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# There Are Limits To Government Regulation

by Wolfgang Reisener, Hamburg

Attempts to control the operations of international shipping lines are productive of many kinds of problems and difficulties. It will not only be found a very thorny task to devise practicable methods for prescribing the operations of Shipping Conferences and Pools, but beyond this, it can never be easy to mark the limits of individual governments' jurisdiction and to enforce controls among foreign nationals, once these have left the limits of territorial sovereignty of the regulating state. The two countries between which given cargoes are being transported, and all the countries whose ships take part in the carriage of these loads, are affected by any form of shipping controls imposed by a government and may feel their interests threatened, should only one of the two, the supplying or the receiving country, introduce regulations unilaterally.

## Crisis of the Shipping Conferences

Virtually all the seafaring nations acknowledge the economic indispensability of the conference system of liner shipping or, to say the least, all of them grant that this system is the lesser of two evils in view of the wild fluctuations of ocean freight rates and of freight rate wars which were frequently the effect of liner shipping conferences falling to pieces. Shipping conferences being motivated purely commercially and having only strict commercial aims, they probably have made a fair contribution to balancing out contrary national interests in liner shipping, in spite of growing State interference with the ocean carriage trade. Yet the shipping conferences are at

present threatened in their mode of operation and in their future development by a crisis. Mandatory prescriptions and interference by individual governments —e.g. by the United States under its Shipping Act, 1916, whose example Brazil now attempts to emulate with similar strictness —narrow down the Conferences' field of operation and obstruct the adaptation of this system of voluntary self-regulation by liner owners to the changes in the economic conditions in world shipping. With State intervention advancing more and more deeply into economic fundamentals, and the number of states attempting to regulate liner shipping growing, the probability also increases that political selfishness will completely displace the economic point of view.

The number of national merchant fleets has gone up almost proportionately to the number of independent states. Especially the developing countries, as they are dissatisfied with their strong dependence upon the merchant ships of industrialised countries, which also prevents them from being heard when shipping services and freight charges are being fixed, try to build up their own shipping, issue their own shipping laws, or endeavour to bring more influence to bear upon liner shipping and its conferences via international organisations, e.g. UNCTAD. It frequently proves virtually impossible to operate the new cargo tonnage economically for gain, and this difficulty is sometimes made worse by the refusal of shipping conferences to admit newcomers. This has the effect that governments of developing countries like to model their shipping

policies on the pattern of the cargo preference laws of the United States, which are then indiscriminately applied to all cargoes shipped to or from developing countries. If there are two nations with merchant fleets which they wish to protect, and they start to trade with each other, the shipping trade between them will frequently be subjected to the rules of bilateral agreements or of pooling pacts. Thus shipowners in the US have made numerous pooling agreements, especially with the shipping lines of the Latin American republics, which fix the number of sailings of either contracting party, apportion traffic or pool earnings between the owners according to an agreed formula. More and more governments are becoming parties to such agreements, and this increases the trend towards excluding the more efficient shipping lines of third countries, which could offer cheaper freight rates and better services, from the trade. And this again intensifies the risk of international tensions which voluntary cooperation through shipping conferences could have actively reduced.

There are people who argue that flag discrimination as practised by the newcomers among seafaring nations is a measure which could be compared to the "educational tariffs" advocated by Friedrich List, the German economist. Once their merchant marine has gained mature strength, the discriminating states might cease to discriminate. However, experiences gained in the past about protected branches of any national economy do not point in this direction: for almost all measures of protection which, at

their inception, had been announced as temporary expedients have grown into permanent fixtures.

### **What Foreign Governments Say**

The objection against unilaterally imposed rules about liner shipping that they violate international law is frequently raised by other governments and/or shipowners in respect of states which, by statute law or government decrees, interfere with international shipping agreements or with the day-to-day activities of the ocean carrying trade. However, such protests mostly consist of verbal generalities, based on references to the rules governing friendly relations between nations, and on doubts about the usefulness and practicability of controls. Protests which have been raised against the recent measures introduced by Brazil have therefore only a scant foundation in considerations of international law.

Legally, attempts at government regulation of liner shipping have mainly two aspects: The first question is whether any government is legally entitled to issue rules and regulations about agreements made between foreign nationals, and frequently on foreign soil. The second problem is whether any State may make it a condition for permitting free entry to its ports to foreign shipping that this tonnage obeys such rules and regulations. No international court of law has yet dealt with the question whether such legislation is valid in international law, and there has not even been any judgement dealing with similar legal problems, which might be used in the way of analogy for coming to a decision.

The question which rules regulating international shipping could be construed as forming part and parcel of international law is, moreover, the subject of heated controversy. This has led, among other things, to sub-

stantial differences between the rules which United States and Brazilian lawyers consider as belonging to the sphere of international law, and those so classified by European jurisprudence.

### **A Cautious Policy or Lack of Planning?**

In 1966, the activities of the US Federal Maritime Commission for enforcing the Shipping Act, 1916, as amended and made more oppressive in 1961, seemed to approach a new climax, which caused Ministers of Transport or Shipping from eleven European countries and from Japan to meet in conference at Oslo, for discussing the efforts of the United States to regulate international shipping. In a press statement published on behalf of the ministers taking part in the conference it was stated: "The ministers were of the opinion that these developments have reached a stage which makes them a matter of considerable political significance. They also believed it to be necessary to confront other states, which have introduced rules and regulations, with the impracticability of their policy by themselves setting up clear and unmistakable legislative barriers to prevent the enforcement of such rules and regulations by one country."

The united front formed by the seafaring nations of Europe, though not being able to frustrate completely the United States' policy on shipping, managed to divest it of its original severity. But, on the other hand, when dealing with the measures of the Brazilian Commission for the Merchant Marine, the same countries seem not to be able to reach agreement on a suitable way of dealing with them. Or perhaps, the governments concerned do not believe that interference by the Brazilian government has yet reached the stage of becoming "a matter of considerable political significance"? Depending on whether an observer is

strongly interested in the problems of shipping and foreign trade and tied up with them or not, he will describe the attitude of European states either as a policy of deliberate caution, or as action or, rather, inaction born of thoughtlessness and lack of planning. It is, however, only too true that the seafaring nations of Europe, in spite of a marked trend towards more and more protectionism and state interference in international shipping, have not done anything to "set up clear and unmistakable legislative barriers to confront other states, which have introduced rules and regulations, with the impracticability of their policy", as the ministers had announced so forcefully at their Oslo meeting in 1966. The Federal German Government, in this context, is among those who seem to believe that a mere profession of faith in the "freedom of the seas" and of shipping is sufficient and makes it unnecessary to develop original concepts and initiatives for safeguarding, jointly with other governments, freedom and "living space" for their own flags, for which other governments fight with the aid of ruthless measures.

### **The Limits of Regulation by Government**

International shipping involves the economic interests and the sovereign rights and jurisdiction of many states directly, and therefore there must be limits to the attempts of individual states to regulate liner shipping one-sidedly. However, in practice it is immeasurably difficult to delineate these limits precisely. The commonplace requirement that no government must ever attempt to use state power to enforce its laws outside its territorial frontiers, in this context, evades the real problem. It is unhelpful since no government makes such claims or tries to enforce them. The decisive question to be posed is: how far may any state extend the practical application of its man-

datory rules and regulations, and to what extent are such rules capable of enforcement in spite of their impinging on the interests of other states? The international character of shipping conferences suggests that individual governments should be required to act with more reserve in their attempts at imposing controls on worldwide liner shipping than, for example, in making rules and regulations for transport on their home territory. Attempts to enforce national rules and regulations in the international field will always meet with unknown and unforeseeable difficulties, especially if other states actively oppose state interference from outside their borders.

There is ample reason for taking seriously the warnings lest other countries might emulate the examples set by Brazil and the United States, setting up their own official control mechanism for liner shipping. This danger is particularly acute in the case of states which do not yet own a merchant fleet of their own, or only the beginnings of one—governments of such states might welcome the justification for trying to protect their national trade and shipping interests which they find in the actions of Brazil and the US. The mind boggles at the almost unconceivable chaos which would suffocate world trade and world shipping if all the seafaring nations were suddenly persuaded to regulate the ocean going trade in their individual national interests through about sixty Federal Maritime Commissions or Comissões de Marinha Mercante. Such fantastic escalation of government regulation trying to ensnare world shipping would set a new record in ab-

surdity as it would coincide in time with new efforts being undertaken by both industrialised and developing countries for advancing the liberalisation of world trade.

The most important limitations beyond which government regulation of shipping conferences and pooling compacts must not stray are set by the need not to disregard the national interests and sovereign rights of other states. Existing treaties of friendship and trade pacts, as well as the risk of causing political quarrels, are among the influences which limit the scope of national control attempts over international liner shipping. There is also always the danger that other countries may introduce political and/or economic reprisals, if they find that their own interests are going to suffer.

#### **Protests and Active Resistance**

Given the fact that international shipping and world trade are composites determined by the interests of many different nations which can always only be imperfectly balanced in a perpetually shifting market, it is clear that attempts of single nations at controlling shipowners' activities unilaterally must produce conflicts between many nations—both conflicts of interest and legal contests about areas of jurisdiction and sovereign rights. National mandatory controls ought therefore to be drafted with particular care, so as not to violate the interests of foreign states. In the transatlantic trade between Brazil and Europe, the Brazilian government, in many respects, has gone too far when trying to regulate liner shipping, by interfering with activities which, in fact, have only

a very tenuous connection with the fundamental economic interests of Brazil. Problems of international liner shipping cannot be overcome by creating new statute law in an individual country, since it is questionable whether such law is enforceable through this country's shipping authorities or by its courts handling down judges' rulings. And it is, above everything, a glaring mistake to try and govern shipping conferences by ordering them about through rules claiming the force of an official command. Such international voluntary associations can only be persuaded to adopt new rules by reasoning with them.

Without the cooperation of foreign shipping lines and without the support or, at least, the tacit agreement of foreign governments, no country will find its unilateral attempts to regulate liner shipping practicable. Countervailing reprisals of other governments, conflicts about jurisdiction, and a chronic deterioration of the foreign relations between the government that tries to enforce its regulations and the other seafaring nations will become inevitable to the same extent in which the offending government claims the right to interfere with long-established and generally recognised operating methods of shipping and foreign trade through its own legislation and enforcement agencies. Protests of foreign governments and especially the steps of active resistance have succeeded, in the past, in restricting the impact of "dirigism" on worldwide shipping policies, and also in the future, the outer limits beyond which state regulation cannot progress will probably be similarly circumscribed.

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