International Freight Rate Regulation

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I Introduction

By far the largest of Canada's trade partners is her great southern neighbour, the United States, although an increasing share of her total trade is taken by overseas countries in Europe, Asia and South America.[2] Hence, it is necessary to discuss the legal, economic and other regulatory aspects of both surface and ocean transport. From a trade point of view, overland transport is most important, but from a legal and economic standpoint, ocean transport overshadows the former, particularly when one considers the interests of the other trading partners, some of whom are developing nations and are dependent upon Canada and other developed countries for their economic survival.[3] In view of this, and the specialized nature of ocean transport, shipping freight rate regulation is first discussed, followed by brief interludes on international air and surface transport.

Ideally, ocean transport should be studied as part of a total distribution system whose principal components include the producer of goods, inland transport and warehouses, ports acting as trans-

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[1] Over 70% of Canada's trade is with United States. Her imports from U.S. in 1969 amounted to $10.3 billion out of a total bill of $14.2 billion and her exports to the U.S. grossed $10.56 billion out of a total earning of $14.87 billion: *Imports by Countries*, Dominion Bureau of Statistics, 7506-507, Vol. 26, No. 4 (July, 1970), Table 1, at p. 8; and, *Exports by Mode of Transport*, Dominion Bureau of Statistics, 7506-560 (October, 1970), Table 2, at p. 19.

[2] Canada's trade with overseas countries can be seen from the following figures, *ibid.*:

	Imports (In million Can. $) *1969*		*Exports* (In million Can. $) *1969*
Western Europe:	1,936.62		2,233.38
U.K. 790.97		1,096.48	
Common Market 789.16		836.96	
Easter Europe	81.51		37.13
Middle East	117.40		65.32
Other Africa	124.86		115.67
Other Asia	768.68		982.09
Oceania	146.03		203.63
South America	466.32		291.49
Central America & Antilles	247.47		292.37

[3] In 1968 the developing countries with market economies exported a total of $44.10 billion worth (or 74%) and their imports from developed countries amounted to $33.69 billion out of a total of $45.8 billion (or 74%). Source: *U.N. Year Book of International Trade Statistics (1968)*, (New York, 1970), U.N. Publication Sales No. E-70, XVII 11, Tables A and B, at pp. 13 to 31.

fer points to vessels, and the ultimate receiver and consumer of goods, and in the provision of which a variety of specialized services such as banks, insurance companies, freight forwarders, agents and middlemen, participate. It will be seen from this catalogue that there is always a differential between what the producer receives and what the buyer pays, even if one disregards processing which changes the nature of the product, and the ocean freight costs may constitute a relatively minor part of the total differential. Concentration on the ocean freight costs only gives a limited picture.[4] Furthermore, because shipping is integrated with other forms of transportation and terminal operation, bottlenecks and inefficiencies in those sectors gravely affect vessel costs and lead to higher freight rates or surcharges.

International Transport Structure

International transport is at present provided by a number of different means:

(i) Land transport between contiguous territories, by road or rail;

(ii) Rail and road transport between non-contiguous territories using "roll-on roll-off" ships, including train ferries, for the sea part of the journey;

(iii) Sea transport of *bulk commodities*, including the carriage of liquid cargoes, or cargoes such as grain which can be handled in the same way as liquids, in tankers, the transport of bulk cargoes in general purpose tramps, and also the transport of bulk cargoes in specially designed bulk carriers;

(iv) Transport of dry cargoes (principally fruit, dairy produce and meat) in specially designed refrigerator ships;

(v) Transport of liquid cargoes in deep tanks of ships carrying dry cargoes;

(vi) Transport of dry cargoes in liner ships operating on a "common carrier" basis;

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[4] "A recent study by the Organization for Economic Co-operation and Development (OECD) of 235 shipments in North Atlantic trades concluded, "of total transport costs paid for the entire sample of shipments, ocean freight accounts for 62 per cent..." See: *Ocean Freight Rates as Part of Total Transport Costs*, Maritime Transport Committee, OECD, MT (68)7 (May, 1968), para. 38. This excludes all non-transport charges; if all other cost items had been included the share of ocean transport costs in the differential would have been very much smaller, thus highlighting the importance of taking an overall point to view." See: UNCTAD Document, ref. TD/B/c. 4/46, para. 15.

(vii) Through transport of general cargo to inland destinations under single Bills of Lading using either traditional transport means or containers;

(viii) Air transport, at present largely restricted to high value manufactured commodities, precious stones and metals, and perishable commodities such as fruit and flowers;

(ix) Pipeline transport, between contiguous countries and also between non-contiguous countries, generally for short distances, and mainly in conveying oil and gas and their products.

II Ocean Transportation

In this section we are primarily concerned with the various forms of sea transport. By way of background it is useful to understand the peculiarities of the shipping industry, its relative importance in international trade and the various interests affected by its operation and regulation. Shipping industry, like many banking and insurance houses, by reason of its very function in the trade picture, is a wholly international industry, with a single and indivisible global market, and often without any strong ties through labor and plant with a home country. The industry operates in an international market, without the protection of an international economic and legal framework such as exists, for instance, in the closely analogous air transport industry. Furthermore, in most maritime nations, the shipping industry is a minor industry,[5] which attracts the government's attention rather for reasons of national security and trade promotion than because of any desire to promote a prosperous industry.[6] While all governments are interested in the development of internal transport, railways and roads, air and water terminals, concern seems to stop short of transoceanic transport. In many countries[7] statements on transport policy dwell at length on inland transport, while ocean shipping which carries export and import goods is treated as an unrelated item even though it may be crucial to its economy. This neglect of the operational aspects of the international waterway has led to a vacuum in total planning of the

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[5] Among the leading martime nations, only Norway and Greece, possibly also Britain and Japan, regard their merchant fleet as a major industry.

[6] Dag Tresselt, *West African Shipping Range,* UNCTAD Document, ref. TD/B/c. 4/32 (1967), at p. 6.

[7] S.C. 1966-67, c. 69, s. 1. The powers given to the Canadian Transport Commission pursuant to s. 4 of the *Act* ignore ocean shipping and other modes of international transport.

transport system.[8] To a large extent this lack of concern stems from the fact that world shipping is concentrated in the hands of a few leading maritime nations[9] and any interference with economic operation could spark off major showdown in trade and treaty relations.[10] However, in recent years the forum for debate has shifted to an international body which is vitally concerned with the economic aspects of transport and trade and their inter-relationships.[11]

Each form of sea transport has its own market.[12] The most important of these markets are:

(i) The liner market;

(ii) The voyage and short-term market;

(iii) The long-term charter market;

(iv) The long-term contract market;

(v) Integrated ownership operating outside the transport market.

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[8] For instance, any rational improvement in port facilities, is possible only if it is known what technical design of ships will use them, the trade flow, the pattern of trade routes, freight rates, etc.

[9] The leading maritime countries are the United Kingdom, Norway, Greece, Japan, Liberia, and the United States. See: O'Laughlin, *The Economics of Sea Transport*, (1967), Tables 4 and 5, at pp. 60-61.

[10] Even the United States, the most sophisticated country, faces serious difficulties in getting the most elementary information on costs and freight rates from powerful shipping companies located in overseas countries. See *infra*, pp. 79-80. See also, Bennathan and Walters, *Economics of Ocean Freight Rates*, (1969), at p. 94. Even the country of registration finds it very difficult to impose restrictive regulation or high taxation on the operation of vessels, as their owners can easily transfer them to another country's register; the so-called phenomenon of "flags of convenience" has come about because of rigid national controls. See: Sturmey, *British Shipping and World Competition*, (1962), chapter 5.

[11] That body is the UNCTAD. "The accomplishments of the Conference in the field of shipping represent a real advance over the early stages of UNCTAD's consideration of the subject... In spite of the extreme reluctance of the maritime developed countries to deal with the topic of freight rates and conference practices, a unanimous resolution of the Conference recommends that governments, especially those of maritime nations, invite the liner conferences to consider lowering of freight rates in accordance with the reduction of shipping costs in ports, admittance of shipping lines of developing countries to full conference membership... etc." See: G. F. Erb, (1968), 2 J. of World Trade Law 355 *et seq.*

[12] UNCTAD Document TD/B/c.4/38, Chapters I to IV.

The liner market is operated in the main by a system of conferences [13] under which the individual lines operating in each trade agree to avoid competition as regards freight rates and in return for the provision of regular services establish loyalty arrangements with shippers. The liners carry the bulk of the world's trade in manufactured commodities and are also important in the carriage of jute, tea, cotton, rubber and other primary products. Most meat and fruit carriers also operate on liner terms where they are not part of integrated organizations.

The voyage charter market and the short-term charter market were pioneered by the international oil companies in oil trades and have spread to many bulk dry cargo trades, especially iron ore. A time charter may be for a period as short as one year but may be for as long as the life of the ship concerned. Such long-term charters are usually arranged before the ship is built, and the size and design of the ship are then determined by the needs of the charterer. Even liner companies make use of this market.[14]

The long-term contract is a comparatively new form and although its use appears to be increasing rapidly, as yet it covers only a minor part of world trades. Under such a contract, a shipper arranges with a shipowner that his transport needs will be met over a period of years by that shipowner, but the contract does not specify the way in which the needs are to be met. This formula opens the possibility for the supplier of transport facilities actually to own no vessels himself but to obtain these by time charter from shipowners, and hence to act as a middleman between the shipowner and the shipper.

Integrated transport facilities began in the oil trades largely because the oil companies found difficulty in obtaining an adequate supply of tonnage on charter terms from shipowners. Apart from the oil companies, integrated organizations carrying on trade in meat, fruit, iron ore, paper and pulp, phosphates and sugar, also supply all or part of their transport requirements from owned tonnage.

a. *General Principles of Ratemaking in Ocean Shipping*

There is as yet no international legal body charged with the task of regulating rates in ocean shipping such as that which exists in air transportation where the International Air Transport Association, by means of its three regional traffic conferences, controls the rates

[13] See *infra*, pp. 73-77, for a full discussion.

[14] The oil companies also supplement their fleet by chartering tankers on a short term or a long term basis.

of participating air carriers.[15] Nor has any individual government, however powerful otherwise, succeeded in effectively restraining the operations of foreign vessels in their international trade.[16] In view of the tremendous importance of the study of freight rates and their impact on international trade and balance of payments, member countries of the United Nations established a Conference on Trade and Development, with a Committee on Shipping,[17] to engage in a research program involving various fact-finding studies in the field of shipping. The objective of the freight rate would be to promote understanding and cooperation by giving all parties interested in shipping a better insight into the economics of the industry, by assessing the effects of the present organization and costs of shipping services on international trade and payments, and by identifying and analysing the factors which enter into the determination of shipping routes and freight rates. It is hoped that the discovery of these fundamental facts and the study of their inter-relationship will serve both to dispel much current misunderstanding and to prepare the ground for possible improvements, in an atmosphere of greater mutual trust between suppliers and users of shipping services. Of particular importance would be the Commodity and Route studies. Commodity study would involve the analysis of facts influencing rates charged for similar commodities on different routes by different conferences and to different shippers, with comparisons of international and inter-conference, liner and tramp rates, etc. This would enable the best possible estimate to be made of the effect of the level and structure of freight rates on the trades in each of those commodities. Route study is designed to gain insight into the rate-making process itself. Among the different factors that enter into the determination of the level and structure of freight

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[15] See: D. Marx, Jr., *International Shipping Cartels*, (1953), at pp. 282 *et seq.*, where he discuss the reasons why the airline transport system of regulation has not found favour with maritime nations.

[16] The Oct. 1961 amendments to the U.S. *Shipping Act, 1916* (known as Pub. Law 87-346, Sept. 7, 1916, ch. 451, §45, formerly §44, as added July 15, 1918, ch. 152, §4, 40 Stat. 903, and renumbered Sept. 19, 1961, Pub. L. 87-254, §2, 75 Stat. 522) were designed to make regulation of cargo liners (both domestic and foreigu) more effective, but the record of enforcement against foreign vessels has been frustrating to the Federal Maritime Commission. See *infra*, pp. 79-80.

[17] This Committee on Shipping was established by Resolution 11(I) of April 29, 1965, of the Trade and Development Board of the United Nations, pursuant to the U.N. General Assembly resolution 1995 (XIX) of December 30, 1964. See: *Report of the Committee on Shipping* (1st Session), UNCTAD Document ref. TD/B/36 Rev. 1, TD/B/c.4/6 Rev. 1 (1966) for the text of the resolution and the Terms of Reference of the Committee.

rates, particular account would be taken of market conditions (especially elasticities of demand), turn-round of ships in ports, allowance for stowage and load factors, cost calculations, number of ports of call and frequency of sailings.[18]

The foregoing not only demonstrates the importance of the subject matter but also seeks to find an answer to two fundamental questions — does the present freight rate structure have the effect of promoting discrimination against particular countries in the interest of the trade of ship-owning nations or is it the result of peculiar economic forces that the industry itself is subject to? While in this paper it is not intended to dwell on the first question, nor, in a primarily law — oriented paper as this is, to grapple with the economic problems and the complexity of factors accounting for specific freight rates to determine what is the "fair" rate, yet an attempt is made to touch upon the second question with a view to understanding the legal aspects of rate determination and the nature of agreements that are in use in one important sector of the shipping industry, namely, the cartelized liner industry.

As a very general proposition it is true to say that transport rates are determined by the forces of demand and supply, and while this is truer of tramp rates which operate under conditions approximating perfect competition, as floor trading on the Baltic Exchange in London, it is also applicable to a limited extent to liner rates since tramps compete with liners and tramps are also chartered by liners. The most important determinant in the demand for shipping tonnage is the level of international trade, its volume and direction; and the size and structure of the world's fleet are determined by the growth and structure of this trade.[19] Because of the close relationship between demand and supply, it is necessary to dwell at length on these factors. Where freight costs are a substantial part of the total value of a commodity, any increase in freight would contract world trade and decline would have the

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[18] Other studies to be undertaken by UNCTAD are: *a) Country studies* — surveying comprehensively the shipping situation and shipping problems of a few selected developing countries. *b) Aggregative studies* — based upon country, commodity and route studies, with the primary aim of examining the *global economic effects* of the existing level and structure of freight rates and of possible future changes in rates that may result from changes in shipping technology, in the organization of the industry or in market conditions. *c) Study of other conference practices and adequacy of shipping services. d) Study of Port operations and connected facilities.* See: UN Document TD/B/116. TD/B/c. 4/30.

[19] O'Laughlin, *op. cit.*, n. 9, at p. 4.

reverse effect, other conditions of international trade remaining unchanged.[20] In any substantial changes in freight rates, of course, the shipping industry has to contend with competition from other modes of transport, such as air freight and long distance pipelining. Thus on light high value goods, there is an obvious limit to freight rates and on bulky low priced goods this limit will be dictated by the possibility of substitution of other products or by indigenous manufacture. One of the principal factors thus considered by transport modes, including ships, is therefore, the elasticity of demand for the commodity from which is derived the demand for shipping. On the other side of the price equation, supply is determined by both cost factors and the mobility of vessels to respond quickly to fluctuations in demand. While in the short run vessels can easily be laid up when demand contracts, new tonnage cannot so easily be pumped in to cope with increased demand nor is there any particular desire to do so unless the increase is expected to be a relatively permanent feature. Within broad limits, however, shipping economics may depend upon this ability to contract or expand supply consistent with the fluctuation in world trade. Of much greater importance, however, is the cost factor that determines the decisions of individual shipowners, whether to put out a ship or to lay her up or even scrap her, and here we enter into some of the most intricate decisions faced by the shipowner. In the first place it should be pointed out that many of the costs experienced by shipowners are external to them and are not subject to their control; and increases in those costs may in fact be the primary reason for contraction of demand for shipping tonnage by their depressing effect on the trade involved. Such costs include port dues, delays, congestions and other inefficiencies increasing ship's turn-round time, whether caused in the port itself or in the hinterland which supplies the cargo that is placed on board the vessels, and may constitute a significant proportion of the total transport cost. Secondly, a large proportion of a vessel's cost is fixed and has to be incurred whether or not the vessel is in operation.[21] These include management and fixed selling costs, depreciation, maintenance and surveys, and insurance. In the short run, a shipowner would be prepared to put a vessel out to sea if the freight rate

[20] For example, tariffs, anti-dumping policies, production capacity, etc.

[21] O'Laughlin, *op. cit.*, n. 9, at pp. 92-95 gives an approximation of various types of cost faced by shipowners. See: UN ECAFE's *Report of the Working Group of Experts on Shipping and Ocean Freight Rates and Related Papers*, UN Document Ref. E/CN.11/715 (1965), Sales No. 66, II, F. 7, at pp. 74-75 and pp. 81-85.

offered is sufficient to meet the voyage costs (i.e., costs directly referable to the voyage undertaken, including the prospect of returning to the home port in ballast), and make some contribution, however small, to the fixed costs. This marginal rate is more attractive to tramp shipowners than to liner, who may be committed whether by contracts or by fear of losing trade patronage, to adhere to an advertised schedule whether or not there is any cargo for picking up, and whether or not the voyage costs themselves could be covered.[22] In the long run these decisions whether to continue in business or withdraw the tonnage permanently would be made and an equilibrium would be achieved by high cost operators going out of business and the most efficient units surviving.

Within this broad framework there are several variations and the determination of freight rates on individual commodities on individual routes follows a specific pattern.

b. *Rate Determination in Free Market and Administered*[23] *Markets*

In ocean transport, the primary market determination of rates, based on free competition and absence of any economic restraints, occurs only in tramp operations. Here the rates are fixed for a particular voyage or for a period of time[24] by a process of bargaining between the agent for a charterer and the broker for a shipowner, on the charter exchange, of which the best known is

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[22] In practice, liners are not thus restricted because of their past experience and inter-company arrangements.

[23] An administered market is one in which the rate is not determined by the free play of market forces.

[24] The charter party is the basic document in the carriage of bulk cargoes. The charterer pays a fixed freight rate per ton of cargo loaded or a lump sum for the entire cargo capacity. Freight rate of course varies with commodity carried. Under a voyage charter party, the charterer only pays the hire, and the vessel is under the control of the ship-owner; under a time charter party, the charterer pays all the incidentals, *e.g.* port dues, use of port services, fuel, etc., and the vessel may or may not be demised to him (in the latter case it is called a charter party by demise or a bareboat charter, and the charterer is responsible for navigation and hire of the captain, chief engineer and the crew). Charters vary greatly in accordance with the subject matter of the trade — *e.g.* some of the voyage charters are AUSTRAL grain charter, CENTROCON grain charter, GENCON general charter; and some well-known time charters are BALTIME and TRANSITIME. See: E.F. Stevens, *Shipping Practice*, (1962), at pp. 43-44.

the Baltic Exchange in London.[25] The chartering agent seeks to find for his client the cheapest suitable seaworthy ship covering his needs and the shipowner's broker seeks the highest possible freight, the bargain following the general law of supply and demand, though to some degree influenced by the expertise of the parties involved.

While in the main tramp rates are determined in a manner quite different from rates established for individual commodities captive to the liner industry, there is some relationship between the two; especially when there is a regular movement of such commodities, the tramps in fact do compete with liners for some of the general cargo traffic, particularly when they are underutilized on some trips made under charterparties or when in order to pick up cargo from a port they have to sail in ballast from the port where they happen to be at the time of entering into the charterparty. This willingness to accept rates at any level that would bring some revenue in excess of the handling charges, and thus compete with liners for the same cargo, puts severe strain on the power of liner carriers to retain the traffic otherwise their preserve, and justifies their countermeasures of employing various tying arrangements with their shippers. Similarly, liners with unused capacity for general cargo are likely to compete with tramps for the latter's cargo on the routes they (the liners) serve; in fact a liner may find it advantageous to use up the extra space by soliciting "tramp" cargo for whatever rate in excess of out-of-pocket expenses involved.[26] The result of this scramble for each other's cargo in times of falling demand for shipping tonnage is to depress the freight rate, and send the tramps to the scrap yard since they cannot survive the onslaught of the combined strength of conference liners, while in times when trade is booming and space is scarce, the tramps may be able to temper the market power of the liners up to a certain point. Nevertheless, the threat of potential competition from the tramps serves as an important check on the monopolistic power of the liner industry.

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[25] Some of the other leading world markets interconnected by instantaneous communications are New York, Hong Kong, SOVFRACHT (USSR) and CZECHOFRACHT (Czechoslovakia). In their home port, shipowners normally act through their own employees, and some charterers act through their own trading organizations (especially the international grain houses).

[26] Contrary to assumptions, there is no substantial body of traffic which is exclusive preserve of either liners or tramps; grain, ores, coal, sugar, cotton, lumber, fertilizers, etc., though generally carried by tramps, are often sought by liners if their destination is en route.

While tramp shipping concentrates for the most part on commodities that move in large volumes, are bulky rather than heavy, whose value is sufficiently low as to make it worthwhile to transport at low rates, and require no exceptional facilities for preserving or handling, liners specialize in general cargo moving in small volumes and requiring special handling, preservation and regularity of delivery. Much of this traffic, which in value and importance outweighs tramp cargo, is captive to the liners most of whom are organized into conferences with a view to restricting competition among themselves. Most of the difficulties and misunderstandings arise in the area of the level and structure of freight rates, the main thrust of the argument being that rates are discriminatory and inequitable, and adversely affect the trade and balance of payments of non-shipowning nations.[27]

A discussion of freight rates evolved by liners who are cartelized into conferences is indeed a discussion of the determination of rates on particular commodities that belong to the general cargo category.

c. *Determination of Rates on Particular Commodities*

Costs incurred in moving a particular commodity, based on the accumulated historic experience of the carrier, set the floor to rates below which in the long run no carrier could successfully operate. Many different types of costs enter into the determination of particular rates, and as mentioned previously, quite a significant proportion of these costs are incurred in ports, in the form of port charges and dues, pilotage, loading and discharging expenses (both wages for longshoremen and rental for equipment),[28] expenses occasioned by delay in port due to congestion or inefficiency. when fuel costs, wages to crew, victuals, etc. continue, even though no

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[27] See: *Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments before the Joint Economic Committee* (the Douglas Committee), 88th Cong., 2nd Sess. (March 25 and 26, 1964), Part 4, at pp. 354-359 and pp. 631-639. Hellawell, *Less Developed Countries and Developed Countries' Law*, 7 Colum. J. Transnat'l L., at p. 203, discusses some of the other aspects of shipping affecting the interests of less developed countries, such as limitation of liability, and suggests that these aspects have a close bearing on the freight rates charged by the shipowner; it is a general economic fact that these factors inevitably affect costs and the profit margins, and have to be taken into account in setting freight rates.

[28] Normally cargo is handled by the ship's own tackle, but heavy machinery may require floating cranes from the port which have to be paid for.

business is done. The ship's voyage costs [29] must somehow be apportioned among the numerous types of cargo in her holds. Some commodities require careful stowage, as they may contaminate others,[30] or may themselves be easily contaminated; [31] others require ventilation, refrigeration or other special treatment; [32] the stowage factor (i.e., the relationship of cargo's weight to bulk) is another important consideration (broken stowage may account for as much as ten percent waste of space).[33] Susceptibility to damage or pilferage is another important item of cost as it will increase the shipowner's risks of carriage. Distance is also a very important factor but the carrier has to take into account the prospect of securing a return cargo or returning in ballast. Since expenses have to be computed on a round-trip basis, where there is a marked imbalance between outbound and inbound trade, it will be reflected in the general level of rates prevaling over particular routes.[34]

While costs are a limiting factor so far as the shipowner is concerned, and these must be computed on a long term basis so that each voyage bears its proper proportion of the fully distributed costs,[35] the shipper is concerned with the comparative freight rates quoted by other modes of transport after due allowance for the difference in service and other savings, and also the competitive position of his commodity at a particular level of freight rate; in other words, he is principally concerned with the value of the carrier's service in transporting his commodity to world markets. If the shipowner were to know this shipper's 'value', he could exploit his position to the marginal level so as to bring him the largest total revenue. In practice of course this is rarely possible and the rate will fluctuate between the marginal cost of movement and the value of service to the shipper, which fixes the minimum and maximum limits respectively for the different commodities

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[29] Such as fuel costs, crew wages, port costs, towage and pilotage, etc.

[30] For example, acids, creosote woods.

[31] For example, chocolates, flour, etc.

[32] Such as grain, fruits, meat, etc.

[33] If because of broken stowage, the ship cannot be loaded "full and down" to her Plimsoll mark (the legal depth), the carrier will not be able to secure the greatest operational efficiency.

[34] ECAFE Report, *op. cit.*, n. 21, at p. 5, lists 27 factors affecting ratemaking.

[35] The long term factors must take account of the volume of cargo on the route in question and the regularity of its flow.

regularly carried by the shipowner.[36] In the short-run, rates can, in response to demand factors, lie outside these long-run limits.[37]

Liner companies, most of whom are linked by conferences, specialize in the carriage of general cargo in less than full shiploads. This cargo is characterized by a heterogeneous group of commodities produced or manufactured by thousands of shippers, many of whom are "captive" to liner transport. These commodities closely compete with one another and with the universe of products and services for the trade dollar of the world community.

Most of the liner companies operating on an established trade route are organized into more than 350 conferences with a view to preventing competition among themselves. There are as many conferences as there are trades but a route in one direction may or may not be free of this grouping and in any case may not involve the same carriers as those participating in the other direction. This organized power of the shipping lines to restrict rate competition gives them an enormous control over shippers so as to cover not only the cost of production of the least efficient unit but, in theory, approximate to the maximum level set by market forces, in this situation by the value placed by the shippers for the services of liner companies.[38] The typical conference would, no doubt, engage in a thorough market research of the freight business and carefully consider the icpact of alternatives available to the shipper at a given level of rates. Such alternatives include carriage by non-conference liners, by air transport, or substitution of a chartered vessel. It is only the potential threat from these alternative modes to enter the freight market and seize the traffic that would normally temper the virtual monopoly position of liner conferences.

d. *Features of the Conference System*

Liner companies from a very early stage in their history[39] have organized themselves into a number of interlocking cartels, with a shipping line usually participating in a number of conferences. Each conference is composed of individual lines operating in the

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[36] ECAFE Report, *op. cit.*, n. 21, at p. 6.

[37] See: *Shipping and the World Economy*, UNCTAD Document Ref. TD/14, TD/B/c.4/17/Rev. 1 (1966), at pp. 5-11.

[38] Shippers who are assured of regularity of service by the liner companies would be quite willing to pay a premium over rates that otherwise would prevail.

[39] The first conference was organized by British liner companies in 1875 in the U.K.-Calcutta trades. See: Sturmey, *op. cit.*, n. 10, at pp. 322-327 for a history of conferences and their mode of operation.

same trade, and often has a permanent secretariat; there is not more than one conference in each trade. It is, however, usual for outward and inward voyages on the same route to be covered by two different conferences, often with identical membership. The individual lines, members of a conference, enter into a conference agreement.[40]

Conferences prescribe in detail the rates to be charged, the nature and character of services to be provided, including scheduling of sailings,[41] and sharing of berths in ports, while shipper adherence is ensured by a system of "dual rates" whereby shippers who sign a 'fidelity agreement' are given the benefit of lower rates (amounting to 5 to 15% off the regular rates), or by a scheme of "patronage refunds" under which a drawback is allowed to shippers who agree to ship their cargo by conference vessels only and who have remained faithful to their agreement. In giving up this freedom of choice of transport, the shipper is assured of regular, dependable and adequate service, according to a predetermined schedule, and rate stability (both of which are essential in international trade for entering into advance commercial transactions with importers) and a lower rate or deferred rebate, which latter provides a great attraction, especially when considering the fact that in a c.i.f.[42] quotation for the commodity which is being transported by the vessel, the shipper rarely computes the deferred rebates in his costing and the buyer pays the full freight.[43] On the other hand, whoever pays the freight, the freight rate will have considerable impact on his trade itself since a buyer who is able to import comparable goods from other sources and by other unrestricted means, may find freight the deciding factor and take his business elsewhere.[44] And if an entire rate structure thus capitalizes on the

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[40] There are also other looser forms of cooperation between liner companies, *e.g.* freight agreements which usually do no more than fix the rates charged by the parties.

[41] Conference agreements vary widely in content. They regulate the freight rates charged by individual member lines; most also contain specific provisions concerning the number of sailings allocated to each member, and the number and type of ships allowed to each member in the trade. In some cases provision is made for a cargo allotment scheme or a pool arrangement. This resembles bilateral agreements in airline operations. See *infra*, pp. 73-77, and *Consultation in Shipping*, UN Document TD/B/c.4/20/Rev. 1, at p. 16.

[42] Cost, insurance and freight included.

[43] It is thus more attractive for shippers to prefer the deferred rebate system.

[44] To a large extent inter-Conference agreements prevent shipper shopping around. See: Marx, *op. cit.*, n. 15, at p. 151 *et seq.*

captive situation of a whole body of shippers, it would inevitably have the effect of contracting their total trade with its consequences on the country's economic and balance of payment position.[45]

The *raison d'être* for the existence of the system of conferences is the provision of an efficient, regular scheduled service which could successfully operate only if ruinous competition is eliminated by controlling freight rates and preventing over-capacity of tonnage on shipping routes. This the conferences do by means of the restrictive provisions of the master agreement itself, so that competition is limited to the quality of services offered, such as speed of ships, care in cargo handling, shore facilities, prompt settlement of claims, etc., and also by keeping out those seeking admission until they literally force the conference lines to admit them into their fold.[46] Furthermore, conferences seek to entrench themselves in the market by shrouding their operations in a mist of secrecy so that not only the shippers but even their national governments cannot easily discover information about the nature and character of their tariffs,[47] and by discouraging shipper combination so that they do not bring to bear their collective strength in negotiations with the conferences.

e. *Loyalty Contracts*

It is essential to study the various tying arrangements and their effect, in order to appreciate the impact of the conference on the rate structure as these have been among the most criticized of conference practices and have been the subject of several detailed investigations. The principal methods in use are the deferred rebate, the cash rebate, the preferential contract, and the exclusive patronage contract.

The deferred rebate system originated in the Indian trade. It was first introduced in 1877 by the U.K.-Calcutta conference in the

[45] See: Douglas Committee (Part 2), *op. cit.*, n. 27, at pp. 354-357.

[46] Existence of a conference on a particular route works as a barrier to entry for non-Conference lines. Often the only way to gain admission into a Conference is for an independent line to operate successfully (by weaning away Conference shippers) and pierce the Conference veil. Independent lines without strong financial backing would easily be driven out by countermeasures of Conference lines.

[47] The tariff is regarded as confidential and a shipper can only determine the rate he will have to pay on any particular consignment by applying to a Conference line or to the agent of such a line. Non-publication of the rate schedule is justified by the Conference lines on the ground that publication would make it too easy for outsiders to undercut the Conference rates.

Liverpool-Calcutta trade and was applied to cotton piece-goods.[48] Under this system a shipper who has not employed a non-conference ship for twelve months receives a refund at the end of the period of part, usually ten percent, of his freight payments in the first six months of that period. The price of using a non-conference ship is the loss of any rebate earned to date in the current half year, plus any rebate due from the previous half year.[49] In most cases the deferred rebate constitutes a substantial tie, perhaps more substantial than is desirable, and discourages new entrants to the freight market since they have to compensate the shippers for the loss of rebate. It is for this reason, and also because of the unilateral nature of the contract without a reciprocal obligation on the part of the shipowner to maintain services or keep the freight rate stable, that the deferred rebate system has been widely attacked in several countries at different times,[50] in most cases the strongest objections coming from countries without large ocean shipping fleets.

The second type of tie is the contract, or dual rate, system which is an alternative to the deferred rebate, and especially suited where the latter is outlawed.[51] This contract, known as the Merchant's Rate Agreement, was an answer to the prohibition on deferred rebates imposed by the U.S. *Shipping Act, 1916*,[52] and under it the shipper agrees to send all his shipments by the conference line for the contract period. Breach of the contract entails the immediate cancellation of present and future contract benefits, perhaps for a specified time, and sometimes also a penalty related to the past shipments by the shipper or the payment to the conference lines of the freight lost on the shipment sent in a non-conference vessel.[53] The difference between the contract and the

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[48] Sarangan, *Liner Shipping in India's Overseas Trade*, UNCTAD Publication TD/B/c.4/31 (1967), at p. 43.

[49] Sturmey, *op. cit.*, n. 10, at p. 338.

[50] See *infra*, II(f).

[51] As under the U.S. *Shipping Act, 1916, op. cit.*, n. 16.

[52] The duel rate system was accepted in the U.S. until 1958 when the U.S. Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481 cast doubts on its legality. The U.S. Congress legalized it by passing Public Law 87-346, 75 Stat. 762, 46 U.S.C. s. 813a (known as the "Bonner Bill") in 1961.

[53] Sturmey, *op. cit.*, n. 10, at p. 339. This is very similar to the system of "Agreed Charges" in force in railway rate structure in Canada. Prabhu, *Freight Rate Regulation in Canada*, (1971), 17 McGill L. J. 292.

non-contract rates is about 10 to 20 percent and is a big inducement to enter into the "loyalty" contract.

A third type is the "immediate cash rebate" whereby the shipper is given the benefit of the deferred rebate at the time of shipment. To obtain this rebate, however, he has to sign a general cargo contract which is almost identical to the deferred rebate contract; the shipper gets the benefit of a somewhat lower rebate and his money is not locked up.

f. *Public Concern about Conference Operations*

Liner freight rates and related conference practices have been the subject of controversy for almost a century because of the inherent vice of unregulated power, and still remains a major bone of contention between the suppliers and users of shipping services today. Because of their monopoly, bolstered by the combined strength of their members, they are in a position to discriminate [54] in favour of some shipers and ruthlessly eliminate others, and in the process, establish an entire rate structure to the detriment of the external trade of individual countries.[55] The system may tolerate high and anomalous rates leading to the same result. The conference arrangement may in some trades reduce the incentive for efficiency, modernization and innovation.[56] Furthermore, in such an organization, rates are determined in secrecy and information regarding cargoes, sailings, load factors and market shares of the various firms is not released, nor is there any willingness to publish full

[54] Discrimination can be said to exist when a rate on a commodity is higher than the rate on the same or on a similar commodity moving from other countries to the same destination, other conditions governing rating being more or less the same.

[55] If a rate on a commodity in an outward tariff is higher than the rate on the same or on a similar commodity in the inward tariff, exports are discouraged and imports encouraged, with consequent effect on balance of payments. A very elaborate case was made out before the Douglas Committee (n. 27) that the foreign dominated conference vessels discriminated against U.S. trade and commerce by this two-fold discrimination, and also by charging relatively lower on trades not touching U.S. but competing with it (*i.e.* third country discrimination). See: Note, *Rate Regulation in Ocean Shipping*, 78 Harv. L. Rev. 635, at p. 647 *et seq.*

[56] *Report of the Restrictive Trade Practices Commission on Shipping Conference Arrangements and Practices*, (1965), at pp. 20-21, which, in referring to the feat of the Lauritzen Line inaugnrating a winter service in the St. Lawrence by the HELGADAN, says that the record of Conferences in technological development is mixed, and that progress is clearly not restricted to Conference or even liner shipping.

particulars of the rate structure. This then is the breeding ground for mistrust and the system is criticized as unfair by users of shipping services.

Although the first conference dates back to 1875 and the practice soon spread rapidly, it was not until after the turn of the century that various trading groups in both the United Kingdom and the United States became concerned about their pricing policies. In recent years, even in Canada [57] and Australia, the conference system has been the subject of government inquiry to ascertain whether the existence of liner conferences is detrimental to the national economy and to the public interest as a whole. Several investigations were also carried out in the United States during the 1950's (the Bonner and Celler Committees on the functioning of the *Shipping Act, 1916*) and the 1960's (Douglas Committee, 1963-64, on the effect of conference rates on the U.S. balance of payments, resulting in considerable international controversy).[58]

The U.K. Royal Commission on Shipping Rings issued a Report in 1909,[59] after a four-year investigation, finding the shipping conference to be justified and that abuses of the deferred rebate system should be tolerated in the interest of achieving a strong conference system; it recommended the establishment of counter-combinations on the part of merchants and shippers.[60] In the United States, Congressional investigation began in 1912 and ended in 1914 with the publication of the Alexander Committee Report.[61] Both the Royal Commission and the Alexander Committee considered that

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[57] In 1925 the Government of Canada proposed putting its own vessels on the high seas in order to break the alleged monopoly of the North Atlantic and the U.K. Shipping ring; it was abortive. See: Currie, *Canadian Transportation Economics*, (1967), at p. 606. *Preston Report* (1925), Canada Parl. Sess. Paper 45, at pp. 87-88. No legislation was enacted. The Restrictive Trade Practices Commission in 1965 also recommended no legislation to curb the Conferences. See: *Shipping Conferences Exemptions Act*, S.C. 1969-70, c. 72.

[58] Retaliation by U.K. and several other countries took the form of specific legislation forbidding national shipping lines from "cooperating" with the U.S. authorities.

[59] Cmd. 4668-4670, 4685-86 (5 volumes). The minority issued its own report pointing out the serious defect of the Conference system. See: Marx, *op. cit.*, n. 15, at pp. 60-64.

[60] The Imperial Shipping Committee on the Deferred Rebate System (1923), on which Canada was represented supported this view. See: Cmd. 1802.

[61] *H.R. Committee on Merchant Marine and Fisheries, Investigation of Shipping Combinations* (Alexander Committee), H.R. Comm., 62nd and 63rd Congress (1913-14).

conferences, on balance, were necessary and stressed that improved service resulted from, *inter alia*, the greater regularity of sailings and services, from the improved ships that were made possible by the greater security which conferences gave to capital investment, from the greater stability of rates, which was a condition essential to the sound development of trade and from the uniformity of rates to all shippers alike. However, the Alexander Committee called for the public regulation of shipping conferences by correcting the abuses of the system, such as the deferred rebates, use of "fighting" ships for killing external competition and the entry into or use of secret anti-competitive agreements. These two reports are significant because their recommendations have led to the first steps in developing the countervailing instrumentalities for meeting the power of shipping conferences.

The United States passed the *Shipping Act* in 1916 accepting most of the recommendations of the Alexander Committee. The Act prohibited deferred rebates, use of "fighting" ships, retaliation or discrimination against any shipper, and unfair or unjustly discriminating contracts with any shipper; it also provided for a penalty not exceeding $25,000 for each offence. Section 15 of the Act provided for filing with and approval of all conference and pooling agreements or arrangements by the Federal Maritime Board which must be satisfied that they are not discriminatory or unfair as between carriers, shippers, exporters and importers, or parts of the United States, and not detrimental to the commerce of the country as a whole. If the agreements are approved, they are exempt from anti-trust laws. Violation of the filing and approval provisions would result in a fine of $1,000 for each day of the offence. The Act also required conferences to admit new lines as members whenever the applicant was a *bona fide* common carrier in the trade route involved. All conferences were required to file their tariffs with the Board to aid in its supervision of section 15 agreements.

Several investigations in the United States have been carried out since then. The Bonner Committee and the Celler Committee in the 1950's reported that some undesirable conference practices were still taking place despite legislation to prevent them. Nevertheless, both reports concluded that the advantages of steamship conferences outweighed their disadvantages, and that in the absence of a better arrangement, conferences should be permitted to function, provided they are subjected to more effective governmental supervision. In 1961, therefore, a fully independent Federal Maritime Commission was created. The *Shipping Act, 1916* was

amended [62] by legalizing dual rate contracts but limiting the spread between rates to a maximum of 15%, and provision was made for the disapproval of any conference rate that the F.M.C. might find to be so unreasonably high or low as to be detrimental to the commerce of the United States, and for shipper termination of the contract on 90 days' notice. It was also provided that the penalty for the breach of a contract should not exceed the freight charge less the cost of handling the particular consignment involved, and certain cargoes were to be excluded from the contract.

In 1963, the U.S. Congress Joint Economic Committee under the chairmanship of Senator Douglas made extensive investigations into the Conference freight rate structure and its effect on balance of payments. Its Report, issued in 1964, urged that the F.M.C. should continue its current investigations of freight rate disparities with increased vigor and that serious consideration be given to holding a conference on international shipping, out of which multilateral agreements could be developed for the control of discriminatory ocean freight rates and anti-competitive shipping practices.

Canadian efforts in the past to control ocean freight rates in the North Atlantic were unsuccessful, as the U.K. government did not cooperate in any effective form of joint control, nor could the Canadian government control rates unless it owned or subsidized a fleet of fast, well-equipped steamers.[63] In 1924, as a result of investigations into the North Atlantic-U.K. Eastbound Conference, the Preston Report was issued pointing out that American ports were being favoured over Canadian ports by this international combine and that marine insurance and rates on flour were discriminatory against Canadian interests; it also concluded that some of the freight rates set by the conference prevented the export of certain Canadian goods.[64] In 1964, Canadian shippers got up in arms over rates charged by the Canadian-U.K. Eastbound Conference. After lengthy hearings the Restrictive Trade Practices Commission found that fifteen firms, engaged in carrying freight both ways between

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[62] Public Law 87-346, *op. cit.*, n. 51. See: Gross, *Studies in Maritime Economics*, (1968), at pp. 30-45.

[63] An attempt to control shipping rates on grain in the Great Lakes trade in 1923 failed when American carriers withdrew from the trade because the rates were being controlled by the Board of Grain Commissioners. The consequent disruption of the movement of grain forced the government against attempting direct control of ocean freight rates in the North Atlantic.

[64] *Report of the Restrictive Trade Practices Commission on Shipping Conference Arrangements and Practices, op. cit.*, n. 56, at p. 16.

Canada and Britain, operated in a combination to fix rates and inhibit competition from tramps. It thought that shippers and ocean carriers should be able to bargain fairly and with full knowledge of tariffs, but excessive rate competition and instability in shipping schedules would be detrimental to the Anglo-Canadian trade. It considered that the record of the conference lines in this respect was good and that they should be allowed to continue such arrangements subject to appropriate safeguards in the public interest. Furthermore, regulation of rates in ocean transport would not be feasible or conducive to the welfare of the Canadian public. The bargaining strength of Canadian shippers and consignees should, however, be further developed, especially in the interest of smaller shippers, and competition should be fostered in the Canadian-U.K. and other trades to the extent consistent with the preservation of the advantages of the conference system. To this end it was desirable to strengthen the position of non-conference lines. In view of the heavy investment required for provision of up-to-date liner services, all liner operators should be entitled to arrange with shippers for a guaranteed share of certain traffic or revenue. The entry and growth of non-conference operators to trade with Canadian ports should not be precluded by a system of exclusive patronage contracts which penalize a shipper who wishes to give some of his traffic to carriers who are not members of the conference. Avenues for solicitation of at least some share of any shipper of consignee's traffic should be open to non-conference operators as well as conference members. The Commission's principal recommendations therefore were:

1) That all conferences should make their tariff available to any member of the public at reasonable cost;

2) That every patronage contract between a shipper or consignee and any shipping conference or conference member should incorporate certain principles which are indispensable for the protection of the public, namely:
   a) a maximum limit of 85% on the compulsory volume of freight to be shipped under an agreement, exclusive of bulk cargo;
   b) an option to terminate a contract by either party on ninety days' notice;
   c) increase in a rate to take effect only after ninety days and a shipper or consignee to have sixty days within which to signify his acceptance of such increase — during this sixty-day period, the shipper/consignee to have the right to negotiate for adjustment of the rate;

d) the spread between non-contract and contract rates may vary from commodity to commodity but in each case not to exceed fifteen percent;

e) in the event that a carrier or conference is unable to name space within a prescribed number of days at any Canadian port served by the conference, the shipper to be free to seek other service and the goods so shipped not to be subject to the contract;

f) a shipper/consignee not to be required to divert goods from a port where the conference carrier does not provide service, to one designated by the conference, if such diversion is contrary to natural routings or entails unreasonable expenses on the part of the shipper or consignee;

g) the contract may provide for reasonable pre-estimated liquidated damages for breach of the undertaking to ship a stated volume of freight.[65]

It would have been observed from the foregoing, that virtually all the official investigation carried out in a variety of countries has come to the same conclusion that, although conferences might have some undesirable practices (the most frequent complaint was the non-publication of tariffs), they were on the whole good and ought to remain. The 1964 UN Conference on Trade and Development, which included developing countries as well as the shipowning nations, arrived at a "Common Measure of Understanding on Shipping Questions" in which, *inter alia*, "it was agreed that the liner conference system is necessary in order to secure stable rates and regular services".[66]

It would thus appear, as Goss notes,[67] that liner shipowners, after all,

> ...do not resemble those monopolistic entrepreneurs beloved of economic textbooks, who maximize short-run profits. If they did, and given the general elasticity of demand for their services, then their freight rates would be several times higher than they are. Instead, they maximize their profits only in the long run.

The limited type of unilateral regulation of shipping conferences imposed by the United States since 1916 has been moderately

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[65] *Ibid.*, at p. 100.

[66] Annex A-IV. 22 to the Final Act of the United Nations Conference on Trade and Development, 1964. See: *Report of the Committee on Shipping, op. cit.*, n. 17.

[67] Goss, *op. cit.*, n. 62, at p. 18.

successful in curbing some of the conference abuses, particularly in view of the obstacles which an individual nation faces in attempting to regulate an international industry. However, the Federal Maritime Commission has exercised little actual authority over rates and no authority over the entry of new shipping lines and the abandonment of existing lines in the U.S. foreign trade. If full scale regulation were exercised unilaterally, it may result in the abrogation of existing treaties of friendship, commerce and navigation, as well as retaliatory action by other countries.[68] As a matter of fact, the 1961 *Shipping Act* amendment emphasizes self-policing by the conferences of their own agreements which implies that "no matter how revitalized, the Commission could not adequately police the conferences by itself and as a practical matter considerable enforcement responsibility had to be vested in a non-governmental body".[69]

A bilateral approach to the regulation of shipping could not be effective because shipping is a multi-partite international industry. In contrast with the regulation of air carriage (which usually requires the carrier to have specific treaty rights in order to participate in the carriage of passengers and cargo to and from foreign countries), ships of any flag can enter most of the foreign ports of the world with passengers and cargo, and therefore a bilateral solution is not likely to be successful. Perhaps, as pointed out by the Douglas Committee, only a multilateral agreement would prove effective if it could be achieved without jeopardizing the traditional concept of freedom of navigation. Effective multilateral regulation, suitably protecting the interests of existing shipping interests, would probably bring about the dissolution of the conference system as it is presently known.[70]

g. *Negotiations between Shippers and Conferences*

The main grievances which shippers justifiably have stem from the lack of conference representation locally where their problems as to discrimination and high freight levels, terms of contract and their interpretation, and business practices, could be ironed out.

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[68] ECAFE Report, *op. cit.*, n. 21, at p. 15. It seems unlikely that courts will enforce penalties for non-compliance with F.M.C.'s order against Conference lines that are forbidden by their governments to produce documents located outside the U.S. See: 78 Harv. L. Rev. 635, at p. 643.

[69] *Self Policing of Ocean Shipping Conferences,* 20 Stan. L. Rev. 724.

[70] ECAFE Report, *op. cit.*, n. 21, at p. 15.

Most of the investigations, from the U.K. Royal Commission of 1906-09 and the U.S. Alexander Committee of 1912-14 down to the Canadian Restrictive Trade Practices Commission of 1964-65, emphasized the desirability of shippers organizing themselves with a view to bargaining with the powerful conferences on equal terms in matters of rate determination and policies and business practices.

In its Recommendation A.IV.22, the UNCTAD has proposed that well-organized consultation machinery be set up with adequate procedures for hearing and remedying complaints by the formation of shippers' councils or other suitable bodies on a national or regional basis.[71] The basic idea behind this is to extend contacts between individual shippers and a shipping company or a conference to a collective level comprising exporters, importers and producers, so that common problems may be discussed and negotiations conducted on a much stronger platform.[72]

The Australian Overseas Transport Association (AOTA), which was formed in 1929, is based on the principle of "closed" conferences, and in order to safeguard national interests, a government officer attends at consultations between shippers and shipowners, though he does not intervene in matters which are to be properly settled by the parties themselves. The council of AOTA comprises an equal number of representatives of exporters and shipowners and is authorized to negotiate freight rates and terms of contract on the export trade in wool, foodstuffs, and general cargo from Australia to the U.K. and the European continent.[73] Agreement on these matters is first reached in negotiations between the Federal Exporters' Overseas Transport Association (FEOTC) and the Shipowners' Oversea Transport Committee (SOTC) and, when approved by AOTA, becomes binding by law upon the participants in the consultation.

In Western Europe, the procedure is similar, but the end result is different. Matters which are brought up for top-level consideration are first considered by the shippers and shipowners separately; they are then placed before joint shipper/shipowner meetings and decided upon there. The decision which is reached is a recommend-

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[71] *Op. cit.*, n. 65.

[72] ECAFE Report, *op. cit.*, n. 21, at pp. 9-11, sets out the recommended structure of such bodies. See: UNCTAD Document TD/13 (October, 1967), pp. 9-11, which states the conditions for the efficient working of such bodies.

[73] The Australian Trade Practices Act provides for steps to be taken to disallow the closed conference system if it should be found that the system operated to the detriment of the public interest.

ation to the individual members of the shippers' councils and to the individual shipowners. There is no mechanism to enforce the decisions but so far as is known all recommendations reached in this way have been followed. Major decisions are reached at a regional level. All western European Shippers' Councils participate and the shipowners represent all Western European-based liner conferences.[74]

The British Shipper's Council, which was formed in 1955, has comprehensive membership of both large and small shippers with the primary object of presenting a united front "in all matters of policy on the relationship between shippers and shipping and air interests, and between shippers, port authorities and the government so far as they affect the general interests of exporters and importers . . .". In 1964 the British Shippers' Council established a Court composed of prominent men in business and industry, to give authoritative support to the Council. The functions of the Court are essentially advisory, but because of its standing its advice is likely to carry considerable weight.[75]

In India the procedure of consultation has so far been tried mainly in respect of general rate increases. Consultations are held initially between the conference concerned and shippers' councils. If these consultations fail, the conference has to enter into consultation with the Government through the Freight Investigation Bureau. If at this stage also no agreement can be reached, then the conference is free to take its own decision. Experience has shown, however, that negotiation with the Government enables the conference to see the problem in a broad perspective, and the opportunity is taken to narrow down the areas of differences.[76]

It will be seen from the foregoing that, of all the avenues utilized to limit the monopoly power of conferences, the most recent and

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[74] *Consultation in Shipping, op. cit.*, n. 41, at p. 21. There are twelve national shippers' councils including the British Shippers' Council whose structure is given above.

[75] *Ibid.*, at pp. 36-37.

[76] A "discussion formula" was evolved in 1961 through the intervention of the government whereby the India-U.K./Continent Conference undertook not to increase freight rates without giving sufficient notice to shippers and also to consult the shippers before bringing it into force. In the event the parties fail to reach agreement, the conferences are committed to holding discussion with the government before taking a final decision. The formula also provides that normally no general rate increase should be made within two years of the previous increase. See: Sarangan, *op. cit.*, n. 48, at pp. 125-126.

the one most likely to achieve fruitful results, is the collective organization by shippers themselves with aid of governments wherever necessary to strengthen them, to negotiate on all matters touching upon their interests in shipping, and this trend toward shipper organization is likely to spread to all countries, large and small.[77] Because of the international aspects of shipping, the governmental participation, though important, is mainly on an advisory basis and the latest U.S. investigations have recognized that in the long run the shippers and shipowners must settle their differences in an amicable manner without legal imposition by government of its authority.[78] In such a setting, shipping conferences are not likely to disregard the overriding interests of the country they service. The various research studies on freight rates and other matters being undertaken by UNCTAD should strengthen this negotiating process.

If the shippers' council device is not successful, a multilateral rate regulating agreement, such as that in use in international air transport, may be the only long-term means of achieving an international freight rate structure which can reconcile international trade and development requirements with the needs of ship operators in performing essential ocean transportation services.[79]

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[77] The Canadian Shippers' Council which was incorporated in Nov. 1966 is modelled generally on Western European Shippers' Councils. It is composed of trade and industry associations representing the interests of shippers, large and small. The Council will not get involved in individual rate negotiations or disputes. One of its primary tasks is to develop closer cooperation and consultations between shippers and carriers in international trade. Prior to 1966, the Canadian Manufacturers' Association and the Canadian Export Association represented these interests. See: *Consultation in Shipping, op. cit.*, n. 41, at pp. 146-147.

[78] "In the U.S. there is no Shippers' Council, but the National Industrial Traffic League which has a membership of about 1,600 industrial firms and trade associations has involved itself closely in the daily problems of American shippers in international commerce; Chambers of Commerce and similar institutions also carefully follow transportation matters, including the carriage of goods in American ocean commerce. These organizations do not negotiate individual freight rates with conferences since legislation is fairly extensive." *Ibid.*, at p. 215.

[79] At a Seminar on Shipping Economics held in Geneva from 1 to 12 August, 1966, several international economists "argued strongly that the IATA rate-making process and results were in important respects worse than the Conference system. It was also stated that in the IATA negotiations on routes and freights, it is often not so much the national interests of their countries as the interests of the individual air line that is pressed by government officials." *Shipping and the World Economy, op. cit.*, n. 37, at p. 11.

III Air Transport

The law of the high seas declaring that they are highways open to all nations of the world, and subject to the sovereignty of none,[80] was extended to air space above high seas and implicity recognized both by the Paris Convention of 1919[81] and by the Chicago Convention of 1944.[82] Together, these two conventions have laid down the foundations of international transport law.

Air transport is fast taking its place today beside ocean shipping as one of the great economic factors in the development of international commerce.[83] But the right of a State to control the use of these two economic forces has, in certain respects, developed very differently. In the absence of specific treaties, a State may withhold permission for entry from the aircrafts of another State but the existing treaties of friendship, trade and commerce would preclude a State refusing entry to the merchant vessels of other States.[84]

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[80] Geneva Convention on the High Seas, (April 25, 1958), Art. 2. See: Brownlie, *Principles of International Law,* (1968), at p. 210.

[81] Art. 1 of the Paris Convention, 1919 (superseded by the Chicago Convention, 1944) provided that:

> The contracting states recognize the full and absolute sovereignty and jurisdiction of every state in the air space above its territory and territorial waters.

but no mention was made of the status of the airspace over the high seas; nor does Art. 1 of the Chicago Convention (which is in almost identical terms) make any direct statement as to the legal status of the space above the high seas. Cooper, *Exploration in Aerospace Law,* (1968), at p. 197, points out that the principle of free air navigation over the high seas "...was fully accepted in public international law prior to the outbreak of World War II, subject to one open question; namely, the status of the airspace over the *Arctic Archipelago, esp.* p. 40 *et seq.* (unpublished thesis submitted to the University of Saskatchewan, College of Law, 1970).

[82] Shawcross & Beaumont, *Air Law,* (1966), at pp. 192-194, as to the limits of State claims over airspace — identical principles apply with regard to rights in airspace above the territorial sea as over the rest of the State's territory. "The concept of sovereign rights in the airspace above the territory of each State is as old as air transport and was enshrined in international law when the Paris Convention was signed in 1919. Art. 1 of the Chicago Convention likewise recognizes that 'every State has complete and exclusive sovereignty over air space above its territory'."

[83] Cooper, *op. cit.,* n. 81, at p. 363 *et seq.* for an historical development of world transport.

[84] Marx, *op. cit.,* n. 15, at pp. 282-283.

It has been suggested that the type of organization prevailing in air transport is no different from that in ocean shipping which is characterized by conferences having more or less complete control of the economic decisions of member lines. While to a great extent this is true,[85] as will be seen later, there is one substantial difference between these two types of organizations — in air transport, every single agreement of the IATA [86] Traffic Conferences is subject to governmental approval before it can become effective; therefore, "whatever criticisms may be made of the rate agreements arrived at by IATA it cannot reasonably be said that they represent the decisions of a private cartel."[87] Furthermore, although air transport is increasingly competing with ocean shipping for general cargo, its predominant importance lies in passenger traffic where the type of regulation feasible is far different from that in freight transport.

a. *The Chicago System*

Before entering into a discussion of rate regulation in air transport, it is useful as a background to discuss the system that was brought into existence by agreement among certain States. Representatives of fifty-two nations assembled at Chicago in November, 1944, with a view to setting up a permanent organization to develop the principles and techniques of international air navigation and to encourage the establishment and stimulate the development of international air carriage. They set up the International Civil Aviation Organization [88] for this purpose, with an Assembly in which all signatories were represented, a permanent Council consisting of 27 elected members holding office for three years and a number of subsidiary bodies such as the Air Transport Committee, the Legal Committee and the Air Navigation Commission.[89] The signatories to

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[85] IATA members are responsible for some 90% of international air traffic; while ocean Conference members control about 50% of general cargo movement by vessels.

[86] International Air Transport Association — see *infra*, pp. 92-94 as to its structure and functions.

[87] Wheatcroft, *Air Transport Policy*, (1963), at p. 77.

[88] The Final Act was signed by 52 States on December 7, 1944; there were 112 adherents to the Convention by March, 1967. See: 22 ICAO Bulletin (1967), at p. 6.

[89] Shawcross & Beaumont, *op. cit.*, n. 82, at pp. 37-66 for a composition of the Assembly and the Council and the various subsidiary bodies under them and their functions.

the convention mutually agreed to exchange, subject to the observance of the terms of the Convention, the privileges of flying across each other's territory without landing, or of landing for non-traffic purposes, to aircraft *not* engaged in scheduled services, without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each State may nevertheless reserve the right "for reasons of safety of flight" to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.[90]

The right of *non-scheduled flight* does however extend to the commercial transport of passengers, mail and cargo (such as those engaged in by charter services) and by Article 5 of the Convention, aircraft engaged in such operations "also subject to the provisions of Article 7", which reserves cabotage traffic[91] to the contracting State, "have the privilege of taking on or discharging passengers, cargo, or mail subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable".[92]

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[90] Art. 5 of the Convention. See: ICAO Document 7278 — c/841 (1952) for an analysis of these rights. See also: Shawcross & Beaumont, *op. cit.*, n. 82, at pp. 196-199. The important provisions of the Convention referred to are Art. 4 (misuse of civil aviation), Art. 8 (pilotless aircraft), Art. 10, (landing at customs airports), Art. 11 and 12 (air regulations and rules of the air), Art. 13 (entry and clearance regulations), Art. 18 (dual registration), Art. 20 (display of marks), and Chapter V and VI in general. If an aircraft lands for non-traffic purposes, the contracting State must afford reasonable commercial facilities. The contracting State may designate the routes and airports to be used within its territory and may impose just and reasonable charges which must not be higher than those paid by its national aircraft on similar international services, for the use of airports and other facilities. The term "stops for non-traffic purposes", as defined in Art. 96 means "a landing for any purpose other than taking on or discharging passengers, cargo or mail" (*e.g.* for refuelling, emergency, etc.) without distinguishing between gratuitous carriage and carriage for reward. See: Cheng, *Law of International Air Transport*, (1962), at pp. 193-199.

[91] Cabotage in air traffic means transport between any two points within the same political territory, and is thus different from the coastal trade meaning of cabotage in sea carriage.

[92] Art. 5, para. 2. The further rights reserved to the State, though unqualified, are to be confined within reasonable limits, so as not to curtail the substantial rights granted under the Art., in such a way as to render their operation impossible or non-effective. See: ICAO Document 7278 — c/841 (1952).

Scheduled air services [93] on the other hand require special authorization and the modes of granting it are provided by the Convention itself. The first method is the restricted TWO FREEDOMS exchange, whereby signatories of the International Air Services Transit Agreement (called the TRANSIT agreement) [94] grant to each other the freedom of flying across without landing and the freedom of landing for non-traffic purposes.[95] The second method is the much fuller grant of privileges under the International AirTransport Agreement (the TRANSPORT or FIVE FREEDOMS agreement) which grants three additional rights, namely the right to put down passengers, cargo and mail taken in the country of origin of aircraft, the right to take on passengers, cargo and mail destined for any other contracting State, and to put down passengers, mail and cargo originating in such States.[96] Since multilateral exchange of rights under the TRANSIT and TRANSPORT agreements, though desirable, was found to be infeasible because of the opposition of the United Kingdom and Commonwealth countries,[97] the Convention

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[93] The Convention does not define a "scheduled international air service" but the ICAO Council has suggested the following definition in its Document 7278 — c/841 (1952):

"A scheduled international air service is a series of flights that possesses all the following characteristics:

(a) it passes through the air-space over the territory of more than one State;

(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

(c) it is operated, so as to serve traffic between the same two or more points, either

(i) according to a published time-table or

(ii) with flights so regular or frequent that they constitute a recognisable systematic series."

[94] Thirty-two of the 52 signatories of the Convention signed this Agreement at Chicago.

[95] *Op. cit.*, n. 90.

[96] Only 20 of the 52 states signed this Agreement in Chicago. These five freedoms do not exhaust the possible privileges in free air transport. Cheng, *op. cit.*, n. 90, at pp. 13-17, refers to three others freedoms — *viz.* the sixth, seventh, and eighth freedoms, which have made their appearance since the Chicago Conference.

[97] There was fundamental difference of opinion between the United Kingdom (supported by other members of the Commonwealth) and the United States over the grant of the fifth freedom rights at Chicago. U.K. proposed an elaborate regulatory system under which an international agency by means of a precise mathematical formula would control the allocation of capacity on

provided for a third method of granting traffic rights to other States and this was by way of bilateral agreements, hopefully in the standard form included in the Final Act of the Conference.[98] These bilateral treaties would, under the standard form (known as Chicago type), describe the routes and the rights granted, whether of transit only, of non-traffic stops or of commercial entry as the case may be, including the designation of ports of call, and the carrier by which the rights granted were to be exercised. Since the Chicago Conference many "Chicago type" bilateral agreements have been made, but the most popular one has been the "Bermuda" type agreement which paved the way for making use of the IATA rate-making machinery established in 1945 as a compromise to the free, unregulated operation contemplated by the TRANSPORT or FIVE FREEDOMS agreements at Chicago.

By the "Bermuda type" bilateral agreements, first popularised by the historic agreement between the United Kingdom and the United States in February, 1946, the contracting States either agreed beforehand on the capacity to be offered by the agreed services between their territories, or provided for a "free and equal opportunity" with an *ex post facto* review of operations.[99] In the latter case, which is now the order of the day, it is usual to provide for prior authorization to be obtained for changing an aircraft to one of different (obviously larger) capacity.[100] A majority of these bilateral agreements also extend the principles[101] and procedure

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international services. See: Cheng, *op. cit.*, n. 90, at pp. 422-23. The U.S., which had a very efficient, well-equipped modern fleet of aircrafts, with unprecedented experience in transocean operations as a result of the war, insisted upon complete, unregulated freedom of operation, but was not able to prevail upon more than a handful of leading States in aviation (such as Netherlands and Sweden) to back her up, with the result that only twenty-one other States signed the Transport Agreement, which was later terminated by the U.S. in favour of the Bermuda type bilateral agreements. "The basic conflict in its essence reflected the economic realties of the airlines of these two countries," Wheatcroft, *op. cit.*, n. 87, at p. 69.

[98] A bilateral treaty is also the only way of granting rights of either scheduled flights, as between States which are not parties to the Convention itself. More than 700 bilateral agreements are now in force, ICAO's "Memorandum on ICAO" (July, 1966).

[99] Cheng, *op. cit.*, n. 90, at pp. 424-434. Capacity means the payload of aircraft multiplied by the frequency operated by such aircraft over a given period and route or section of a route.

[100] *Ibid.*, at pp. 434-441.

[101] General provision is made for the establishment of tariffs at "reasonable levels, due regard being paid to all relevant factors. Factors enumerated for

of tariff regulation to all the agreed services; where procedure of regulation is agreed upon in addition to the principles, it is normal to refer expressly to the IATA Traffic Conferences for determination of rates,[102] and in some cases (especially where agreements with the United States are involved) to further approval by the aeronautical authorities of the contracting States.[103]

b. *The IATA Rate-Making Machinery*

It will have been noted from the foregoing that the International Air Transport Association (IATA),[104] as a result of the Bermuda formula agreed to by the United Kingdom and the United States in February, 1946, was officially designated to consider rates and fares, and has come to be recognized as the agreed machinery in numerous bilateral treaties. This organization came into existence in December, 1945, at a meeting of 41 airline representatives in Havana, on account of the failure of the Chicago Convention to resolve the conflict between the protectionist policies of the U.K. and the liberal policies of the U.S. on the economic regulation of international air commerce, the United Kingdom's position regarding price and capacity control being basically the same as its rationale of Shipping Conferences where this system has been found to be necessary for an efficient, scheduled service. The primary object of the IATA is to control rates and fares on international flights provided by its members and its other non-price functions, such as the clearing house, while extremely important in facilitating the operations of the members, are only secondary.

To ensure that American participation would not run afoul of domestic legislation, the IATA Articles of Association included two important provisions — the first providing for unanimity among the voting members of the organization, the second requiring the approval of the aeronautical authority of each country represented by the airline in IATA.[105]

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purposes of illustration and emphasis are generally the following: (a) economic operation; (b) reasonable profit; (c) characteristics of service, for instance, standards of speed and accomodation; and (d) tariffs charged by any other operators on the route". *Ibid.*, at p. 445.

[102] Cheng, *op. cit.*, n. 90, at pp. 445-447.

[103] *Ibid.*, at p. 448.

[104] Its predecessor, the International Air Traffic Association was established as early as 1919 by six European nations (including U.K.) but it was not concerned with price-fixing. See: C. Sackery, Jr. *Overcapacity in the U.S. Internationl Air Transport Industry*, (1966), 32 J. Air L. & Com. at p. 36.

[105] 'Double veto' is thus not confined to the U.N. Security Council.

The rate-making function of the IATA is carried out through its three Traffic Conferences,[106] each with its own geographical area, which hold periodic joint and composite meetings.[107] The draft Resolutions of the Conference are put before the member airlines, each of whom has one vote, and efforts are made by means of compromises, if necessary, to reach a unanimous vote. These resolutions are then submitted to the governments represented by the airlines, who in the normal case endorse the same, having already briefed their airline on the line of action to be taken. If unanimity is not achieved either at the conference or at the governmental level, the IATA will ordinarily call supplementary conferences in order to work out a compromise; but if compromise is not possible in the rare case, an "open-rate" situation would prevail [108] although it has never degenerated into rate-wars — "apparently there is a tacit agreement among the members of IATA simply to maintain the rates agreed to in the previous Traffic Conference." [109]

The IATA Rate Agreements are policed by an Enforcement Section under the direction of the Director General, and penalties for infraction range from a mild warning to a fine up to $25,000 per offence, and in extreme cases, suspension from the Organization. In most cases, infractions involve a failure to comply with agreements concerning the type of service to be provided on flights, rather than failure to charge the correct rate.[110]

It has been argued that the IATA operates in the same way as a cartel where the rates most likely to be agreed upon are "sufficiently high to protect the least efficient operators," [111] or,

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[106] Conference No. 1 covers the Western Hemisphere, Conference No. 2 covers Europe, Africa and the Middle East (including Iran), and Conference No. 3 covers Asia, Australia, New Zealand and Islands of the Pacific. An airline may belong to more than one Conference, depending upon its route and interest.

[107] The Conferences usually meet every two years in the same place and at the same time. In recent years these meetings have been held in October to set fares and rates for the following year beginning April 1.

[108] Wheatcroft, *op. cit.*, n. 87, at pp. 77-78, where the open rate system of 1963 upon the CAB refusing to approve of a tariff resolution made by IATA at the Chandler Conference, prevailed for a short period and was quickly settled; see also Lissitzyn, *Bilateral Agreements on Air Transport*, (1964), 30 J. Air L. & Com. 249, at pp. 262-263.

[109] Sackery, *op. cit.*, n. 104, at p. 39 *et seq.*

[110] *Ibid.*, at p. 40.

[111] 75 Harv. L. Rev. 575, at p. 579 — "limitations on entry into the industry will also ensure that new competitors will not emerge in response to high rates".

in other words, governments are not really concerned with the welfare of its travelling or shipping public, but with the financial well-being of its airlines. This is evidenced by the high rate of earnings of the airlines.[112] Wheatcroft[113] argues that the airlines as a combine do not act as monopolists for three reasons: first, although rates are controlled, the amount of capacity operated by each of its members is not;[114] second, the need for unanimity in all rate agreements prevents the highest possible rate coming into force — "there can be very little doubt that if IATA agreements during the past decade had been reached by a majority vote, international fare levels would, in general, have been higher than they have in fact been";[115] thirdly, the influence of governments on the deliberations of the Traffic Conferences and the continuous oversight of rate agreements discourage the unreasonable use of the veto power.[116] These three features, according to Wheatcroft, combine, when the system works at its best, to produce a good balance of countervailing powers. He concedes, however, that lower fares or rates could have resulted in the absence of the IATA machinery and this is substantiated by the successful operation of non-IATA members i.e., the independently scheduled airlines and charters) at well below the IATA fixed rates. Nevertheless, he concludes that the Traffic Conferences seem reasonably well to protect the public interest in international air transport. It would seem that in the international operation of air transport which necessarily involves the interests of at least two nations, given the present attitudes and disposition of States towards unrestricted competition, there is not likely to be any immediately acceptable medium to replace the present arrangements governing rates or the other important economic variables such as routes and capacity, "without the exercise of high level diplomatic pressures to 'persuade' other nations to go along."[117] In this diversity of national interests,

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[112] Wheatcroft, *op. cit.*, n. 87, at p. 80.

[113] *Ibid.*, at pp. 81-84.

[114] It should be noted here of course that bilateral agreements besides specifying that the rates to be charged are those fixed by IATA also provide for sharing capacity on a predetermined or *ex post facto* basis.

[115] Wheatcroft, *op. cit.*, n. 87, at p. 82. It should be pointed out however that unless the rate level yields some profit to the least efficient operator, it is likely to be vetoed by the government concerned; for no government is willing to sacrifice its interests for the profit of others. See: *Shipping and World Economy, op. cit.*, n. 37, at p. 11.

[116] See: 75 Harv. L. Rev. 575, at p. 582, on the influence the CAB has on IATA ratemaking.

[117] Keyes, *The Making of International Air Fare and the Prospects of Their Control*, (1964), 30 J. Air L. & Com. 173, at p. 174.

the establishment of tariff levels becomes a matter of delicate balance between the natural desire to lower fares and rates, expand markets, increase turnovers and thus produce greater economic growth on the one hand and the need to protect the economic viability and financial soundness of the national airlines on the other; this balance of interest between the airlines and their governments, and between one government airline group and another, means in reality that decisions can only be formed by a consensus. Apart from certain obviously discriminatory practices which national legislation can curb (and which in any case are not in consonance with the true spirit and intent of IATA) unilateral regulation by States [118] is not likely to succeed in an interlocking system of bilateral treaties in which the interests of several treaty countries are so intricately bound up that any tinkering with the rates on particular routes, serving particular parts of the world, may have an immediate impact on rates on the same or other routes; the same difficulties become apparent even where bilateral treaties provide for procedures to determine rates should the IATA rate not be acceptable.[119]

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[118] 75 Harv. L. Rev. 575, at pp. 583-587, where the author discusses the limited areas of success which CAB in the U.S. has had, such as the conditions it has attached on foreign air carrier permits, especially those not expressly authorized by Statute, *e.g.* waiver of sovereign immunity, filing of economic date, etc. Also at p. 580 the author states: "The CAB has also successfully thwarted IATA's attempts to compel compliance with its rate structure by non-IATA members, whose operations are apparently viewed by the CAB as a counter-balance to IATA's monopolistic tendencies.

Cf. U.S. regulation of ocean shipping conferences under the Shipping Acts, *supra,* pp. 79-80.

[119] For an illustration of this difficulty see: 75 Harv. L. Rev. 575, at p. 588, reproduced below:

Consider the route from New York to London: the agreement between the United States and Great Britain contemplates that any dispute over this rate will be settled by these two nations alone. But airlines of other countries, Alitalia, Lufthansa, and Air India to name but a few, fly between New York and London as part of their routes between their home country and the United States. Not only has such a country no right to participate in the rate determination under the agreement between the United States and Great Britain, but neither is there any provision for adjusting the New York-London rate in the country's bilateral agreements with the United States or with Great Britain. Yet these countries will find their carriers forced to comply with the rate agreed upon by the United States and Great Britain. In addition, the rate between New York and London will affect rates on competitive routes to other points, such as those from New York to Paris or to Rome. Tourists, with a choice of gateways through which to enter Europe and of countries to visit, are bound to consider a comparative difference in rates. The impact of a single route can be appreciated by considering that over a dozen nations have carriers flying on the North Atlantic route. Since binational arbitration

Many alternatives have been suggested by various writers ranging from the liberalization of the IATA machinery itself to completely doing away with that organization and letting the rates to be determined by economic factors alone. Some of the suggestions, such as a complete and objective review of the tariff structure by an outside and non-partisan body [120] are designed to enhance the competitive position of IATA member airlines with other operators such as charters which are an increasingly significant force in the travel market.[121] Other suggestions aim at solving the recurrent problem of overcapacity in the airline industry [122] but their authors are diffident about changing the basic attitudes and sentiments of nations who cling on to the highly restrictive economic framework.[123] So long as these ideological or economic differences or fears remain, it is unlikely that the present system would be displaced in favour of either a multilateral arrangement under which an inter-governmental agency would have economic regulatory powers or a complete *laissez-faire* situation where the strong and powerful airlines would drive away the weak and inefficient ones.[124]

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of rates does not contemplate participation by the numerous other nations with valid interests, the political repercussions of setting a rate in this fashion render it unlikely that the CAB would often attempt to effectuate its policies through the procedures of the Bermuda Agreements.

[120] Cohen, *Confessions of a Former IATA Man*, (1968), 34 J. Air L. & Com. 610, at p. 617. He also suggests an internal reform of the IATA by allowing members sufficient scope for innovation in rates or service, and by the de-emphasizing rigid uniformity and extreme legalism, etc. (pp. 614-617).

[121] Many inter-State airlines are participating in various cooperative arrangements with a view to rationalizing their operations, such as the Commonwealth partnership, SAS and Air Union and other forms of pooling. For detailed discussion of these arrangements see: Cheng, *op. cit.*, n. 90, at pp. 252 *et seq.*

Any limited scale operation covering few airlines on the same routes undoubtedly accentuates competition among the IATA members themselves, and perhaps a capacity control and utilization program should be entrusted to the IATA itself. Billyou, *Air Law*, (1963), at p. 472, suggests that the U.S. should relax its antitrust policy, which effectively restrains domestic carriers from rationalizing their services, in international operations to meet the threat of competition from the European and Commonwealth pools. Such pooling arrangements are of course entirely outside IATA's competence as IATA is not concerned with questions of routes or capacity, but the ICAO has expressly sanctioned them in its constitution.

[122] Sackery, *op. cit.*, n. 104, at p. 88.

[123] *Ibid.*, at pp. 89-90 and pp. 92-93.

[124] Wheatcroft, *op. cit.*, n. 87, at p. 85, suggests that "a general agreement between governments on the circumstances in which they might permit fares and rates to find their own level in an open rate situation might prove to

c. *Determination of Particular Freight Rates*

Once the specified fares and basic rate levels are agreed upon at the Traffic Conferences, it is really a technical matter to translate these decisions into specific rates on some 150,000 pairs of points in the vast international network. The Organization has to ensure that these rates would not, either by themselves or in combination with others, be inconsistent with conference decisions.

In the sphere of freight rates,[125] the IATA has laid down two basic types, the flat rate and the differential rate. The flat rate represents a fixed standard rate per mile or kilometer for a given quantity of goods, regardless of distance or the nature of the commodity; [126] the differential rate represents a varying price per mile or kilometer, depending on distance, the commodity shipped and the airport of origin and destination. The latter rate is flexible and takes into account not only the demand and supply factors but also the potentiality of traffic volume and fluctuations in local currencies.

The basic standard rates are charged for general merchandise for which no special rates, such as specific commodity rates or class rates, are in effect. Specific commodity rates are lower than the standard rates and are designed to develop new traffic on a restricted type of merchandise which are carefully selected on specific sectors; they are introduced after a detailed evaluation of the interests of shippers and consignees and except in rare cases they cannot be combined with standard rates to extend their effectiveness to points beyond those specified.

The machinery for establishing specific commodity rates within the IATA structure follows a pattern different from the normal method of fixing rates and fares, and it was devised in order that airlines may compete favourably with the predominant mode of international affreightment, namely ocean shipping. For the purpose of dealing with applications for the approval of these rates, the

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be a great importance for future success in the international regulation of tariffs". A multilateral agreement on commercial rights was tried once more at Geneva in 1947 at a conference organized by the I.C.A.O. but failed and there is no more reason for hopes of achieving one today as there was in 1947. See also: Koffler, *IATA — Its Legal Structure — A Critical View*, (1966), 32 J. Air L. & Com. 222, at p. 234, where he deals with the impracticability of direct inter-governmental negotiations on air fares.

[125] Groenwege and Heitmeyer, *Air Freight — Key to Greater Profits*, (1964).

[126] A minimum charge is levied on very small parcels.

IATA at its 1947 Conference established Specific Commodity Rate Machinery within the Traffic Conferences to meet fairly frequently to permit the speedy introduction of special rates to attract new kinds of air cargo. Two basic procedures were instituted: (1) The shipper makes a written application on a special form, giving complete particulars of the commodity, including weight, value, anticipated traffic volume and proposed rate, and the national airline concerned must sponsor it and place it before the Board for approval at its next meeting. If the members of the Board are unanimous, they are authorized to approve of the proposed rate after ensuring that it is compatible with the rate structure. (2) The more expeditious way is to get the sponsoring airline to submit proposals containing the same information as (1) by cable or air mail direct to the airlines operating services between the countries concerned and to the Board Secretary; the other airlines then have seven days to raise any objection to the initiating carrier and to the Board Secretary and thereby prevent the rate from becoming effective; if the objections are not received, the rate may be provisionally used on the eigth day following the date of the proposal, pending final confirmation by the Board.[127]

Class freight rates are applied to a specifically designated class of goods for a specified area or route and are in terms of a percentage increase over or reduction off the general cargo rate — the commodities involved being newspapers and periodicals, livestock, gold and securities and similar items which call for a different approach to rating.

d. *Charter Rates*

The International Air Transport Association has also evolved certain rules relating to air chartering,[128] the primary rules being

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[127] Groenwege and Heitmeyer, *op. cit.*, n. 125, at pp. 103-104.

[128] Sundberg, Air Charter: *A Study in Legal Development*, (1961), at p. 647 mentions two basic types of charter agreement, which are similar to ocean shipping charters. In the *"voyage"* charter, a charterer hires a fully equipped aircraft, together with the services of captain and crew. In a "bare hull" charter, the aircraft is leased or demised to the charterer and the services of the captain and crew may or may not be superadded. There are of course several hybrid categories of charter arrangement, such as *"time"* charters so called because the charter price is computed on a time basis, according to the number of flying hours utilized with a guaranteed minimum, etc. (These have very little in common with their maritime counterpart); *"period"* charters where the chartered hires the aircraft and its crew for a number of well

those laid down in its "Resolution 045 Charter".[129] This resolution lays down two important principles — (a) charters should be planeload contracts, and (b) resale of space by the charterer, whether by a sub-charter or by sale of individual tickets at less than IATA fares and rates, is prohibited.

While the principal competition to IATA airlines in the travel business comes from charter operations of non-IATA members especially in the lucrative trans-Atlantic tourist market, both have to struggle hard to gain an edge over ocean shipping in the freight market. This is primarily due to the limitation of capacity of aircrafts whose maximum payload at present is 85/90,000 lbs. (or 45 metric tons) [130] compared to the carrying capacity of 60/80,000 tons of super carriers (and 2/300,000 tons capacity of super tankers) and comparatively very high capital cost. Costs of transportation being what they are, air freight is primarily attractive in cases where the time element is very important, or where the unit value of the product is high. Airlines are no doubt trying their best to attract the value of their service. They are aware of the tremendous savings in total transport cost that can be achieved by reducing inventories, capital costs, and interest charges during transit, insurance, packing and warehousing costs, losses due to damage or pilferage, door-to-door service and even business risks which are eliminated by the insignificant time lag between production and marketing. But, at the present stage of technical development, it is unlikely that air freight can significantly affect ocean liner operations in most commodity categories.[131]

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defined voyages, these voyages being performed at definite intervals, and "wet lease" charter, where one air carrier hires an aircraft from another carrier under a "period" or "time" charter.

[129] This resolution was agreed to in Bermuda in November, 1948, and has since been revised. *Ibid.*, at p. 102.

[130] The projected C-5A aircraft will have a payload of only 250,000 lbs. (or 125 Metric tons).

[131] Groenwege and Heitmeyer, *op. cit.*, n. 125, at pp. 82-91 (Tables 1-10) have shown by an analysis of the comparative costs by air and surface transport on a number of high value commodities that air freight in many cases is cheaper if the total transportation cost is considered. This analysis is valid for high value articles not moving in bulk or substantial quantities. There is keen competition on the traffic for these articles, and in order to retain their customers, ocean liners have very often to set rates at an attractively low level. This phenomenon is identical to rail-motor competition in internal carriage. See: Prabhu, *op. cit.*, n. 53.

IV Freight Movement Between Canada and United States

It was indicated in the introduction that Canada's international trade predominantly takes place with the United States.[132] In the carriage of this trade, all modes of transport participate. As a general rule, in order to engage in this movement a carrier must obtain operating authority from the regulatory bodies of both countries for a through operation. A Certificate granted by one country to move goods to the International Border cannot be combined with a similar certificate granted by the other country to move goods from the transfer point to destinations within that country.[133] Although the regulatory bodies of one country can issue operating authority to engage in its foreign trade and commerce, there must be a reciprocal grant by the appropriate authorities of the other country. Similarly, in the regulation of rates on this international carriage, the power is joint so that each body controls the rate over such portion of the through rate (if one is established by the carrier, or by carriers where more than one is involved) as lies within their respective jurisdictions.

It is apparent from this division of authority that many complications and possible injustice[134] in the rate structure (as well

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[132] *Supra*, p. 61.

[133] I.C.C. in *Re Grand Trunk Railway Co.* 2 I.C. Rep., at p. 501 and its recent decision in *Red Star Express Lines of Auburn Inc. et al.* v. *Maislin Brothers Transport Ltd.*, No. MC c-5882, (May 27, 1969); F. Carr. Cas. (1968-70) No. 36,320.

See also: *Railway Act*, R.S.C. 1952, c. 234, s. 345, which prohibits agreements or devices preventing a carriage from being a continuous one, almost identical provision exists in the Interstate Commerce Act of the U.S., s. 17. It would thus appear that a Canadian shipper cannot so arrange his shipments as to get a U.S. carrier licensed to operate within the United States to receive them at the International border and thus take advantage of lower rates, if any, under U.S. railway tariff.

[134] McGibbon, *Railway Rates & the Canadian Railway Commission*, (1917), at pp. 230-231. McGibbon states that in practice the Board of Railway Commissioners has been able to influence these rates to some extent for if its power ceases at the boundary it at least could indirectly touch foreign conditions by its control over the Canadian part of the joint rate. It is thus able to remedy to that degree any injustice in the charge. However, on the whole the Board's power is slight and a larger degree of control of some sort is desirable from the standpoint of both the American and Canadian shipper... At p. 232 he suggests the establishment of a special tribunal to deal with these cases.

See also the dissenting judgment of Anglin, J. in *Grand Trunk Railway Co.* v. *B.A. Oil Co.*, 43 S.C.R. 311, at p. 329.

as other operating characteristics) would arise in the absence of either a joint commission or cooperation between the two regulatory jurisdictions whether by means of an express agreement or by tacit approval of the action taken; the reciprocal interests of the two countries demand such understanding, so that the delicate balance hitherto existing between shippers, industries and even carriers of the two countries is not unduly disturbed.[135] Surprisingly, however, the existing practice works admirably well,[136] despite a few complaints that international rates are in some cases prohibitive and jeopardize the export trade of Canada. The Royal Commission on Transportation under the chairmanship of W. A. Turgeon in 1951 concluded that the creation of a Joint International Board which had been considered in the past by American and Canadian authorities and been discarded by them, does not appear to be either practicable or desirable.[137]

a. *Regulation of International Railway Rates*

Because of the indentations in the Canada-U.S. border, there are basically two types of movement, one being truly international and the other a corridor type of operation — in the latter case, traffic moves between two points in the same country through the other. In the case of the truly international type of traffic, as indicated previously, the legal jurisdiction over rates is divided, the regulatory authority of each country controls rates on its own sector and neither country has complete control over the entire rate. Sections 343 and 346(1) [138] of the Railway Act require a joint rate to be filed and published in printed tariffs by carriers, whether Canadian or foreign (i.e., U.S.) with the Canadian Transport Com-

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[135] It has been the practice of the Canadian authorities for a long time to grant automatic increases or reductions in rates in the Canadian portion of the international rates whenever the Interstate Commerce Commission decided to do on the U.S. portion of the rates, even though the Canadian railways did not deserve an increase or reduction. *The Royal Commission on Transportation,* (1951), at p. 103, suggest that if this practice were not followed the American shippers would be discriminated against within their own country by the lower international rates for shipments to or from Canada, the relationship between the various trade gateways would be distributed and the flow of trade across the border thrown into a state of confusion.

[136] *e.g.* in the *International Newsprint Rates* case (42 C.R.C. 15), the carriers willingly submitted to the jurisdiction of the Board of Railway Commissioners.

[137] *Turgeon Report, op. cit.,* n. 135, at p. 103.

[138] R.S.C. 1952, c. 234.

mission.[139] In the case of corridor operations, where the movement is between two points in Canada, the freight tariff must be filed with the Canadian Transport Commission and as the Interstate Commerce Commission is not really concerned with it, it does not require such filing; but where the movement is between two points in the U.S., the freight tariff must be filed with both regulatory agencies.[140]

b. *Trucking, Pipeline and Inland Water Rates*

The Canadian government has stayed away from regulating rates in both interprovincial and international trucking, the main instrumentalities here being the provinces some of which control most of the economic aspects of that carriage.[141] Here again the basis of jurisdiction so far as the Canadian sector of trucking is concerned is clarified by the *Motor Vehicle Transport Act* [142] and Part III of the *National Transportation Act* [143] and the American Sector by Part II of the Interstate Commerce Act. The same problems as discussed above under international rail transport are also encountered here, but the Canadian legislation unlike the *Railway Act* [144] does not specifically empower the regulating bodies to require through routes or

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[139] The Interstate Commerce Commission has also the same requirement. In neither country are the railways compelled by law to agree to joint international rates; the agreement is voluntary but when made, the tariffs pubishing such rates must be filed. Only then the joint rates become subject to the Railway Act of Canada and the Interstate Commerce Act of the United States. See Davis, J. in *Grand Trunk Rly. Co.* v. *B.A. Oil Co.*, 43 S.C.R. 311, at pp. 317-318. Normally where the amount of international traffic is sufficient to justify the institution of joint international rates, *e.g.* between points in Eastern Canada and points in the eastern U.S., an agreement is arrived at by the participating carriers.

[140] *Railway Act*, R.S.C. 1952, c. 234, ss. 343 and 344. Although technically Canada has jurisdiction over this rate on that portion of carrier's operation within its territory, since it does not affect Canadian shippers, the Canadian authorities accept the I.C.C. rate determination.

[141] Saskatchewan, Quebec and Alberta. Though Alberta does not regulate trucking within its own provincial boundaries, she controls intraprovincial and even international trucking. See: Prabhu, *op. cit.*, n. 53.

[142] S.C. 1953-54, c. 59, which confers powers on provincial Boards to regulate extraprovincial trucking.

[143] S.C. 1966-67, c. 69, s. 33 requires filing of the tariffs and protects 'captive' shippers. See: Prabhu, *op. cit.*, n. 53 on the scope of s. 33 and the *Motor Vehicle Transport Act.*

[144] R.S.C. 1952, c. 234, s. 318.

joint rates to be established by truckers among themselves or with another mode, such as the railways or water carriers. The Interstate Commerce Act, on the other hand, provides for this but unlike its power to compel railroads, its power here is merely permissive.[145]

The same observations are valid as regards pipeline transmission of commodities where the jurisdiction in Canada is divided between the Canadian Transport Commission and the National Energy Board, both of whom have power to regulate all aspects of the pipeline carriage.[146] Perhaps the only case dealing with international joint rates before the Board of Transport Commissioners was *International Refineries Inc.* v. *Interprovincial Pipeline Co.*[147] under the old *Pipeline Act*.[148] Shepard (Chief Commissioner) in his judgment in that case stated that:

> The Board is not unmindful of the possible overlapping of jurisdiction between Canadian and U.S. authorities in any case involving construction of joint international rates.
>
> The Board's jurisdiction in the matter of international joint rates on movements of oil by pipeline is limited, firstly, to such rates as are participated in by oil pipelines coming under our jurisdiction; secondly, to consideration and determination whether such rates are just, reasonable, not unjustly discriminatory or contrary to any provision of the Pipelines Act, or to any order or regulation of the Board; and thirdly, if such rates are found to be contrary to such provision, regulation or order, to disallow the rates or to require the carriers under our jurisdiction to cease and desist from participation therein.[149]

In the case of inland water transportation, i.e., shipping on the Great Lakes, under treaty provisions vessels of the United States and of Great Britain and Canada enjoy "equal, free, and open use of all navigable boundary waters for purposes of navigation."[150] The St. Lawrence Seaway is a joint Canada-U.S. project and their respective national Seaway Corporations regulate shipping on this waterway.[151] United States ships may carry goods from a Canadian

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[145] S. 216(e) of the *Interstate Commerce Act*. See: Hudson and Constantine, *Motor Transportation*, (1958), at pp. 572-573.

[146] *National Transportation Act*, S.C. 1966-67, c. 69 (Part II), and the *National Energy Board Act*, S.C. 1959, c. 46.

[147] 75 CRTC 68.

[148] Replaced by the *National Energy Board Act*, S.C. 1959, c. 46.

[149] 75 C.R.T.C. 68, at pp. 73-74.

[150] See: Corps of Engineers, U.S. Army, *Transportation on the Great Lakes*, (1937), at p. 13; see also, the *International Boundary Water Treaty Act*, S.C. 1911, c. 28 and Prabhu, *op. cit.*, n. 53.

[151] *St. Lawrence Seaway Authority Act*, R.S.C. 1952, c. 242.

to a U.S. port and even between two Canadian ports provided they call en route at U.S. port and the United States has identical restrictions on Canadian ships. There is no rate regulation on this international movement, as the *Transport Act*[152] only governs package freight traffic by ships plying between Canadian ports licensed to operate by Canada.

V Conclusion

The history of regulation of world transport has so for shown an inflexible trend towards maintaining and strengthening established institutions without any noticeable sign of modification. This has been largely due to the curious blend of national interests and private operators' interests and it would appear at first sight that the interests of users of the transport service have not received recognition to any significant extent. With the rapid technological progress in both ocean and air transport, especially in the latter, transportation economics and law in the future are likely to undergo considerable change. Though it is difficult to foretell the nature and direction of such change it may well be that intermodal competition will occur on a much larger scale and necessitate a much more closely knit economic organization where efficiency and lower freight rates would be the dominant criteria of operation. Planning of superports and jumbo air terminals to accommodate giant carriers must not only keep pace with this rapid development but also blend and co-ordinate with the planning of the internal transportation system as a whole.

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[152] R.S.C. 1952, c. 271.