Maritime Agreements with State Traders

Jon Magnusson
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INTRODUCTION

Wouldn’t it be nice if a perfectly operating open market trading system were an assured condition for our merchant marine. We hear the merchant marine is expensive, inefficient and uncompetitive. Under a well-functioning free enterprise market every ocean carrier would pursue his business assured that if he were efficient he would be rewarded; his price would reflect the quality of service; he could make speedy service changes to meet shippers’ needs without asking the government’s permission; he would not have to pay anyone to remove a threat of injury, but only for services rendered; he would bargain on terms of relative equality; and, his contract obligations would be respected and enforced. It would be a world where there were no penalties on useful service to the public. Our merchant marine would be efficient and competitive. We know, of course, this ideal condition is just a utopian dream.

The real world of ocean commerce is not so nice and rosy. On the contrary, in some parts of the world trade routes are beset by penalties on useful service. There is gross inequality of bargaining, expensive payments to avoid commercial injury are necessary, government restrictions are prerequisites to service changes (in the name of public interest, of course), quotas are imposed on tonnages or products that may be carried, governmental price restraints are imposed, and worst of all there is no assurance of contract enforcement. These conditions seem to be most prevalent and most penalizing along trade routes where governments participate directly in ocean transportation by operating ocean carriers (herein “state traders”), rather than leaving operations to private citizens. There is a very good reason for these adverse conditions. The origin of the conditions is the absolute inequality of the state trader vis-á-vis any private citizen, in competition, in contract negotiation, and contract enforcement.

UNEQUAL ADVANTAGES OF STATE TRADERS

The inequality between a government and its citizens need not be belabored, but its consequences when the two try to operate on equal

* Ass’t General Counsel, Maritime Administration 1967-70; B.S., University of Virginia, 1935; J.D., George Washington School of Law, 1937.
terms are not so well understood. Antiquity supports the inequality and we have the following from *The First Book of the Kings*:

And Samuel told all the words of the Lord unto the people that asked of him a king. And he said, this will be the manner of the king that shall reign over you: He will take your sons and appoint them for himself, for his chariots, and to be his horsemen; and some shall run before his chariots. And he will appoint him captains over thousands, and captains over fifties; and will set them to make his instruments of war, and instruments of his chariots. And he will take your daughters to be confectionaries, and to be cooks and bakers. And he will take your fields, and your vineyards and your oliveyards, even the best of them, and given them to his servants. And he will take the tenth of your seed, and of your vineyards, and give to his officers, and to his servants. . . . And ye shall cry out in that day because of your king which ye shall have chosen you; and the Lord will not hear you in that day.\(^1\)

Hobbes concludes the *Leviathan* with:

And thus I have brought to an end by Discourse of Civil and Ecclesiastical Government . . . without other design than to set before men's eyes the mutual relation between protection and obedience; of which the condition of human nature and the laws divine, both natural and positive, require an inviolable observa-

The unequal relation of subject to sovereign, then, is not open to ques-

Before discussing the effect of state traders on our commerce a few examples from the adjudications of a government agency, the Federal Maritime Commission\(^3\) (Commission), reveal how these pen-

Some Specific Examples

The similarity of the facts provided by cases involving commerce with two South American nations are good illustrations of what may be expected from other state trading nations. Venezuela, Brazil and several other countries in South America use state agencies to transport their ocean commerce and have promoted their use by different restrictive practices, but with the same effect.

A. The Venezuelan Pooling Agreement

Through government agencies Venezuela holds the stock of Com-

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1 *Samuel 8: 10-18.*
2 1 COLLIER CLASSICS IN THE HISTORY OF THOUGHT 511 (1966).
3 Established by Reorganization Plan No. 7 of 1961, § 191(a), 75 Stat. 840.
known as its "national line." After pressures on shippers to use the national line failed, inducements imposed by governmental decrees were substituted. One decree exempted cargo, called "exonerated" cargo, from import duties, and another decree made shipment on the national line or on "its associated services" a condition of exoneration i.e. tax exemption. An "associated service" was defined as any other carrier which had an agreement with the national line regulating transportation. The decision as to eligibility for exoneration was made by the Minister of Development, a government agent, after he examined the agreement with an associated carrier. Government compulsion was thus established by legislation and administrative decision, with the state's taxing power as a sanction. Effectiveness of the power was shown by the fact that from 1960 to 1961 Grace Lines' carryings went down about 5%, Alcoa's (another U.S. company operating ships from Venezuela) already low participation decreased 3%, while CAVN's carryings rose 7%. To overcome further loss of business Grace Lines negotiated an agreement with CAVN to become an associated carrier and between the two they agreed on percentages of specified cargoes each would transport.

To assure itself some equality of bargaining power before the agreement was closed, Grace prevailed on the Commission to propose "rules and regulations to meet conditions unfavorable to shipping" authorized by section 19(1)(b) of the Merchant Marine Act, 1920. The rules were preceded by explicit references to the Venezuelan decrees and provided that the Federal Maritime Board (a predecessor of the Commission) would impose charges on CAVN to offset any added expenses to others caused by "diversion of cargo from United States flag vessels." The proposed so-called rule departed from the usual requirement that a rule be preceded by public notice and comment, was not of general applicability and applied only to CAVN, making it more an administrative threat than a true rule. To assure direct communication the FMC said: "These regulations, although never put into effect, were made available to the Venezuelan Government through the Department of State in June 1961." The threatening regulations had the desired effect. Negotiations were completed, and Grace obtained "an instrument to secure for each party access to cargo it would otherwise

5 Id. at 348, 349. Decrees No. 255, March 18, 1960 and No. 331, March 10, 1961. The latter provided: "The total or partial exemption from import duties . . . is predicated upon the obligation . . . to transport . . . by means of the CAVN or its associated services."
be denied.” The agreement obligated each carrier to pay the other for excessive carryings according to a formula in the agreement. Alcoa was denied participation.

The effectiveness of state power to reallocate the quantity of cargo a carrier might carry was clearly shown by these facts. Time consuming diplomacy (of sorts) was shown by the fumbling with the spurious rules.

B. The Brazilian Pooling Agreement

The United States of Brazil owned and operated Lloyd Brazileiro (Brazileiro) a state trading enterprise, which was also called its national line. At its head was a director appointed by the President of the Republic, and directly subordinate to the Minister of Transportation and Public Works. The carrier failed to obtain all the business it wanted in international markets and governmental action was substituted for sales effort and superior service by competitors. National rights, prestige and public welfare were also factors in negotiations.

Instead of tax exemption incentives for favored shippers, Brazil’s method of compulsion to achieve predominance and greater rights, was to require by decree that all of its exports to the United States and Canada be carried by steamship companies which were members of a named conference of which Brazileiro was a member. Enforcement was achieved through control over loading permits by the Bank of Brazil Bank Fiscalization. No cargo could be loaded on a ship without the permit. When an earlier agreement expired, negotiations for a new agreement, drastically reducing the share of coffee carryings

8 Id. App. I, at 366.
9 See 8 F.M.C. 213, 235-37 (1964) where the facts are described.
10 Id. at 239. The following testimony shows what motivated the Brazilians: “... this is a national line ... I am willing even to recognize that my own service may be bad; but accusing Moore-McCormack of bad service makes no sense ...” It is significant also to note that “bad service” is admitted, but thought to be without relevance in view of public welfare considerations.
11 Id. at 238-39. The Brazilian representative said: “They [the national lines] have a greater right than any of you may think that you have .... My Government could very well ... demand that a quite greater percentage of this commerce remain between the U.S. and the Brazilian lines .... You have the obligation to understand that our situation is such a one that we cannot afford the luxury ... to let this trade escape our hands ....” Later a Brazilian Merchant Marine Commission resolution in “Diario Oficial” of November 14, 1967 refers expressly to the “principles of the Brazilian Maritime Transportation Policy, with predominance of national flag lines ...” Other statements of preference and compulsion decrees are in Res. No. 2,995 of the Merchant Marine Commission 1967 D.O., June 5, 1967, and Res. No. 3181 of the same Commission, Nov. 10, 1967. See F.M.C. Nos. 67-47, 48 (Feb. 15, 1968).
12 A voluntary association of ocean carriers which agree among themselves as to the freight rates to be charged along the trade route they serve.
allowed a Norwegian line, was proposed in spite of large past payments to Brazileiro. Under the revenue pooling allocations of the expiring agreement, $833,810.51 had been set aside by foreign lines simply as payment to Brazileiro for not carrying coffee. The Norwegians refused to agree to the reduction — at first. This refusal was followed by denial of loading permits and for a short time they carried no coffee. The message was clear. Negotiations were immediately resumed, but just to make sure no one misunderstood the shape-up or ship-out-of-the-trade message, the excluded carrier was told by the Brazilian representative “that a quite greater percentage of this commerce” could “remain between the U.S. and the Brazilian lines.” He continued: “We have told Mr. Lorentzen that he has now reached a level beyond which he cannot go. Isn’t this clear enough now?” An American line representative with the bravery of having a big brother in reserve, chimed in on this hard line with a specific time deadline: “I think we have advised Mr. Lorentzen that a reasonable time has already passed . . . if he does not accept by noon tomorrow, we see no other alternative than to form a new pool,” without the Norwegian line. In this case the U.S. carriers were satisfied with their quotas and the North and South American carriers were victimizing the European carriers. Needless to say that after such demands, threats and presentation of alternatives in the name of negotiation Mr. Lorentzen signed, but not until remarking, “. . . in view of the existence of regulations [such as decrees] we have no alternative.” Mr. Lorentzen, with either Scandinavian reserve or the tact and restraint of a foreign guest, further remarked with respect to the payments, that the “. . . large payments passing from one line to the other is not healthy. . . .”13 If a private citizen rather than a foreign government were involved in a comparable transfer of funds where no service whatever was rendered by the payee and under comparable compulsion of non-market circumstances, far more vigorous and descriptive words than this mild understatement could be used to identify the enrichment.

The end-product of both negotiations was an agreement requiring approval by the Commission before it could be performed.14

Another agreement was recently before the Commission for approval covering Brazilian commerce in coffee and cocoa.15 Its nego-

13 The record of these statements is quoted in 8 F.M.C. at 245 (1964).
14 Shipping Act § 15, 46 U.S.C. 814 (1916), provides that an agreement not approved shall be unlawful and before approval and after disapproval it is unlawful to carry out any such agreement. Only lawful agreements are exempted from the prohibitions of the anti-trust laws. 15 U.S.C. §§ 1-7, 26 Stat. 209 (1890); 15 U.S.C. §§ 8-11, 28 Stat. 510 (1890).
15 In Inter-American Freight Conference, No. 68-10 (F.M.C. Sept. 4, 1970), the Com-
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1. A struggle for government-granted privilege, a negotiation pitting government welfare against commercial endeavor and a bargain that embodies unequal advantages, all penalize private enterprise. How these penalizing conditions are detrimental to carriers and create distorted relations between carriers by making possible the creation of unchanging market conditions and poor service is discussed next.

These cases have a common element: Private carriers experience revenue losses as a preliminary condition because of non-commercially associated causes in the form of governmental action. The losses are followed by acquiescence with a government's announced objective. The reality of power unrelated to service and performance is translated into cash losses recoverable only by acquiescence to the power.

Inevitable Conflict Between a State Trader Nation's Welfare and Private Ocean Carrier Interests

When useful service or fair performance is penalized by being pitted against the demands of another nation's welfare, serious concern should be given to the conflict by our government before agreements stemming from the conflict are approved. Our ocean carriers' interests which are narrower than those of foreign nations make it most important that the United States assume a burden of concern and establish a few rules to govern the relation and the effect on commerce of future clashes between the commercial needs of our carriers and the welfare of foreign nations revealed by these facts.

Lawyers are interested in the legal impact of this conflict because the 1916 Shipping Act, as amended, requires the Commission to approve many agreements needed to operate under those conditions before the agreements may be performed. The Commission is thus the means for which this concern is made effective.

Validity of an agreement is established by fact and argument fol-

mission served its decision and report that two parties withdrew from the pooling agreement prior to approval under section 15, therefore Commission jurisdiction terminated and the proceeding was discontinued. Two Commissioners concurred and dissented.

A separate docket to investigate the alleged malpractices has been initiated. No. 68-44 (F.M.C. Nov. 18, 1970). Four separate dockets have been opened to deal with issues surrounding these agreements.


46 U.S.C. § 814 (1964) requires the Commission to approve all agreements which fix or regulate transportation rates, regulate competition, pool earnings or traffic, regulate sailings or provide for any kind of cooperative working arrangement unless certain conditions exist.
lowing an adjudication that it is not detrimental to commerce nor unfair between carriers and that it is either an enforceable agreement or generally not contrary to the "public interest." 19

This article which has described some facts will now advance a few arguments that ought to affect conclusions about detriments, unfairness and public interest. Two propositions are offered to show that because of the conflict between such unequal contracting parties the Commission ought to disapprove agreements with state traders unless some equalizing United States government counterweight is present in the negotiating process. First, we have a public interest in the operation of the private enterprise system of commerce that requires an absence of penalties on the most useful maritime service possible. Restrictions on revenues or quotas on products carried, unrelated to quality of service or ability to serve, cause penalties as the result of agreements with state traders which are detrimental to commerce and unfair as between ocean carriers. Second, stability and continuity of commerce as a standard of usefulness requires that parties to an agreement be accountable in the courts of a country where disputes must be adjudicated. Certain well-established legal principles make agreements of state traders unenforceable. Such agreements should not be considered true agreements under the Act unless the state trader is first bound by treaty to subject itself to the jurisdiction of our courts and regulatory agencies of government. Either proposition and its conclusion is enough to assure disapproval of agreements under the Act. Arguments in support of the first proposition present considerations pertinent to issues in an administrative proceeding before a regulatory agency such as the Commission, and arguments in support of the second proposition relate to jurisdictional issues appropriate for judicial review.

The rightness of any commercial practice, maritime or otherwise, ought to be judged by a standard of usefulness: methods, not values, ought to be the test of relative utility of a commercial practice. The methods of commerce ought to be objectively ascertainable by a factual showing that the easiest, least expensive, least damaging to property and most expeditious way of moving goods is the most useful one. Penalties on useful commerce occur when struggles for special privilege replace the struggle for wealth through technical improvement and better service, when commercial negotiation is elevated to an issue of national policy and prestige, and when enforcement of obligations is uncertain because of conflicting national interests.

Restricting the number of ocean carriers using a country's ports,

the amount of cargo each may carry, the revenues each may earn, and the method of conducting their business generally, except as required for a clear public interest, inevitably results in fights for the conferral of government privilege on favored carriers rather than in competition for business based on service improvement. Government sanction of agreements promoting struggles for privilege will require that the principle of privilege instead of usefulness be extended to other areas of commerce. Serious long term effects on our commerce can result from these developments affecting decisions as to what are detriments to commerce. Seeking privilege is bad enough, but it also becomes an unequal contest when the government as one of the parties is also the dispenser of the privilege and the contract enforcer. This is the major problem with the state trader.

Even without a shift to a struggle for privilege there is also an underlying difficulty in just negotiating an agreement between a foreign state-operated business and a private business before a contract obligation exists because, as the Brazilian negotiators proved, the negotiation inevitably involves one nation's organs of public policy and its public welfare on the one hand and a private citizen with only self-interest and profit making responsibilities on the other. We are never dealing with negotiations and disputes between equals who may be subjected to uniformly applicable laws by the courts and regulations by agencies of government, but with foreign governments which are not subject to such laws. A situation of such inequality and diversity of interests makes irreconcilable conflict inevitable unless bargaining power is enhanced. When the normal concessions of interest in private commerce, which among equals are bargaining points before an agreement is reached, are raised to the level of policy and welfare, the issues of conflicting public versus private interest are almost infinitely expanded. Every dispute, instead of being only the rare dispute, becomes a threat to public welfare to be resolved by time-consuming diplomacy involving national prestige—a highly undesirable situation for the expeditious flow of commerce through speedy negotiation of contracts.

If there is any one fundamental need for the orderly conduct of commerce it must be respect for the obligation of the contract and its enforceability. Enforcement by the courts of any nation will help, and is necessary, but will work only if the strains of inequality in exchanges are minimized. No amount of enforcement will prevent breaches if the penalties on performance become excessive, and only relative equality of bargaining power and stability of values exchanged will diminish the strains and generate respect for the obligations undertaken. Agree-
ments between state agencies and private citizens are most vulnerable to the strains of inequality and resentment of overreaching power exercised, and cause suspicion where disputes are adjudicated by one of the parties, such as a state trading nation. Self-restraint by nations may make a few agreements work, but self-imposed restraint is not reliable especially where political or cultural systems are widely variant and prone to hostility.

Penalizing Restrictions by Governments Impede Commerce

A. The restrictions are detrimental to commerce

The restricting effect of state trader domination of the bargaining, shown by the examples, caused the imposition of an unchanging market relationship for the period of the agreements. By the decrees both countries gave their national lines control over the entire market for the selected products before bargaining even started. They used the power as a formidable bargaining advantage. The entire market is normally not controlled by any one person having a monopoly, but is influenced by many participants who compete for shares that are constantly shifting with sales efforts, public tastes, technical changes and other influences. Entry into the trade by new venturers is thereafter restricted. As long as the market is larger than any one participant and is more or less subject to change, each carrier is protected by his own historically accumulated influence based on the known quality of his service in relation to his prices, even though where a conference (an association of carriers who agree among themselves on the rates they will charge) is involved, price is a less significant factor. Even here newcomers or “independent” carriers are protected by this innovative ability. These considerations are familiar ones used as arguments against monopolies and restraints of trade, but have current relevance to what is now happening. Domination of access to, and division of, the market through control of loading permits or tax exemption made the state trader both a participant and the controller of the entire market—a role usually reserved to government acting in the general public interest without the self-interest of a participant. There is no longer any diversity between public and private interest. The controller of the entirety can wrest any agreement he wants from those dependent on him for participation. The only limit on the state trader’s bargaining power was its ability to provide capacity regardless of quality or price. Government control is absolute, whereas with the semi-monopolistic control of a conference, some flexibility remains either through intra-conference rivalry on the basis of quality or threats of independent
service. An unchanging static condition is unrealistic in its disregard of shifting influences and is productive of incipient strains among the inevitably dissatisfied adherents to the agreement (such as the Norwegian carrier), or the excluded (such as Alcoa), or the coffee shippers denied choices based on their needs.

Having achieved control, the two state traders with their contented allies were in a position by a single agreement to revise the entire power structure of the particular segment of commerce which is no longer subject to the influence of shippers or other carriers. Historic positions, achieved through years of investment and sales effort and business relationships with proven past usefulness, were altered immediately by the might behind the dominating signatures. Market shares were subject to future diminution or increase with no sales effort whatever and exporter-importer choices became irrelevant. It would be hard to withhold sympathy for the pained astonishment of the importer witness who said that the latest proposed Brazilian agreement stifled competition with a "brand new concept." "In the past nations who wanted to build up a carrier have done so in the normal form of doing business, starting out carrying a commodity and performing a record and building it up. This one doesn't make that necessary at all."20

Shipper choices of carrier service are no longer a major factor, changes in public tastes may not be responded to directly, and improved technical alternatives have minimal importance. None of these conditions is useful to anyone except the privileged parties, but will exist nevertheless and produce the uneasy strains on the static condition created by the dominators. Detriment to commerce through impediments to easy accommodation is thus an expensive result.

An open market is, of course, only theoretical, does not exist in practice, and where conferences operate, it is most restricted. An ideal starting point is not necessary, however. Where the state trader is present it is guaranteed that there will be no freedom whatever to compete and the penalty of a static condition is absolute. The detriment caused by such restriction is unjustified by any circumstances, which is not the case with conferences, however non-ideal they may be. Conferences, like the democratic system, are the worst form of control i.e., except for the alternatives.

B. Restrictions produce unfairness between carriers

Quota restrictions imposed on carriers cause expensive service. When efficient carriers, such as our American carriers, restrict them-
selves to a prescribed quota, even if it is voluntary, there is a waste of productive ability and good service is penalized for the benefit of the bad service as the Brazilians acknowledged. 21 When bad service is enlarged by quota imposed by government intervention there is an added expensive waste. The generous quota holders have no need to try harder. 22 The expansion of the fleets of the more efficient carriers will not be needed because the ships which might otherwise be pushed out of service might just as well be used since efficiency is no longer a factor. New investment and new shipyard work is sidetracked and delayed. The unfairness is so obvious that the aggressive, efficient carriers sometimes take over the quotas of the less efficient and pay them what the better ones would earn if they carried all they were allowed under an open market. Revenue is spent unnecessarily this way and the money comes “off the top,” i.e., out of potential profits. Very likely this money made up the extortionate near-million dollar payment possible in the coffee trade. All of this non-market inefficiency is progress wasted for the benefit of the powerful but less efficient and is unfair to the non-privileged.

As if this injury is not enough, erosion of their own stockholders equity by our own contented and privileged carriers seems extraordinarily shortsighted. By taking the short-term gains afforded by these agreements they obtain stability and profit only for the short period the agreements work satisfactorily. The profitability won’t last long under the continuing strains imposed by shippers who may insist on more for their money and won’t hesitate to seek less restricted, wasteful areas for their business. The managers who make these agreements do so at the expense of their investors. New investors will not be so shortsighted and investment requiring long-term stability will not be put to risk in a market abused by short-term influences over which they have so little control because of governmental compulsions. The more watchful stockholders will sell out, diminishing further the capital-attracting potential of the company. The vagaries of political action will thus be avoided.

Shippers and investors represent a public interest in useful, efficient service and waste, causing them loss, creates unfairness to shippers and to the public, in addition to intercarrier unfairness between the efficient and the inefficient.

It is useful that relative equality between carriers who are con-

21 F.M.C. at 245.
22 For example, a witness testified regarding “horrible” service and the carrier had an opportunity to “improve their service and they did not.” Supra note 15, at 1561.
tract bargainers be maintained to assure a constant reflection of ability to realize cost savings by the efficient. The purpose behind fair trade and anti-monopoly laws is this usefulness. Inevitably the relation between a private citizen and the State is that of an applicant and a dispenser of public privilege and protection, not a relation of equals. In judging such agreements we ought to recognize the spurious character of agreements with state traders who are only secondarily carriers. Agreements dominated by non-commercial factors such as public welfare do not reflect true or useful exchanges of value because the reality of the power unrelated to service and performance translates itself into immediate commercial loss for the less powerful citizen, particularly a foreigner. It is unfair as between carriers where one of them is governmental since the role of one party is not essentially commercial, but rather the reflection of public welfare of a foreign nation.

Discrimination is another factor of unfairness the Commission is responsible for considering. There is not only a subordinate relation, but a contradiction between private enterprise commerce and the public control exercised by state traders. The former relies on the government for maintaining non-discriminatory trading conditions, but the latter depends on a discriminatory condition as a basic condition of trade. There is nothing wrong with discrimination where state trading exists; on the contrary, it is to be expected, but we have to acknowledge the expected discrimination contradicts our standards of non-discrimination. Therefore, adjustments are going to have to be made if this commerce is to go on, but the fundamental inequality will make non-discriminatory opportunity virtually impossible.

In spite of the questionable character of these agreements they are going to continue to be presented for approval. The suggestion is offered that the best that can be done is to equalize the bargaining power of the participants. It is suggested that in the future the Government through representatives of the Department of State participate in, or oversee, all negotiations for agreements with state traders and that these representatives be authorized to use the bargaining might of this country to equalize any shortcomings in the power balance. The Commission might refuse to regard any agreement as being fair as between carriers unless the Government was a part of the negotiations with state traders and on conclusion of negotiations the Depart-

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23 The suggestion does not apply where a nation does not operate or manage a shipping line, but entrusts this function to financially responsible private companies which may use state-owned ships.
ment of State verified that equality was achieved before agreements were closed.\(^ {24} \)

C. Two Recently Approved Agreements Validate the Penalties

The two more recently approved Brazilian revenue pooling agreements are noteworthy and require special comment because they exemplify further the objectionable features of restrictive agreements compelled by conflicting national welfare and bargaining inequality.\(^ {25} \) The Federal Maritime Commission report accompanying approval does not accept the arguments of this article and contains suggestions of use of the powers of the President without his permission and of disregard of a recent, but subsequent Presidential request for Congressional "support for policies aimed at securing a more open world trading system."\(^ {26} \) An agreement which limits the amount of cargo some carriers may transport, pools revenues, requires exchange of manifests and shipping documents, and fixes rates between competitors is restrictive even if it is legal under the Shipping Act. Whatever else a restrictive agreement is, it does not embody a policy of securing a more open world trading system. Restrictiveness is antithetical to openness even if it is legal as the Commission proclaims.

The Commission's latest report takes its stand on "realities of the trades" as a justification for opposing a policy of more open trading. The trades are the ocean shipping routes between Brazil and the United States Atlantic and Gulf of Mexico ports. The agreements in question are "necessary under present conditions" the report says. To support its case the Commission chose an irrelevant reality, left out some realities that might conflict with its premises, and ignored

\(^ {24} \) Governmental participation in negotiations has in fact been found to be essential in the latest rounds of Brazilian coffee pool negotiations. See note 18 \textit{supra}; \textit{U.S.-Brazil Ocean Cargo Plan Expected to Cause an Uproar}, J. of Commerce, March 16, 1970, at 1. The incident provides a good example of the undesirable, time consuming negotiations involving public welfare required to conclude agreements with state traders. A subordinate official in the Department of Commerce went to Brazil and worked out a "guideline plan" embodied in what was in effect an international agreement with Brazilian maritime officials. There was no mention of any State Department participation, but the two governments agreed through their signatories, on guidelines for shipments, to take certain other actions and to consult before terminating specified provisions of the agreement. This activity by government officials has several highly undesirable aspects: First, it seems to involve a misuse of the President's powers, if not to lack any authorization under the merchant marine or other laws; second, it is selective and discriminatory in application because it applies only to the negotiations of the chosen carriers; and, third, it regulates the single agreement without any published standards applicable other agreements. Such activity also diverts attention from the more fundamental problems, and leads to a belief something is being done to solve them.

\(^ {25} \) Agreement Nos. 9947 & 9948—Revenue Pools, United States/Brazil Trade, No. 70-30 (F.M.C. 1970); reconsideration denied, 12 S.R.R. 178 (1971).

some higher realities and necessities influencing conclusions about American public interest and detriments to commerce, and about the use of Presidential powers.

The irrelevant reality was that “certain Scandinavian lines have likewise entered into agreements with Brazilian lines which apportion the cargo carried in the trades between South America and their own countries,” thus showing a willingness to participate in such agreements. The issue is not what foreign carriers are willing to do in other parts of the world under different laws and public policies. The relevant issue is what the Commission, within the confines of the Shipping Act and our own public policy, approves as being in the public interest of the United States.

An omitted conflicting reality is that by favoring two American flag lines in the Brazil trade and by disfavoring Norwegian and Swedish flag lines the Commission is simply ignoring inevitable retaliatory disfavoring of American flag lines in the Norway and Sweden trade. No facts bearing on this potential detriment to overall U.S. trade are introduced and the ultimate effect of a policy of primary allegiance to particular carriers in one trade just because they are American, rather than a policy of open allegiance to all carriers in our merchant marine, may not be in the general public interest and may be a commercial detriment to many other American-flag carriers. Expediency of this sort has only short-lived benefits.

The ignored higher realities are those discussed in this article. They are the disadvantages of approving agreements which substitute a struggle for privilege for the competitive struggle and which inhibit commercial change by preserving a status quo. The events leading up to the agreements followed the classic pattern disclosed in this article. A decree in 1969 “resulted in a loss of cargo” followed by acquiescence to the consequences of the exercise of power causing the loss. The Commission’s approval of the ensuing agreement, acknowledging the power and the loss, is based on lack of evidence that the competitive situation will be changed to any significant degree by approval and on a conclusion that “it does not appear that the status quo will be appreciably altered. . . .” The tacit approval of an unchanging competitive situation and the non-alterable status quo is precisely what is wrong with approval of these agreements, not what is right about them. No competitive position can be changed and status quo is thought to be in the public interest and an aid to stability in commerce. However, unchanging status quo, is not the same thing as stability, as the report apparently assumes. Stability is related to fair competitive prac-
tice, not to guaranteed success and profitability. Fair competitive prac-
tices help prevent extreme fluctuations in rates. If this argument is
wrong and status quo is the same thing as stability, it must be the
stability of the tomb for someone. No matter how hard some carriers
may try they are to be shut out of 80 to 85 percent of the trade in the
name of stability. United States and Brazilian lines through “this equal
access provision which is the heart of the agreements” are clear winners
in the struggle for privilege assuring them of “80 to 85 percent United
States and Brazilian Government-controlled cargo moving in the trade.”
The reality of privilege secured from government restriction and the re-
sultant status quo replaces the higher realities of open competition. The
ignored realities require the exact opposite of a condition in which no
significant degree of change is possible and status quo is protected —
not a useful method of commerce.

Misuse of the President's authority over foreign relations is the
overlooked subject having still other consequences. The report refers
to a “Memorandum of Consultation” agreed to by United States and
Brazilian representatives. Identities and authorizations of signatories
on the “Memorandum” are not disclosed. The “Memorandum” en-
dorses the approved division of up to 85% of the government con-
trolled cargo moving in the trade on a fifty-fifty basis between the
ships of the two nations, and excludes open, multi-nation participation
on an unlimited basis under the “equal access” obligation. Perhaps
some thought was given to international relations aspects of “equal
access,” but the report does not indicate any Presidential review of
approval of the agreements, nor the consequences thereof. Perhaps
it was thought the approval was consistent with our cargo-preference
laws, but the approval goes well beyond these statutory authoriza-
tions without visible Presidential approval because the cargo-preference
laws apply only to U.S. government controlled cargo which must be
carried in U.S. registered ships. The laws are silent as to preferences,
reciprocal or otherwise, for non-government cargo and the use of for-

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27 See note 24 supra. The title of the “Memorandum of Consultation” dissembles its
real scope because it contained far more than just notes about a consultation and contained
agreements to perform specific actions. The absence of identification of the signatories
to this memorandum conceals further and contrasts with the explicit identification of a
named person who was a subordinate official in the Maritime Administration, a subordinate
agency in the Department of Commerce, with respect to an earlier “Memorandum of
Understanding.” In both cases neither official had authority over foreign affairs negotiations
at least in the absence of any visible State Department participation.

28 46 U.S.C. § 1241b (1964); Merchant Marine Act § 901(b) (1936); as amended 49
Stat. 2015, § 901, and the Agricultural Development Act, Pub. L. No. 480, which provides
that surplus agricultural products moving into foreign countries be carried 50-50 on U.S.
registered ships.
eign registered ships. Under a strict construction of the statutes the silence of the laws means an absence of authority and the void can be filled only by the President's much broader authority over foreign relations under the Constitution. There is no authorization to limit the remaining cargo that may be carried in foreign ships to the ships of only one or two nations.

Finally, a puzzling aspect of the report was that after endorsing a "requirement" of the Shipping Act that all carriers regardless of flag "be accorded equal treatment" the commission held that restricting three Norwegian and Swedish line ships in the southbound trade to 15 to 20 percent of the total cargo and dividing the remaining between the favored two American and three Brazilian carriers, was equality of treatment. Three out of eight carriers are compelled to divide one-fifth or less of the trade between them. There is no way that the equation works to produce equality on these figures. The solution may be "fair" or in the "public interest" or not "detrimental" to commerce within the precedents interpreting the Shipping Act, but it is not equal treatment.

The Commission recently refused to reconsider its approval of the Brazilian coffee pooling agreements, but added some new reporting requirements. The Commission denied the charge that its decision was "grounded on international politics rather than regulation." The Commission insisted its decision was based on "commercial and economic factors." What it persists in refusing to see, however, is that the earlier "commercial realities" and now the "commercial and economic factors" are in reality superior governmental action by Brazil. The Commission pretends that these realities are not the use of governmental power by a state trader, and as long as this pretense creates an inability to distinguish between governmental power behind the state trader and commercial market place action without this power there is apparently little hope for the administration's trade policies being executed by the Commission at least along the South American trade routes in coffee.

The Agreements Are Unenforceable

An historically established doctrine of law, developed primarily through cases involving our ocean shipping business, is that foreign nations are immune from suit.29 Legal issues arise only when the identity of the sovereign status of a party is not apparent as when a ship

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is libelled, or a business association is complained against and the sovereign's presence is called to the court's attention by way of defense. In such instances, the sovereignty issue has to be decided to the exclusion of the merits of a case.

The rule of law which protects sovereigns is opposed to concern for rights of property and for the redress of wrongs to private persons, because it allows parties to escape being made answerable to complaints of wrongdoing. Consequently, qualifications have been developed to accommodate this concern. In the case of ships, possession as well as ownership, by the sovereign has been held to be essential to the defense. Corporations distinct from government agencies, wherein government only has a partial interest, have been denied the defense of immunity. Immunity will be considered as waived under certain circumstances.

The courts have also deferred to the executive branch for a determination of whether sovereignty claims should be absolute or qualified. Where executive predominance has prevailed the determination of immunity status may be regarded as conclusive. The determination of immunity, however, must be clear and unambiguous and not just a transmittal of a foreign government's claim of immunity with a "suggestion."

Deferral to the executive means deferral to the Department of State as the executive agency responsible for receiving and informing the courts of immunity claims. The Department has established a distinction between foreign agencies engaged in commercial activities and those engaged in governmental activities. It has pre-announced

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30 Ex parte Muir, 254 U.S. 522 (1921).
31 Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).
32 Mexico v. Hoffman, 324 U.S. 30 (1945). The S.S. Baja California owned by Mexico had been delivered to a private operator for five years for his commercial use. A libel was sustained and claimed immunity by Mexico not recognized because the sovereign was not truly sued.
33 Ulen & Co. v. Bank Gospodarstwa Karajowego, 261 App. Div. 1, 24 N.Y.S. 2d 201 (2d Dep't 1940). Suit to recover on unpaid bond interest coupons. The defendant bank claimed to be an instrumentality of the Polish government which owned 60% of its shares. Held: a corporation for commercial objects in which a government is interested does not share the immunity of the sovereign. In Amtorg the corporation was 100% foreign owned, but was organized under New York laws. Immunity was not allowed.
34 Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F. 2d 705 (2d Cir. 1930). An agency of the Swedish government sued for breach of contract for the sale of coal, and lost. Its actions were considered a waiver of immunity and it could be sued on a counter-claim.
35 Ex parte Peru, 318 U.S. 578 (1943). A Peruvian corporation as an agent of the government was sued for breach of a charter agreement. The proceeding was against the SS Ucayali in rem. The State Department recognized the claim of immunity and made a presentation to the court. The court held the district court should release the ship on the basis of the presentation of facts by the Department.
that in reviewing activities in connection with its determination of whether sovereignty claims should be absolute or not and with its referral of foreign immunity claims to the courts to call their attention to the available defense, the Department will adopt a "restrictive theory of sovereign immunity." The Department views its role as an evaluator of foreign claims rather than as a transmitter of foreign government messages.

The difficulty with such announcements and the assumption of the specialized role of evaluator which are intended to be helpful, is that they do not help at all because a court is not interested in theory, but only in the result of making a decision one way or the other. A foreign government is not going to be controlled by any such unilateral evaluations based on announcements. Court judgments, whether based on the judge's conclusions or on executive predominance, are based on our own legal precedents. Most judgments settle disputes between claimants and award damages, but as far as a foreign nation is concerned a judgment does not settle anything unless there is advance consent to abide by it. It is a delusion to fail to recognize the fundamental difference between adjustment of domestic conflict and adjustment of conflict with foreigners and their business, particularly where the apparent business entity is the foreign nation itself. Sovereign immunity among nations is an assertion of the fact of power, not a domestic theory of law.

In recognition of the justness of the concern for the rights of property and a need to redress wrongs, the nation as a whole has negotiated treaty qualifications to accommodate the concern over the rights of each other's citizens. For example, the Treaty of Friendship, Commerce and Navigation with Italy provides:

No enterprise . . . which is publicly owned or controlled shall, if it engages in . . . shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein . . . from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

87 26 DEP'T OF STATE BULL. 984-85 (1952). The State Department's theories seem to be based on inapplicable reasoning and not apt to be persuasive to foreigners. The Department's Acting Legal Adviser's reasoning compares governmental waiver of immunity for domestic purposes such as for admiralty, contract and tort claims to prove that traditional doctrines of sovereign immunity are outmoded. The conclusion has a logical consistency if the premise is correct, but it is not correct because the two types of immunity are entirely different and are not comparable. Sovereign immunity between nations has nothing to do with the rights of citizens vis-a-vis their government and is related only to the practical needs of nations to avoid the consequences of retaliation if immunity is not respected. The private citizen has no such power of an equal.

88 Feb. 2, 1948, art. xxiv, par. 6, 63 Stat. 2255 (1948).
Absent any treaty, the assertion of the fact of power conveyed to courts by the Department of State may not be a satisfactory way of adjudicating the rights of aggrieved parties, but at least it recognizes the unequal and superior claims of the nation as a whole over the rights of litigants. Vindication of litigants' rights is a worthy objective, but it must be achieved in other ways. No doubt, absolute immunity is unworkable under today's conditions. The problem is whether it should be qualified unilaterally or multi-laterally by agreement as to how far each nation may go. So far the United States has gotten by with few such agreements, but the hazards of confrontation increase the hazards of our ocean carriers as they begin dealing with more powerful nations which may take a more vindictive approach to being sued than has been the case.

The difficulty with the Department's procedure and the existing court precedents is that state traders now have at least a chance to win their case if they follow the procedures long enough, by inducing support of immunity claims by Departmental officials. If they are unsuccessful they can then resort to their retaliatory sanctions, but our own nationals even in our courts always lose if immunity is granted at any stage and the losses must become added expenses of business—no help to commerce. All the procedures and precedents do where immunity is not recognized is uphold the validity of service of summons on the state trader and compel it to present its case. A judgment may result, but the claim still may not be vindicated by payment of damages. No case where there is a levy and execution against state traders has been found.

Two other impediments to a successful adjudication exist which assure further expense caused by uncertainty as to the status of an agreement in spite of a trial. First, a true presentation of the facts is not always possible. Evidentiary proofs located abroad need not be produced. Second, vindication of rights is frustrated unless the state trader's property can be seized by a levy in execution of a judgment.

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By prior agreement a bond should be required or property held for satisfaction of judgments. Other levies in execution have been tried and failed.\footnote{41}

Even the "restrictive theory" of sovereign immunity still leaves residual impossibility abroad beyond any control within the United States. The status of the parties before a court is unequal both in law and in fact, and the consequence of this inequality can never be eliminated, but only modified by offsetting action. The Commission is the only agency that can make the first move to assert the unapprovability of the agreements as a consequence of the inequality and the Department of State is the agency to initiate the offsetting action.

The consequences of the immunity doctrine and the confusion over how it will be asserted in any particular case and whether a judgment is collectible or workable today, are that contracts with state traders are compacts of uncertain status which are either detrimental to commerce or lacking in the qualities of a true agreement subject to Commission approval.

What would be the status of agreements such as the ones with Venezuela and Brazil if the carriers later damaged someone by failure to perform, or were adjudicated to be subject to damages and their ships or other property seized? Suppose they overcarried their quotas and refused to pay other carriers the penalty for overcarrying? Would they claim sovereign immunity as Italy, Mexico, the U.S.S.R. and Poland did with regard to their shipping interests?\footnote{42} It would take a brave lawyer to advise his client as to whether he could collect damages on the basis of existing precedents.

As long as foreign nations and their state traders choose to honor their agreements no trouble is expected, but the cost of business is uncertain to the extent that remedies against foreign nations are matters of grace, not right.

\footnote{41} Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). Even though Sweden was held not immune from suit because of waiver of immunity, an order of attachment on its property was vacated and its property held not subject to execution. See also New York & Cuba M.S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

\footnote{42} See notes 29, 31-33; see also Low v. S.S. Rossia, 1948 A.M.C. 814 (S.D.N.Y.) where an injured passenger libelled a Soviet ship, but on the Ambassador's presentation of a claim of sovereign immunity the case was dismissed without even an inquiry as to the true facts of ownership of the vessel.
Sources of instability caused by differing notions about the sovereign immunity of state traders will also vary in degree depending on how much the political philosophy of the particular country is governed by the imperatives of doctrines which dominate its economic life, further increasing the difficulties and uncertainties for our carriers. Nations with appointive leadership may be less flexible to changing commercial needs.

Instability caused by the applicability of entirely different standards of enforceability of agreements by state traders dictates a review of their agreements by the Commission under entirely different standards from those used to approve or disapprove private agreements. Rather than attempt to correct all these impediments of instability the Commission might simply refuse to recognize the products of such unequal, penalty-laden, bargains as lacking the binding character of an agreement cognizable under section 15 of the Shipping Act, unless the stated preconditions based on Department of State verifications exist. In such a case the basic impediments would not be corrected, but at least the bad effects would be neutralized.

SUMMARY

Certain anti-competitive agreements between ocean carriers, illegal under the acts to protect trade and commerce against unlawful restraints and monopolies, commonly called the antitrust laws may be approved by the Commission pursuant to the 1916 Shipping Act, and by approval be excepted from the provisions of the antitrust laws. The original assumption of the Shipping Act was that agreements subject to such approval would be between private citizen international or domestic common carriers by water in foreign commerce. Today many of these ocean common carriers are not private citizens, but agencies of foreign governments or state traders armed with governmental powers. The governmental powers of state traders are used in negotiating agreements to the serious disadvantage of American private citizen ocean carriers. Our government ought to recognize the inferiority of our carriers which must negotiate these agreements armed only with economic power normal to the free enterprise system and that the inferiority caused distorted results in the market for ocean transport services. The unequal negotiating process converts normal competitive bargaining to a struggle for special government conferred privilege instead of a struggle for trade based on quality of service. The government should equalize the inequality as a condition of approval of agreements. If an agreement, without negotiating assistance, estab-
lishes non-commercial restrictions on trade it penalizes useful commerce to the point of being detrimental to commerce and unfair between carriers and ought to be disapproved by the Maritime Commission and exposed to prosecution of the participants under the antitrust laws. Antitrust immunity should not be conferred on unequal anti-competitive bargains imposed by state traders on our free enterprise market system. Even if an agreement is approved and given antitrust immunity we might also recognize the legal impediments to such agreements being considered true enforceable contracts.

The sovereign immunity doctrine with its qualifications and uncertain application coupled with the absolute power of a foreign nation, not bound by treaty, to defeat claims for faulty performance raise the question whether agreements with state traders should not be considered unenforceable compacts which either (a) ought to be considered against public interest and detrimental to commerce because of instabilities and uncertainties shown to exist, or (b) ought not to be regarded as true agreements unless treaty unqualifiedly subjects state traders and their property to American jurisdiction.