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Perspectives and Developments in the International Regulation of Various Commercial Operations†

I.

In light of the attention now being focused on behavioral standards and codes of conduct for multinational enterprises,[1] it is easy to lose sight of the fact that there is nothing new about international regulation of transnational business. The international community long ago responded to commonly felt needs for safety with adoption of rules of the road for mariners[2] and with a number of more recent conventions. The Chicago Convention required certificates of airworthiness for aircraft in international commerce,[3] and the Safety of Life at Sea Convention set minimum requirements for compartmentalization and for maintenance of radio and lifesaving equipment on ocean-going ships.[4] The International Telecommunications Union[5] and the International Whaling Commission[6] derived from a commonly perceived need for orderly use of limited resources.

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[7] the International Convention of Civil

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[1]*E.g.*, O.E.C.D. Declaration on International Investment and Multinational Enterprise, O.E.C.D. Press Release A(76)20, June 21, 1976, reprinted in XV INT'L LEGAL MATERIALS 961 (1976).

[2]*See* Regulations for Preventing Collisions at Sea [1948], T.I.A.S. 2899, 191 U.N.T.S. 3.

[3]Chicago Convention on International Civil Aviation, Arts. 33, 39-41 [1944], T.I.A.S. 1591, 12 U.N.T.S. 295.

[4]London Convention on Safety of Life at Sea [1960], T.I.A.S. 5780, 5813, 536 U.N.T.S. 27; *see also* 1929 convention, U.S.T.S. 921, 136 L.N.T.S. 81 and 1914 convention, 108 BR. & FOR. ST. PAPERS 283 ff. (1914, part 2).

[5]International Telecommunications Convention [1965], T.I.A.S. 6267, 18 U.S.T. 575; *see also* Radiotelegraph Conference [1927], U.S.T.S. 767 (first adopting Table of Frequency Allocations).

[6]International Convention for the Regulation of Whaling [1946], T.I.A.S. 1849, 161 U.N.T.S. 72.

[7]T.I.A.S. 8068.

Liabilities for Oil Pollution Damage,[8] and the Ocean Dumping Convention[9] derived from internationally accepted standards of environmental protection. The Warsaw Convention[10] has long governed documentation and liability of carriers in connection with international aviation.

Domestically, we would refer to these types of regulation as "police power" functions—and the proposed codes of conduct for multinational enterprises are just another exercise of the same type of power; just one more subject of jurisdiction for the emerging international bureacracy.

Indeed, even the idea of a code of conduct is anything but new. The draft charter for an International Trade Organization signed at Havana in 1948 included provisions for host countries—

> to take any appropriate safeguards necessary to insure that foreign investment is not used as a basis for interference in its internal affairs or national policy; to determine whether and to what extent and upon what terms it will allow future foreign investments; to proscribe and to give effect on just terms to requirements as to ownership to existing and future investments; (and) to proscribe and give effect on just terms to other reasonable requirements with respect to existing and future investments.[11]

Not only American business but the International Chamber of Commerce opposed these provisions, because they failed to refer to investment security and equal treatment for foreign investment.[12] In 1952, the United States Council of the International Chamber of Commerce proposed a text of foreign investment standards which included such precepts as scrupulous conformance with the letter and spirit of local law, respect for local mores, avoidance of speculation in local currency, development of local employment opportunities, fair labor standards, and the avoidance of restrictive practices,[13] but this, and a subsequent attempt in 1959, failed, probably out of fear host governments might convert the voluntary provisions into local legislation.

Indeed, when the United States proposed study and development of a code by the OECD in 1972, what was contemplated was a code to insure "national treatment" for multinational enterprises; no one thought United States law was inadequate or that MNEs were a world problem. However, foreign reaction to published reports of bribery and corporation interference gave rise to a fear of what the United Nations might come up with; it was better to attempt a volun-

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[8]Sen. Exec. G, 91st Cong., 2d Sess. 1970.

[9]Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter [1972], T.I.A.S. 8165.

[10]Warsaw Convention for the Unification of Certain Rules relating to International Transportation by Air [1929], U.S.T.S. 876, 137 L.N.T.S. 11.

[11]Havana Charter for an International Trade Organization [1948] (Dep't of State Commercial Policy Series 114).

[12]INT'L CHAMBER OF COM., GOVERNMENT GUARANTEES TO INVESTORS, No. 145, p. 12.

[13]INT'L CHAMBER OF COM., 1959-61 STATEMENTS & RESOLUTIONS 19-21 (18th Cong., No. 217).

tary code with balance. Accordingly, the United States has generally supported the code.

It is too early to identify what practical impact it will have on Department of State action. But it will certainly enter into any dialogue between State and host governments; and if an aggrieved American company has clearly been in violation of the code, it will almost certainly affect the vigor with which negotiations with the host government are pursued—poor corporate conduct already affects the support which a company abroad can expect from State Department officials. By the same token, it can be argued that if American business is to comply with new, more rigorous standards, the United States government owes its companies wholehearted support when they are confronted with confiscatory or discriminatory conduct.

But the OECD Code of Conduct is only one of many important developments confronting the United States with respect to international regulation of multinational business.

II.

In the field of international transportation, rates are frequently determined by air conferences and shipping conferences. Fixed rates are exempt from United States antitrust laws if they are filed with and approved by the appropriate agency, in the case of air rates, by the Civil Aeronautics Board,[14] and in the case of shipping, by the Federal Maritime Commission.[15] The rates submitted for trans-Atlantic carriage in 1972 were disapproved as uneconomic, and trans-Atlantic rates remain open.

Ocean conferences have existed for almost 100 years, and there are currently some 360 of them around the world. About 125 affect shipping to and from the United States. As in other fields of transportation, it is felt regular service and reliable rates require protection from rate wars.

Unlike aviation, however, where participation has always been to some degree limited by bilateral air agreements, participation in liner trade has been historically open to ships of all flags. Less developed countries have come to view this system as preserving a status quo which does not afford them an adequate opportunity to participate. They have come to view shipping to and from their countries as a national resource in which they have a right to participate without the requirement of competition.

Accordingly, in 1974, under the auspices of UNCTAD, a Code of Conduct for Liner Conferences was adopted in Geneva which would establish the right of

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[14] *See* Federal Aviation Act of 1958, § 414, 49 U.S.C. § 1384 (1970).
[15] Shipping Act of 1916, § 14, 45 U.S.C. § 814 (1970).

trading partners to divide 80 percent of their foreign ocean-borne commerce, leaving only 20 percent for third flag carriage.[16]

Primarily because of these cargo allocation provisions, the United States has opposed the convention. Its policy is not altogether consistent, however, and the policy may be subject to change. For instance, United States cabotage laws reserve coastal trade exclusively for American ships,[17] and military cargo and government-owned and foreign aid cargo must similarly use American ships if possible.[18] While these laws may spring from congressional policy rather than executive policy, the executive has acceeded to cargo preferences in agreements with Latin-American countries such as Argentina,[19] and cargo sharing was a major objective in negotiating the U.S./U.S.S.R. Maritime Agreement[20] because Soviet trading institutions, whether importing or exporting, would otherwise be free to insist on Soviet shipping for reasons of policy and regardless of comparative costs.

Somewhat surprisingly, the American Institute of Merchant Shipping also opposes the Code. One must say surprisingly, because usually one hears of the disadvantages confronted by American shipping in competing for a fair share of international trade, of its high labor costs, and the need for subsidized shipbuilding. While the participation of United States shipping in liner trade is substantially greater than its participation in tramp shipping, the 40 percent participation contemplated by the Code exceeds by a significant amount the share currently enjoyed by American lines. There are other interests which bear, of course, such as those of American exporters, whose competitive position in foreign markets depends on minimum rates fostered by maximum competition. Accordingly, executive policy was recently reconfirmed by the President's Interagency Committee on Export Expansion in its study of the potential impact of non-market cargo allocation in United States liner trades.[21]

Among other reasons for the government's opposition are the loud protestations of our NATO allies in Scandinavia and certain divergences from the United States Shipping Act. Article 12A of the Code provides that rates "shall be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for ship-owners." These criteria are

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[16]Convention on a Code of Conduct for Liner Conferences, U.N. Doc. TD/CODE/11/Rev. 1 (1974), reprinted in XIII INT'L LEGAL MATERIALS 912-51 (1974).

[17]*See* Merchant Marine Act of 1920, § 27, 46 U.S.C. § *883* (1970).

[18]*See* 46 U.S.C. § 1241 (1970); 10 U.S.C. § 2631 (1970).

[19]*See* Agreement between Empressa Lineas Maritimas Argentinas S.A. and Moore-McCormack Lines, Inc., approved May 3, 1973, F.M.C. doc. no. 10038; *see also* Agreement No. 9932 and Agreement No. 9939, 16 F.M.C. 293 (1973).

[20]Agreement on Certain Maritime Matters, December 29, 1975, United States-U.S.S.R., Annex III, pp. 9-11, T.I.A.S. 8195.

[21]*See* INT'L ECON. REPORT OF THE PRESIDENT 107 (1976).

potentially quite different from those of Section 18(b) of the United States Shipping Act,[22] which authorizes the Federal Maritime Commission to disapprove "a rate or charge . . . so unreasonably high or low as to be detrimental to the commerce of the United States." More importantly, however, are the disparities with respect to membership in conferences, which must be open under United States law.

Under the Code, matters which affect trade between two countries require the consent of the shipping lines of those two countries. The United States Shipping Act, however, bars any agreement which does not provide for "equal terms and conditions for admission and readmission to conference membership," a requirement which appears to mandate the "one-carrier one-vote" principle.[23]

Eleven countries have ratified the convention, which will go into effect when twenty-four countries owning twenty-five percent of world tonnage have ratified. In that event, the United States could not avoid participation. Some officials have expressed a desire to compromise at reserving two-thirds of bilateral trade to national shipping as opposed to the eighty percent contemplated by the Code. It may be too late for that, however, although the Code is subject to renegotiation in five years. Although over twenty-four nations have signed the convention, since the percentage of world tonnage represented is nowhere near the required twenty-five percent, ultimate adoption remains open to question.[24]

Another current development relating to international transportation has the full support of the United States government. This relates to the Warsaw Convention, which was adopted in 1929 and ratified by the United States in 1934. Its rules govern air carriers' liability for injury to passengers and loss or damage to cargo, as well as ticketing procedures and cargo documentation.[25] In many ways, however, it has become outmoded: its ticketing procedures impede the use of computers; its liability provisions, which established only a presumption of liability, permitted the carrier to defend with a proof of due care and limited liability for death or injury to $10,000. The United States has long pressed for increased liability, and in 1969 even threatened to repudiate the convention. In Montreal, in 1975, protocols[26] were adopted which tied the limit to SDRs now equivalent to $117,000. In addition, the protocols imposed absolute liability on the carrier; no longer could terrorism or weather be a

[22]46 U.S.C. § 817(b)(5) (1970).

[23]47 U.S.C. § 814 (1970).

[24]*See generally* Capone, *U.S. Laws and the Convention on a Code of Conduct on Liner Conferences*, 15 VA. J. INT'L L. 249 (1975); DEP'T OF TRANSP., POTENTIAL ECONOMIC IMPACT OF NON-MARKET CARGO ALLOCATION IN U.S. FOREIGN TRADE (1976).

[25]*See* note 10, *supra*.

[26]Montreal Protocal No. 3, ICAO Doc. 9147(1975); *see* FitzGerald, *The Four Montreal Protocols*, 42 J. AIR. L. & COMM. 273 (1976).

defense. Industry acceded in exchange for provisions that the liability limitation be made applicable to officers and employees of the carrier as well as the carrier itself. In a recent case, the president of Trans-World Airlines has been included as defendant in a suit seeking damages in excess of the Warsaw Convention limits.[27]

III.

In addition to the issues relating to international regulation of international transportation, the United States is facing a number of important issues with respect to the production of raw materials. The degree to which nations are interdependent for supplies of essential raw materials and, reciprocally, markets, has long been recognized. Rules of fair access were considered as early as the Versailles Peace Conference,[28] by the League of Nations in 1921,[29] and a World Economic Conference in 1927.[30] Also in 1927, a Convention for the Abolition of Import and Export Prohibitions and Restrictions produced a study stressing the need for International Principles to regulate access to raw materials.[31]

The paramount interest of consuming countries is, of course, access, and the most recent expression of this concern is the International Resource Bank proposed by Henry Kissinger at Nairobi.[32] The underdeveloped producing countries, on the other hand, are primarily concerned with stability of markets. In the past, this concern has found expression in various commodity agreements relating to cocoa, coffee, sugar, textiles, tin and wheat.[33]

The International Tin Agreement included buffer stocks, with price limits,[34] and the Multi-Fiber Agreement of 1973 provides for bilateral marketing arrangements and restrictions, and entitles an importing country unilaterally to restrain imports in the face of market disruption.[35] But the United States did not sign the 1972 International Cocoa Agreement; it gave as reasons technical problems with establishing quotas on exports rather than sales (which disrupts commodity markets since the export occurs long after the sale) and the

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[27] Reed v. Wiser, 414 F.Supp. 863 (S.D.N.Y. 1976), *appeal pending*.

[28] M. Hill, Economic & Financial Oragnization of the League of Nations 48 (1946).

[29] C. Wilcox, A Charter for World Trade 5 (1949).

[30] *Id.* at 236.

[31] League of Nations, Report of Comm. for the Study of the Problem of Raw Materials 29 (1937).

[32] 54 Dep't State Bull. 657, 661 (1976).

[33] A. Law, Int'l Commodity Agreements (1975); Whiteman, 14 Digest of Int'l Law 617 ff. (1970).

[34] *See generally* Law, *supra* 57-58; Whiteman, *supra* 650; *see also* Fifth Int'l Tin Agreement, Sen. Exec. J, 94th Cong., 2d Sess. 1976.

[35] Agreement regarding International Trade in Textiles [1973], T.I.A.S. 7840, 25 U.S.T. 1001.

proposed voting system, under which the European Community would have had an absolute majority of consumer votes.

The United States signed the 1973 extension of the 1968 International Coffee Agreement,[36] but in the face of worldwide shortages, no quotas were established and the economic provisions became inoperative. Those provisions would, like past agreements, establish quotas, regulate exports, provide for certificates of origin and reexport, regulate processed coffee, regulate imports, establish production policy and controls, and provide for seasonal financing, diversification and regulation of stock.

In general, the United States has opposed commodity agreements. Like American industry, government policy makers do not believe such agreements have worked very well; tin buffer stocks, for example, were quickly exhausted in the shortage markets of 1974.[37] Furthermore, United States policy makers oppose market intervention on account of general devotion to the free market economy.

As a rule, therefore, the United States has responded to demands for commodity agreements by urging international study groups, such as those for lead, zinc and rubber. These groups publish statistics on production, consumption, foreign trade, new projects, and supply and demand; they do not intervene in the market.[38]

In light of OPEC's recent successes, however, the producing countries are demanding something more. At the recent UNCTAD Conference, the Group of 77 demanded a fund to finance price stabilizing stockpiles for a basket of ten commodities which account for over seventy percent of underdeveloped countries' exports, including cotton, copra, copper, bauxite, jute, sugar, coffee, tea and cocoa. The proposal calls for an international board to set parity prices for commodities, just like the American farm price support system operated in the 1960s. The board would have a $3 to $6 billion war chest and would intervene in the market to buy excess supplies. In keeping with its long range policy, the United States opposed such a fund as requiring too many political and economic concessions, including both "inflation" and "over-production." Within the executive branch, the State Department is, as always, more sympathetic to working with the producers than is the Treasury Department which insists on minimum interference with free markets.[39] One State Depart-

[36]T.I.A.S. 6584, 19 U.S.T. 6333.

[37]The reason, it has been suggested, is that the inventory was too small. *See* statement of C.F. Bergsten, Hearings on Natural Resource Stockpiling, Joint Comm. on Defense Production, June 8, 1976.

[38]*See* WHITEMAN, 14 DIGEST OF INT'L LAW 628-36 (1970).

[39]*See* The Washington Post, April 27, 1976, p. A20.

ment official concerned with these matters pointed out that such a fund might have less impact than feared, because the buffer stock would necessarily be limited in size and, with respect to most commodities, market control is just not practical.

Speaking practically, it is easy to see that buffer stocks would result in more even prices. But whether they would be generally higher or lower seems unsettled. American mining companies fear the depressing effect on prices of buffer stockpiles overhanging the market; the Group of 77, on the other hand, clearly anticipate higher prices. Experience is similarly hard to interpret: the United States agricultural price support program certainly created a floor for agricultural products in this country, but industry still smarts from the tin sales by the Office of Emergency Preparedness a few years ago. As a practical matter, any fund would have enormous pressures against selling and would do so probably only in markets plagued by scarcity, like those of 1973.

IV.

A number of other important instances of international regulation of transnational business may be noted. There is the International Atomic Energy Agency which regulates safety, disposal of wastes and access to fuels.[40] The International Energy Agency[41] has established a system for sharing supplies in the event of an emergency shortfall amounting to seven percent. Implementation is to be made in close consultation and coordination with industry.

The International Labor Organization[42] also has a long history of developing minimum standards for hours of work, days off, labor by children, and so on. Because such matters generally lie within the constitutional jurisdiction of our states, the United States has ratified very few I.L.O. conventions but it has been an interested participant in its activities. In 1975, however, it served notice of withdrawal, primarily because of the increasingly politicized nature of its proceedings and resolutions. Unless rescinded, it will take effect in November 1977.

Although there are a great number of other international regimes affecting transnational business, those mentioned above are the principal ones with respect to which there are current issues or developments of concern to the United States.

It is evident that the less developed countries are searching for means to effect their demands for a new economic order. There is a new sophistication in their

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[40]*See* Statute of the International Atomic Energy Agency, T.I.A.S. 3873, 276 U.N.T.S. 3; CCH Atomic Energy Law Rep. § 8333.

[41]*See* Agreement on an Int'l Energy Program (1974), reprinted in XIV Int'l Legal Materials 1 (1975).

[42]Constitution of the International Labor Organization [1919], U.S.T.S. 874, 2 Bevans 241; amended [1946] T.I.A.S. 1868, 15 U.N.T.S. 35.

proposals and in their negotiations which signals increasing success, and if, as many fear, continued economic recovery leads to renewed shortages of basic raw materials, the leverage of the producing countries will be formidable.

For these and other reasons, increased regulation of business by international bodies can be expected. Diplomats are learning that, for nations of businessmen, business is what international relations are all about. Such regulations do have effect, and it is increasingly important for management and its lawyers to keep abreast of international negotiations, to insure appropriate industry input. Such input is generally a matter of executive branch lobbying, since the executive branch handles negotiations. If the results of negotiations are unsatisfactory, of course, a lobbying effort on the Hill may be called for to block ratification.

It must be remembered that executive lobbying must usually address a number of agencies—not just Commerce, the C.A.B., or State. Executive decisions are the result of give and take among many departments and agencies, and the educational process should address them all.

For its part, the executive branch is generally extremely receptive to information which will assist it in determining the national interest.