized a shipping conference; an International Shipping Conference was founded in 1921 with a membership of shipowners' organizations from the more important maritime countries; there are international associations of tramp vessel owners. An International Maritime Committee founded in 1897 deals with legal aspects of international shipping.

That these private agreements are quite inadequate stems from the fact that the shipping industry has always been subject to rather violent fluctuations. Although it is impossible to forecast what the situation will be after the more urgent relief cargoes have been carried, there is considerable reason to believe that in spite of the encouraging prospects for world trade, the volume of shipments will probably fall short of utilizing available tonnage.⁵ The dual function of shipping—commerce and defense—will cause many nations to continue to subsidize their merchant fleets and thereby contribute to the plethora of tonnage. That the strategic requirements of many nations exceed their commercial needs will aggravate the situation.

Therefore, the problem of adjusting the supply of shipping to demand will in all likelihood remain a most perplexing one. Even if it be assumed that much of the existing tonnage will be laid up for use in emergencies, the penalty of obsolescence will promote continual construction. If ships are necessary for national security (and they will be so considered as long as nations refuse to surrender any of their sovereignty to a world organization, and as long as preparations for the next war proceed on the basis of the last), modern vessels will be demanded.

5. Variables that will affect the post-war supply of and demand for shipping are discussed in Marx, *The Determination of Postwar Ocean Freight Rates* (1946) 36 *AM. ECON. REV.* 561-3; Carlson and Lytzen, *Postwar Shipping—World Tonnage Available and Emerging Policies* (1946) 22 *FOR. COM. WEEKLY* 3, 12, 50. For a more optimistic estimate of the demand for shipping, see Adler, *British and American Shipping Policies: A Problem and a Proposal* (1944) 59 *POL. SCI. Q.* 193.

II

When one considers the decreasing cost nature of ship operations and the fact that large surpluses of shipping have been created by wars and other non-commercial stimuli, it is not surprising that the economic forces of competition are sometimes rather slow in adjusting the supply of tonnage to a lower demand. Consequently, mechanisms to help adjust supply to demand have long existed in the industry. As early as 1875 self-preservation impelled ship-owners to organize for the purpose of minimizing wasteful, cut-throat competition. Shortly before World War I, investigations led both the American⁶ and British⁷ governments to recognize the undesirability of unrestricted competition and the advantage to be gained from cooperation in the regulation of rates, sailings, etc. It was felt, however, that this form of cooperation, the conference system, would lead to abuses if the ship-owners were left entirely to themselves. The measures of self-regulation employed by conference lines are not altogether confined to the fixing of freight rates. Not infrequently, they include such cooperative arrangements as the pooling of traffic or revenue. From this, it is but a step to the substitution of monopoly profits for competitive uncertainties.

During the depressions of the 'thirties, even tramp vessels which had hitherto always operated independently found it necessary to resort to cooperative measures. Under the initiative of a subsidy offered by the British Government, the Tramp Shipping Administrative Committee was formed to rationalize this part of the dry cargo industry. Through a scheme of minimum rates and payments for vessels that were laid up, cooperation was secured with tramp owners in other nations. About the same time, an International Tanker Pool was organized to accomplish the same objectives for tankers.⁸

These pools marked something new in the shipping trade, and their methods may establish useful precedents for international cooperation in rationalizing the employment of tonnage in the future. Another organization which may provide experience for future use is the Australian Oversea Transport Association which combines in a single formal organization both shippers and ship-owners. This Association emphasizes the community of interest between the two groups, and

6. H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

7. *Report of the Royal Commission on Shipping Rings* (1909) 47 and 48 PARL. REP.

8. The Tanker agreement provided that members pay to a pool a percentage of all freight receipts. The proceeds of these receipts, less administrative expenses, were distributed among the vessels which were idle, thus providing an inducement to owners to refrain from accepting uneconomic rates. For descriptions of the operation of this pool, the Tramp Shipping Administrative Committee, and the older but more restricted Baltic and International Maritime Conference, see Sanderson, *Control of Ocean Freight Rates in Foreign Trade* (1938) DEPT. OF COM. TRADE PROMOTION SER. No. 185.

stresses the importance of stable rates and regularity of sailings to the majority of importers and exporters.

Rate control up to the present has been mainly a function of the ship-owners themselves in most areas, although the influence of shippers has been recognized in the case of the Australian Association. In Great Britain, where the Royal Commission had recommended that shippers form associations in order to bargain on more equal terms with the shipping conferences, the formation of adequate shipper bargaining units has been hampered by a conflict of interests between importers and exporters and manufacturers and merchants. The difficulties experienced by the British in forming associations of shippers to deal satisfactorily with the conferences have been far more typical than the comparative success achieved by the Australian Oversea Transport Association, whose problem was somewhat simplified by the fact that only a small number of basic commodities were involved. A number of governments have, therefore, superimposed various degrees of authority for the prevention or correction of the abuses to which the conference system was susceptible. In the United States trades, for example, all conference and pooling arrangements are subject to review by the United States Maritime Commission, as will be described in Part III of this article.

Government control of rates in foreign trades is obviously limited by multiple jurisdiction and possibly, to some extent, by treaty obligations. That no serious conflicts have arisen so far is due, apparently, to the general policy of conservatism that has been exercised in the administration of existing laws and regulations. During the recent war, a high degree of centralized control was achieved by the War Shipping Administration and the British Ministry of War Transport over practically all the merchant tonnage of the allied nations. A United Maritime Authority was finally evolved to coordinate the merchant shipping of the United Nations, but even before V-J Day there was considerable impatience with its restrictions in several of the smaller countries. As a result this effort at international cooperation, which had been designed for wartime rather than peacetime purposes, was terminated in March 1946. It has been succeeded by the temporary and eviscerated United Maritime Consultative Council.

After World War I a similar problem confronted the nations of the world, and although international control was not seriously considered at that time as a permanent arrangement, considerable sympathy was expressed for the continuation of such aspects of wartime control as might be necessary until shipping was adjusted to the post-war situation. Opposition to the continuation of international control, however, gained the upper hand in all the victorious countries, so that the efficacy of control in peacetime was neither proved nor disproved. The result was an over-production of ships and a depressed level for freight

rates. To prevent a repetition of this uneconomic situation and to promote more cordial relations between the maritime nations of the world, an international organization to coordinate the industry is again proposed. Lord Leathers, former Minister of War Transport for the United Kingdom, recently said that in shipping, no less than in civil aviation, there is much to be said for internationalization as an ideal policy. He believes that the international agreement on the pooling and control of the merchant tonnage of the United Nations, as was provided by the United Maritime Council, might serve as a starting-point.⁹ Vice Admiral Land, until recently Chairman of the United States Maritime Commission, has also endorsed the principle of an international organization to coordinate world shipping.

Great Britain has already accepted in principle the proposal of the United States for an International Trade Organization to investigate all private cartels or agreements which restrain international trade, restrict access to international markets, or foster monopolistic controls. It would seem logical to organize a comparable organization to supervise shipping conferences and pools, inasmuch as the unique problems of the shipping industry make a separate international control body desirable. Because of the strategic importance of merchant shipping, it may be necessary to make this latter body responsible to the Security Council as well as the Economic and Social Council of the United Nations. Such a division of responsibility is not ordinarily desirable, and such a suggestion will doubtless encounter considerable opposition, but the fact remains that the shipping industry has both martial and commercial characteristics.¹⁰

The Temporary Transport and Communications Commission of the United Nations, in its first report to the Economic and Social Council, refrained from making any recommendations concerning an international organization for commercial matters in the field of merchant shipping. Instead, the Report advocated an integration of activities in the technical field, where there are already a large number of inter-governmental agreements. The Commission, however, may have chosen to proceed slowly, restricting its activities for the time being to matters concerning which there is a fairly close consensus.

Although conference and pooling arrangements have had considerable success, they have not always been adequate to solve the overall problem of the industry. The acquisition of greater authority by these extragovernmental, cartel-like agencies would only increase the responsibility of the governments concerned to protect the shipping public, which in the past has rarely been sufficiently well organized to protect itself. Furthermore, to promote both commerce and security,

9. (1944) 147 THE ECONOMIST 483.

10. Since reaching these conclusions the author has found that rather similar suggestions are made by MANCE and WHEELER, *op. cit. supra* note 3, at 149-71.

international competition in the building and maintenance of mercantile fleets must be brought under control. The international nature of the industry and the international complexion of the problems both indicate, therefore, the need for an international control organization to (1) protect the shipping public against the monopoly powers of shipping conferences; (2) help rationalize the economic forces of supply and demand where ordinary competitive practices fail to make the necessary adjustments with sufficient rapidity; and (3) coordinate national maritime policies.

However, even if all the political problems were solved and national rivalries for power were eliminated, the international regulation of the commercial aspects of shipping would still be extremely complicated and difficult. These difficulties are well illustrated by the experience of the United States in its efforts to regulate the international shipping which is engaged in transporting its foreign trade. As this country's program for the regulation of shipping rates and practices has been one of the most ambitious undertaken, a discussion of the procedure followed and of some of the results achieved will shed considerable light on the advantages and shortcomings of unilateral regulation of shipping, and should also illuminate some of the problems that will confront multilateral regulation by an international organization.

III

Several agencies of the United States Government have regulatory authority over the shipping industry. Safety and certain technical matters, for example, have been handled by the Bureau of Steamboat Inspection and Navigation and by the Coast Guard. The regulation of rates and commercial practices, however, has been under the jurisdiction of the United States Maritime Commission, which, when created in 1936, fell heir to the powers previously exercised by the United States Shipping Board Bureau of the Department of Commerce, which in turn had inherited the authority of the United States Shipping Board. Each agency in turn received new powers of its own.

REGULATORY LEGISLATION

The earliest legislation directly regulating the rates and practices of water carriers as such was the Shipping Act of 1916, providing for supervision of common carriers operating on regular routes on the high seas and Great Lakes (1) in the foreign trade of the United States (except ferry boats) and (2) in both interstate and non-contiguous domestic trade.¹¹ Similar supervision was provided over persons

11. 39 STAT. 728 (1917), 40 STAT. 900 (1919), 46 U. S. C. § 801 (1940). Authority over interstate carriers by water was transferred to the Interstate Commerce Commission by the Transportation Act of 1940, 54 STAT. 933 (1941), 49 U. S. C. § 904 (1940).

carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water on the high seas or Great Lakes.¹²

In international shipping the Act prohibits (1) deferred rebates, (2) "fighting ships,"¹³ (3) retaliation or discrimination against any shipper, and (4) unfair or unjustly discriminatory contracts with any shipper. A fine of not more than \$25,000 for each offense is provided as the penalty for a breach of these provisions.¹⁴ If water carriers—other than citizens of the United States—violate the foregoing provisions or deny an American common carrier admission to a conference on equal terms with all other parties, the Secretary of Commerce, upon certification by the Commission, is empowered to bar vessels of the offending parties from United States ports.¹⁵

Agreements between parties subject to the Act or changes in earlier agreements must be filed with the Commission. The Commission may disapprove, cancel, or modify any agreement or modification thereof deemed to operate to the detriment of United States commerce, to be in violation of the Act or to be "unjustly discriminatory or unfair" between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Approved agreements are exempted from the Anti-Trust laws. Violators are subject to a fine of \$1000 for each day of the offense.¹⁶

It is unlawful (1) to give unreasonable preference to any person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) to permit by false billing, weighing, etc., transportation at less than regular rates; (3) to influence insurance companies to discriminate against a competitor; and (4) to disclose information detrimental to shippers or consignees.¹⁷ It is also unlawful for any shipper, consignor, or consignee to obtain or attempt to obtain by false billing, false weighing, etc., rates less than otherwise applicable. A fine of not more than \$5000 is provided for each offense.¹⁸

The charging of rates or fares which are "unjustly discriminatory" between shippers or ports, or "unjustly prejudicial" to United States exporters compared to their foreign competitors, is prohibited, and the Commission is empowered to alter rates which are in violation of this

12. *Ibid.*

13. A "fighting ship" is a vessel placed on berth by one or more established lines which quotes lower rates than its sponsors with the intention of rendering the entry of a newcomer to the route difficult.

14. 39 STAT. 733 (1917), 41 STAT. 996 (1921), 46 U. S. C. § 812 (1940).

15. 39 STAT. 733 (1917), 41 STAT. 996 (1921), 46 U. S. C. § 813 (1940).

16. 39 STAT. 733 (1917), 46 U. S. C. § 814 (1940).

17. 39 STAT. 735 (1917), 46 U. S. C. § 819 (1940) and 39 STAT. 734 (1917), 46 U. S. C. § 815 (1940).

18. *Ibid.*

section. Reasonable regulations covering practices relating to receiving, handling, storing or delivery of property must be observed,¹⁹ and the Commission has authority to require the filing of reports, records, etc., of any person subject to the Act.²⁰ The Commission is also authorized to investigate any violation of the Act on its own volition, or to do so upon a complaint filed by any person. In the latter case full reparation for injury may be awarded if the complaint is filed within two years after the cause of action accrues.²¹

The main provisions of the 1920 Act concerned the continued operation of war-built American vessels by the Shipping Board and their ultimate sale to private operators. Section 19 of the Act, however, authorizes the Commission to make such rules and regulations affecting shipping in foreign trade as are necessary to meet unfavorable conditions resulting from foreign rules or laws or from competitive methods of foreign ship operators or their agents.²²

The principal purpose of the 1936 Act was promotional, but in addition to transferring to the Maritime Commission the regulatory powers described above, the 1936 Act contained two new regulatory provisions. The Act made it unlawful for a common carrier by water to prevent or attempt to prevent any other such carrier from serving a port within the continental limits of the United States, designed for the accommodation of ocean-going vessels, when an improvement project for such port had been authorized by Congress.²³ (This example of local favoritism had been engineered by a few recently-developed outports seeking to assure themselves of direct water service at terminal rates regardless of whether or not it was economical from an operating point of view.) The 1936 Act also authorized the Commission to investigate discriminatory rates and practices whereby American exporters are required to pay a common carrier in the foreign trade of the United States a higher rate to a foreign port than the rate charged by such carrier on similar cargo from the foreign port to such United States port.²⁴ Pursuant to this authority, a study was made by the Commission in its first year leading to the conclusion that services and conditions in the import and export trade are so different that no decision regarding discrimination could be drawn.²⁵

REGULATORY PROCEDURE

In 1940, an investigation of administrative procedure in government agencies conducted by a committee appointed by the Attorney-General

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19. 39 STAT. 734 (1917), 46 U. S. C. § 816 (1940).
 20. 39 STAT. 736 (1917), 46 U. S. C. § 820 (1940).
 21. 39 STAT. 736 (1917), 46 U. S. C. § 821 (1940).
 22. 41 STAT. 995 (1921), 46 U. S. C. § 876 (1940).
 23. 49 STAT. 1987 (1936), 46 U. S. C. § 1115 (1940).
 24. 49 STAT. 1990 (1936), 46 U. S. C. § 1122 (1940).
 25. REP. MARITIME COMM. (1937) 17.

found little to criticize in the Maritime Commission's regulatory procedure.²⁶ Certain recommendations to extend the use of informal methods of adjudication and the use of a shortened procedure similar to that utilized by the Interstate Commerce Commission were incorporated by the Maritime Commission, and accordingly it was given a "clean bill of health" by the Attorney-General's committee in their final report in 1941.²⁷ One reason for the Maritime Commission's successful administration of its regulatory powers was no doubt due to the fact that the Commission and its predecessors had borrowed heavily from the Interstate Commerce Commission.²⁸

Formal Docket. The procedure in the case of formal dockets is quite similar to that before a United States district court sitting as a court of equity. Formal complaints are filed and served on the respondent, and an opportunity is afforded to respond to the complaint. An examiner, whose duties are very similar to those of a master in chancery, is appointed by the Commission to hear evidence and report his findings. Exceptions to the findings of the examiner are then heard before a committee appointed by the Commission for the purpose, and the Commission finally considers the record of the case and issues a report containing its findings, and if necessary issues a formal order. Even in investigations initiated by the Commission there is an element of an adversary nature; one section of the Commission's legal staff prosecutes the case, while another section of the staff advises the Commissioners as to the merits of the case and its proper disposition. The same counsel who conducts the case for the Government does not advise the Commission. As a result of such hearings orders are issued (1) to cease and desist from an unlawful practice, (2) to fix a rule governing future practices of respondent and other carriers, and (3) to pay reparation for injury caused by unlawful acts or practices.²⁹ During the fiscal year 1941, a shortened procedure was introduced, whereby complaints are disposed of upon the submission of evidence under oath by memoranda, thereby avoiding the need of a hearing.

Informal and Special Dockets. The Commission also maintains an informal docket to assist shippers, carriers, and other persons in the adjustment of controversies which arise in regard to rates, fares and other charges. Informal complaints are handled by correspondence or adjusted through informal conference, thereby avoiding the delay and expense incident to formal procedure.

A special docket is maintained to permit reparations to shippers where carriers believe that the charges they have collected for trans-

26. SEN. DOC. NO. 186, 76th Cong., 3rd Sess. (1940) Part 4.

27. SEN. DOC. NO. 8, 77th Cong., 1st Sess. (1941) 189.

28. SEN. DOC. NO. 186, 76th Cong., 3rd Sess. (1940) Part 4 at 3.

29. Cunningham, *The U. S. Maritime Commission—A Study in Administrative Law* (Unpublished thesis in Harvard Law School Library, 1939) 70-8.

portation are unlawful. Applications for such authorization must admit that the rate charged was unreasonable, and are considered the equivalent of informal complaints. Careful consideration is given them in order to avoid the possibility of granting rebates to favored shippers.

Section 15 Agreements. Under Section 15 of the Shipping Act of 1916, common water carriers and other persons subject to the Act are required to file for approval a true copy, or if oral, a true and complete memorandum of every agreement with any other such carrier or such person to which it may be a party, fixing or regulating rates; or controlling, regulating, preventing or destroying competition; or allocating ports or restricting or otherwise regulating sailings; or in any manner providing for a cooperative working arrangement. All such agreements, modifications, or cancellations are subjected to analysis and, if found to be unexceptionable, are approved as a routine matter. (Great care is taken to assure the accurate expression of intent of the parties filing the agreement. Thus, the Commission exercises a combination of regulatory and service functions.) If a protest against approval of an agreement is received, examination is more critical. In all cases an effort is made to reach informally a solution satisfactory to all. If a proper solution cannot be achieved in this manner, a formal hearing is scheduled.

Filing of Tariffs. The Commission requires all conferences to file their tariffs as an administrative matter in its supervision of Section 15 agreements. However, as not all common carriers by water are members of shipping conferences, it has been necessary to supplement this requirement. Under a regulation issued by the United States Shipping Board Bureau of the Department of Commerce in 1935, common water carriers in foreign commerce are required to file with the Commission tariffs covering the transportation of property, except bulk cargoes, from the continental United States to foreign ports.³⁰ Such tariffs have to be filed within thirty days of their effective date. Bill-of-lading forms are also filed under regulations prescribed by the Commission.

Pursuant to an order issued by the Commission on January 26, 1939, common carriers are required to file their rates and charges on cargo, other than bulk cargo, transported from the East Coast of South

30. Investigation of § 19 of Merchant Marine Act of 1920, 1 U. S. S. B. B. 470, 502-3 (1935); *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139 (1937). (In this article, reports of the United States Shipping Board will be designated by the letters U. S. S. B.; reports of the United States Shipping Board Bureau of the Department of Commerce will be indicated by U. S. S. B. B.; and reports of the United States Maritime Commission will be designated by U. S. M. C. In the text, the United States Shipping Board will be referred to as the Board; the United States Shipping Board Bureau of the Department of Commerce will be called the Bureau; and the United States Maritime Commission will be designated as the Commission.)

America to the Pacific Coast of the United States.³¹ Other lines and conferences frequently file import rates voluntarily.

If the Commission doubts the reasonableness or lawfulness of the tariffs filed, or if a protest is received, the Commission attempts to effect a settlement by informal means. In most cases, carriers have voluntarily made the necessary corrections upon informal notification by the Commission. If this fails, a suspension may be ordered and a formal hearing scheduled, or the Commission may permit the tariff to become operative without delay, and schedule hearings for a subsequent time.

REPORTS

American experience with the regulation of domestic trade, over which the government has had maximum and minimum rate control, is more complete than that with the regulation of shipping in foreign trade. Nevertheless, a considerable body of cases concerned with carriers operating in the foreign trades is available. Furthermore, many of the Commission's powers are applicable to carriers in both the foreign and domestic trades; therefore, cases involving domestic carriers occasionally evolve principles apposite to carriers in the foreign trades.³² The narrowness of the Commission's legal authority implicitly limits its regulatory decisions. The Commission possesses no mandate to consider the broader social and economic consequences of its actions,³³ nor the impact of its decisions on international economic and political relations. Its primary function is to promote American flag shipping and commerce.

The Commission's policy is to base decisions on the facts of record in each case, and it maintains that findings in connection with similar practices do not have the force of law in subsequent proceedings involving different carriers, different trades, different competitive conditions, or different statutory provisions.³⁴ Despite this alleged policy of considering each case *in vacuo* certain general principles can be traced, although they should not be regarded as established precedents possessing the force of law.

31. In the Matter of Rates, Charges, and Practices of Yamashita Kisen Kabushiki Kaisha and Osaka Syosen Kabusiki Kaisya, 2 U. S. M. C. 14 (1939).

32. Note the similarities between § 18 of the Shipping Act of 1916, 39 STAT. 735 (1916), 46 U. S. C. § 817 (1940) (domestic carriers) and § 17 of the Act, 39 STAT. 734-5 (1916), 46 U. S. C. § 816 (1940) (foreign carriers).

33. But see *Ames Harris Neville v. American-Hawaiian Steamship Co.*, 1 U. S. M. C. 765 (1938) (anti-monopoly policy invoked), discussed *infra*, at 1227, and see discussion of the Commission's assumption of authority to consider the reasonableness of conference rates *infra*, at 1228.

34. *Los Angeles By-Products Co. v. Barber Steamship Lines*, 2 U. S. M. C. 106, 115 (1939).

*Standards of Reasonableness.*³⁵ The Commission's predecessors devoted considerable attention to evaluating general factors pertinent to the reasonableness of rates and practices. Value of service was early recognized as a factor to be considered in rate determination,³⁶ although not conclusive when considered alone.³⁷ Cost of service was also recognized as an important criterion, so that a justifiable rate for a cheap article might be greater in proportion to its value than the rate for a high-priced article.³⁸ But a carrier was held not justified in burdening a port with a differential for the sole reason that the cost of operation from that port is greater than from some other port; such elements as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others were deemed to merit consideration.³⁹ However, reasonableness of rates is not to be gauged by the ability of shippers to market their products with profit.⁴⁰

The reasonableness of passenger fares has been considered in only one case. In 1934, the Bureau held that classification of passenger fares should depend not only on location and type of space, but also on service, freedom of the ship, and age, size, speed and itinerary of the vessel.⁴¹

The rates of other carriers and services are not determinative of the reasonableness of water carrier rates. Export rates higher than import rates have been held not unreasonable if the import volume is far greater and there is no proof that reduced exports' rate would produce a comparable volume.⁴² In 1939, the Commission held that joint through rates greater than a combination of locals and transfer charges did not violate the Act, since the conference controlling the through rates did not control the local rates.⁴³

Questions of services which water carriers should perform without charge, and of what constitutes reasonable charges for services that need not be included in the transportation rate, have been adjudicated frequently. The Bureau inclined to the view that the published rate must be all inclusive. In 1935, in *Re Assembling and Distributing*

35. Several of the cases discussed under this heading also involve considerations of undue preference and prejudice.

36. *Judson L. Thomson Manufacturing Co. v. Eastern Steamship Lines*, 1 U. S. S. B. 58 (1924).

37. *Dobler & Mudge v. Panama Rail Road Steamship Line*, 1 U. S. S. B. 130 (1927).

38. *Atlas Waste Manufacturing Co. v. The New York & Porto Rico Steamship Co.*, 1 U. S. S. B. 195 (1931).

39. *Port Utilities Commission of Charleston, S. C. v. The Carolina Co.*, 1 U. S. S. B. 61, 71-2 (1925).

40. See note 38 *supra*.

41. *Passenger Classifications and Fares, American Line Steamship Corp.*, 1 U. S. S. B. B. 294, 302-5 (1934).

42. *Edmond Weil v. Italian Line*, 1 U. S. S. B. B. 395 (1935).

43. *Neuss, Hesslin v. Grace Line*, 2 U. S. M. C. 3 (1939).

Charge,⁴⁴ it held that the carriers' undertaking was not only to transport cargo but also to present it in a deliverable state, and therefore the carriers cannot charge for assembling and distributing services at one port when they customarily provide such services without additional compensation elsewhere. Similarly, it was held that no charge could be made for the issuance of bills of lading because this was part of the common carrier service.⁴⁵ The Commission, after a decision that carriers are obliged to mail arrival notices without charge,⁴⁶ came to the conclusion that nothing in the Shipping Acts prohibits carriers from dividing their rates for different services performed, nor requires them to publish their charges in single amounts.⁴⁷ Following a 1939 rehearing of the *Assembling and Distributing* case,⁴⁸ the Commission overruled its predecessor and held that a carrier is entitled to compensation for any transportation services rendered. The fact that all parties were benefited by the delivery and receipt of general cargo at place of rest on dock instead of at end of ship's tackle could not operate to prohibit the carriers from charging for the services actually rendered in performing the handling beyond ship's tackle, when, as here, it was not shown that the published tackle-to-tackle rates included compensation for further services or were in excess of fair and reasonable rates for the tackle-to-tackle service actually rendered. In 1940, the Supreme Court sustained the Commission's view that the separation of charges by water carriers to show costs beyond ship's tackle is lawful.⁴⁹

To grant excessive free-time storage has been held unlawful, the Commission stating that only such free time should be allowed as may be reasonably required for the removal of property, the criterion of reasonableness being transportation necessity and not commercial convenience.⁵⁰ Subsequently, nominal charges on coffee were held in violation of the foregoing decision, as coffee did not share the proper burden of preventing pier congestion.⁵¹

Undue prejudice, preference and discrimination. Along with cases involving the reasonableness of rates, questions of undue prejudice, preference and discrimination were among the earliest problems requiring the Board's attention. In 1936, the Bureau indicated the general philosophy that the existence of unjust discrimination and

44. 1 U. S. S. B. B. 380 (1935).

45. *In re Gulf Brokerage and Forwarding Agreements*, 1 U. S. S. B. B. 533 (1936).

46. *Intercoastal Segregation Rules*, 1 U. S. M. C. 725, 733 (1937).

47. *Los Angeles By-Products Co. v. Barber Steamship Lines*, 2 U. S. M. C. 106, 114 (1939).

48. *J. G. Boswell Co. v. American-Hawaiian Steamship Co.*, 2 U. S. M. C. 95 (1939); *Los Angeles By-Products Co. v. Barber Steamship Lines*, 2 U. S. M. C. 106 (1939).

49. *Sun-Maid Raisin Growers Ass'n v. United States*, 33 F. Supp. 959 (N. D. Cal. 1940), *aff'd* 312 U. S. 667 (1941).

50. *Storage of Import Property*, 1 U. S. M. C. 676, 682 (1937).

51. *Storage Charges Under Agreements 6205 and 6215*, 2 U. S. M. C. 48 (1939).

undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof.⁵² Acceptable evidence from which to infer the unreasonable or prejudicial nature of rates may include showing a differential not justified by cost, value of service, or other transportation conditions.⁵³ However, the Acts do not afford relief from disadvantages inherent in geography.⁵⁴ Different port conditions and facilities, warranting different methods of handling cargo, may justify differential charges.⁵⁵ The advantage which comes to a shipper merely from the location of his plant does not constitute an illegal preference.⁵⁶ Accordingly, rates to Hawaii from Gulf and Atlantic ports, higher than those from Pacific ports, have been held lawful.⁵⁷

In 1936, the Bureau held that prejudice to one shipper, to be undue, must ordinarily be such that it shall be a source of positive advantage to another shipper.⁵⁸ This principle received specific illustration in several cases involving minimum weights. For example, rates based on minimum weights so large as to be available to one shipper only constitute undue and unreasonable preference,⁵⁹ and quantity discount rules in the intercoastal trade are unjustly discriminatory.⁶⁰ Moreover, where the prevailing shipping quantity is small, even though carload lots are offered by some shippers, any-quantity rates are consonant with anti-monopoly policy as they protect small shippers.⁶¹

Underquoting any rate which other carriers quote, and the use of rate cutting as a club to compel other carriers to adopt pooling agreements, rate differentials, or other measures have been held unfair practices and detrimental to American commerce.⁶² Similarly, the refusal of conference lines to accept cargo from a certain shipper when space was available was discriminatory and in violation of the law.⁶³ (Eventually

52. Philadelphia Ocean Traffic Bureau v. The Export Steamship Corp., 1 U. S. S. B. B. 538 (1936).

53. Atlantic Refining Co. v. Ellerman & Bucknall, 1 U. S. S. B. 242, 250 (1932).

54. Sharp Paper & Specialty Co. v. Dollar Steamship Lines, 2 U. S. M. C. 91 (1939).

55. Foreign Trade Bureau New Orleans Association of Commerce v. Bank Line, 1 U. S. S. B. 177, 185-6 (1930).

56. Atlantic Refining Co. v. Ellerman & Bucknall, 1 U. S. S. B. 242, 251 (1932).

57. See note 55 *supra*.

58. California Packing Co. v. American-Hawaiian Steamship Co., 1 U. S. S. B. B. 543 (1936).

59. Intercoastal Rates of American-Hawaiian Steamship Co., 1 U. S. S. B. B. 349 (1934).

60. Transportation of Lumber Through Panama Canal, 1 U. S. M. C. 646 (1937).

61. Ames Harris Neville Co. v. American-Hawaiian Steamship Co., 1 U. S. M. C. 765 (1938).

62. Section 19 Investigation, 1935, 1 U. S. S. B. B. 470, 498 (1935).

63. Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H., 1 U. S. M. C. 686 (1937).

a reparation of over \$25,000, the largest amount ever involved in a Commission reparation case, was awarded.)⁶⁴

In 1940, the Commission on its own initiative, instituted investigations into false billing and misdescriptions of cargo. Nine of fourteen respondent carriers were found to allow shippers to obtain transportation from Japan to the United States at less than regular rates by means of false billing,⁶⁵ and a fine of \$5,250 was assessed.⁶⁶ Nine shippers and six carriers were found to have violated the Shipping Acts by misdescribing shipments from New York to the Philippine Islands.⁶⁷ In 1942 the Commission held that "brokerage" payments to shippers were unlawful methods of reducing freight rates.⁶⁸

Conference and Other Section 15 Agreements. Although there is no specific statutory provision authorizing the Commission to pass upon the reasonableness of rates established by conferences in the foreign-trade, the Commission found an opportunity to influence such rates in its power to disapprove the conference agreement. If the Commission disapproves the agreement, the parties thereto are compelled to operate individually, and thereby lose the advantages of the conference system. This method of influencing rates was first employed by the Bureau in 1935, when it held that upon a showing that a conference rate in foreign commerce is unreasonably high, its reduction to a proper level will be required; if necessary, approval of the conference agreement will be withdrawn.⁶⁹ This was a considerable departure from the earlier attitude that in Section 15 Congress had given sanction and encouragement to conferences, as the benefits from them to shippers are often as great as the benefits accruing to the carrier members, and therefore it was the Board's function to afford relief only from actual and not from theoretical wrongs arising from such agreements.⁷⁰

In 1938, the Commission considered the agreement between the Matson Navigation Company and the Dollar Steamship Lines,⁷¹ whereby Matson agreed not to operate to the Far East in return for Dollar's agreement not to solicit traffic between the Pacific Coast and the Hawaiian Islands and to pay Matson fifty per cent of such business that Dollar happened to carry. The Commission held, over the dissent

64. *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M. B. H.*, 2 U. S. M. C. 62 (1939), *rev'd on other grounds*, 31 F. Supp. 76 (S. D. N. Y. 1940), *rev'd on other grounds*, 116 F. (2d) 849 (C. C. A. 2d, 1941), *cert. denied sub nom. Compania Espanola de Navegacion Maritima v. Roberto Hernandez*, 313 U. S. 582 (1941).

65. Rates from Japan to United States, 2 U. S. M. C. 426 (1940).

66. U. S. Maritime Commission Press Release No. 869, March 21, 1941.

67. Rates from United States to Phillipine Islands, 2 U. S. M. C. 535 (1941).

68. Rates, Charges, & Practices of L. & A. Garcia and Co., 2 U. S. M. C. 615 (1941).

69. *Edmond Weil v. Italian Line "Italia,"* 1 U. S. S. B. B. 395 (1935).

70. *In re Rates in Canadian Currency*, 1 U. S. S. B. 264, 281 (1933).

71. *In the Matter of Dollar-Matson Agreements*, 1 U. S. M. C. 750 (1938), *aff'd on rehearing*, 2 U. S. M. C. 387 (1940).

of two Commissioners, that agreements restricting competition should be of definite duration and for reasonably short periods, so that the parties concerned and the Commission would have an opportunity to consider changed conditions. The Commission continued that the exemption from the Anti-Trust laws granted by Section 15 is intended to permit water carriers to regulate competition so as to eliminate rate-cutting and other abuses injurious to shipper and carrier alike, but is not intended to foster monopoly. In a subsequent case, the Commission held that the advantages of group rate action and exemption from the Anti-Trust laws require conferences to consider shipper needs and provide an opportunity for an exchange of views with their customers.⁷²

As "fighting" ships and deferred rebates were prohibited by the 1916 Act, contract rates came to be widely used in the foreign trades of the United States.⁷³ In 1922, the Board decided that contract rates were in violation of the 1916 Act, where a single line operated in the trade,⁷⁴ but in 1933 it upheld the practice where more than one line quoted the contract rates and new lines could join the conference if they so desired.⁷⁵ By the outbreak of World War II, sixty-eight conferences in the foreign trade of this country were employing the contract rate system.⁷⁶

The Commission formalized and refined the holdings as to contract rates. In a case involving the right of lines operating from United States North Atlantic ports to the European range to prevent contract shippers located in the interior of this country from patronizing vessels which called directly at Great Lakes ports, the Commission pointed out that the contract rate system in foreign commerce is not unlawful per se, but is condemned where it operates solely to effect a monopoly. Since the North Atlantic lines carried more than eighty per cent of the traffic originating in the Great Lakes area, it was held that they had a practical monopoly and that a difference in rates for identical services based solely upon whether the carriers secure the shippers' entire patronage was prima facie discriminatory.⁷⁷ In the instant case, the discrimination was undue and unreasonable, since the flow of traffic was not naturally tributary to the North Atlantic lines, and the same

72. *Pacific Coast-European Rates & Practices*, 2 U. S. M. C. 58 (1939).

73. Contract rates grant shippers who agree to patronize conference lines exclusively for an agreed period of time lower rates than shippers who do not enter such an agreement. This differs from the deferred rebate system, which is widely used abroad, in that the latter arrangement requires the shipper to give the contract carriers his business during a period of deferment as well.

74. *Eden Mining Co. v. Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922).

75. *Rawleigh v. Stoomvaart*, 1 U. S. S. B. 285 (1933).

76. *INTER-AMERICAN MARITIME CONFERENCE (Nov. 25-Dec. 2, 1940) REPORT OF THE DELEGATES OF THE UNITED STATES* (1941) 176.

77. Note influence of *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937).

shippers were permitted to use the Gulf routes to Europe without jeopardizing their contracts.⁷⁸

The exclusion of applicants from conference membership has posed a series of questions. The Commission has stated that its policy is to require in all conference agreements a clause permitting the admission as a conference member of any line seeking admission on equal terms, but that this does not mean that a ship operator can become a member merely by requesting admission.⁷⁹ The decisions, however, do not indicate a consistently-applied regulatory philosophy so much as a response to expediency, particularly where contract rates or war conditions enter the picture.

As early as 1925 the Board held an agreement between three separate conferences unfair to the carriers and detrimental to American commerce because the admittance of a new member line required the unanimous vote of all parties.⁸⁰ Voting provisions have been rejected which gave a conference control of traffic moving over routes in which none of its members participated,⁸¹ and which permitted inactive members of a conference to vote to exclude a new member who would actually operate in the trade.⁸²

Exclusion of an applicant who would charge ten per cent less than conference rates has been sustained where there was no proof that a differential was justified and the existing members did not have a monopoly.⁸³ Refusal of membership on the grounds the applicant was not a common carrier actually operating in the trade has been held not to result in discrimination, undue prejudice, or detriment to the commerce of the United States,⁸⁴ even where the applicant did not at the time operate in the trade because contract rates prevented operation except at a substantial loss.⁸⁵ Similarly, where previous contract commitments obligated the applicant to charge lower than conference rates, exclusion by the conference was permitted.⁸⁶ In 1939 and 1940, however, the Commission moved toward a more liberal attitude by holding that conference membership cannot be denied because of the adequacy of existing services, for carriers in the trade could thereby

78. Contract Routing Restrictions, 2 U. S. M. C. 220, 225-6 (1939).

79. INTER-AMERICAN MARITIME CONFERENCE, *op. cit. supra* note 76, at 175.

80. The Port Differential Investigation, 1 U. S. S. B. 61, Order for Docket No. 26 (1925).

81. Commonwealth of Mass. v. Colombian Steamship Co., 1 U. S. M. C. 711, 718 (1938).

82. Sprague Steamship Agency v. A/S Ivarans Rederi, 2 U. S. M. C. 72 (1939).

83. Wessel, Duval & Co. v. Colombian Steamship Co., 1 U. S. S. B. 390 (1935).

84. Hind, Rolph & Co. v. French Line, 2 U. S. M. C. 138 (1939).

85. In the Matter of Gulf Intercoastal Conference Agreement, 1 U. S. S. B. 322 (1934).

86. Application of G. B. Thorden for Conference Membership, 2 U. S. M. C. 77 (1939).

perpetuate monopoly by continuing to maintain adequate service.⁸⁷ The Commission maintained that the test for admittance to conference membership cannot be the same as that for a certificate of public convenience and necessity because (1) the Commission has no such express power and (2) it would be illogical to imply such power after a Federal District Court had denied the Commission the right to prevent abandonment of service.⁸⁸ In 1940, the Commission stated that the announcement of a proposed service, the publication of sailing schedules, and the solicitation of cargoes resulting in common carrier commitments are sufficient to qualify a line to submit an application for membership in a conference.⁸⁹ However, repeated reference to the existence of contract rates in the former, and war conditions in the latter, instances makes the precise bases of the decisions unclear.

Pooling. In 1939, the Commission upheld an agreement to pool earnings in the United States North Atlantic-Germany run, because the result of the agreement was effective control of destructive competition without introducing unfair discrimination or being detrimental to American commerce.⁹⁰

IV

The complexities of regulating commercial practices in the shipping industry are apparent from even a brief review of United States Maritime Commission decisions. A relatively permanent world surplus of tonnage seems likely and, since the surplus is induced by political as well as commercial stimuli, adjustment to demand cannot be accomplished even in theory through free competition. Nor can such private organizations as shipping conferences and pools be expected to control the industry with due regard for the interests of competitors, shippers and the public. The conference devices which the Maritime Commission has approved as not unreasonable, unduly discriminatory, or detrimental to American commerce are only a short step removed from being devices which would secure a monopoly position to conference members. The chastening effect of competition from free-lance tramp vessels, while of salutary effect upon conference and pooling arrangements, has generally not been sufficient and holds little promise for the future in view of the declining importance of tramp shipping relative to liner service. Consequently, governmental or inter-governmental regulation of some sort appears necessary.

However, unilateral regulation by individual nations is inadequate, since such regulation can attack only a segment of the commercial

87. *Waterman Steamship Corp. v. Arnold Bernstein Line*, 2 U. S. M. C. 238 (1939).

88. *McCormick Steamship Co. v. United States*, 16 F. Supp. 45 (N. D. Cal. 1936).

89. *Cosmopolitan Line v. Black Diamond Lines*, 2 U. S. M. C. 321, 328 (1940).

90. *Agreements 1438 and 5260-4*, 2 U. S. M. C. 228 (1939).

problem and cannot reconcile the conflicting maritime aspirations of the various nations. While the defects of unilateral regulation might conceivably be diminished by multilateral regulation pursuant to international treaty, the effectiveness of such a cure seems slight. If only major shipping nations participate, multilateral regulation may easily become a tool for forwarding the maritime interests of the participating nations and crushing the shipping and trading interests of non-participants. If all major shipping nations do not participate, multilateral regulation can achieve only minor success.

Therefore, it appears that only an international agency of world-wide scope can effectively minimize conflicting nationalistic ambitions for commerce and security and at the same time preserve world shipping from chronic depression or monopoly control. Logically, such an agency should be affiliated with the United Nations. In so far as it regulates trade rivalries and commercial practices, the shipping authority should be integrated with the Economic and Social Council, while insofar as it is concerned with the military and naval aspects of shipping, the Security Council would appear to have primary claim.

It seems advisable for such an international agency to make use of many of the existing arrangements that regulate and control shipping affairs, either by integrating the present bodies into the new organization, or by drawing on their experience and procedures. Some extant technical and legal supervisory bodies could well be continued subject to appropriate oversight by the international agency. Regulation of commercial practices might well follow the precedents of the United States Maritime Commission, the Tramp Shipping Administrative Committee, the International Tanker Pool, etc., and thereby retain much of the flexibility of regular commercial operation—an important desideratum whether merchant shipping is privately or governmentally owned and operated. The international agency would, of course, face new and infinitely complex problems of regional competition, the intensity of which would be heightened by nationalism and colored by conflicting political aspirations. Consequently, techniques of control would have to be developed to meet the expanded scope of the problem attacked and the solution contemplated. Even here, however, the pattern set by existing regulatory bodies suggests valuable precedents.