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U.S. DEPARTMENT OF TRANSPORTATION, BEFORE THE HOUSE MERCHANT MARINE AND
FISHERIES COMMITTEE, MERCHANT MARINE SUBCOMMITTEE, CONCERNING THE POSSIBLE
ENTRY INTO FORCE OF THE UNITED NATIONS CODE OF CONDUCT FOR LINER CONFERENCES.

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to discuss, on behalf of the Department of Transportation, the UNCTAD Code of Conduct for Liner Conferences. This subject is of particular interest to me in that I attended all of the preparatory negotiations, in 1973, on the Code as a member of the U.S. delegation and was U.S. representative to one of the main committees of the plenipotentiary conference that adopted the Code in 1974.

Introduction

In considering the Code, it is important to remember that much of what it sets about to do is consistent with long standing U.S. policies and practices. For example, the Code seeks to ensure that: 1) national flag lines have the right to join conferences serving their countries, 2) the public has the right to basic information about conference membership, office location, and tariff information and shipper representation, and 3) shippers and carriers have equitable, and readily available forums and procedures for dispute settlement. All of these have long been available in the United States trades.

United States policy, of course, supports the right of all countries to participate, under conditions of fair competition, in international ocean transportation. In the post-World-War II period, the shipping industry became a highly visible symbol of the developed world's domination of the world economy. Understandably, the developing countries sought to gain some control over both the costs and management of the shipping services in their trades.

The vehicle employed to attain this objective was the United Nations Conference on Trade and Development, which was created to help promote the commerce and economic viability of the less developed nations, and one of its products was the Code of Conduct for Liner Conferences.

At the same time, we must view the Code within the context of the U.S. merchant marine and the entire maritime industry. The ocean shipping sector of our economy is rapidly deteriorating. Currently, the active U.S. flag fleet comprises about 580 privately owned oceangoing vessels, 280 of which are engaged in foreign commerce--a decline from about 800 in 1970. In 1979, this fleet handled a little over four percent of our total foreign trade tonnage, representing about fifteen percent of the total value of our imports and exports. In the liner sector, however, about 27.5 percent of total U.S. liner trade moved in U.S. flag ships.

Let me now turn to the substance of the Code itself. The Code, as it stands, would either require or permit:

- (1) Closed conferences open to and essentially controlled by the carriers of the trading partners;
- (2) Cargo sharing on a 40-40-20 percent allocation of the liner conference bilateral trade between the fleets of the two trading partners and the fleets of third countries;
- (3) Formation of shippers councils for purposes of counterbalancing the powers of the conferences;
- (4) Mandatory time intervals between general rate increases;
- (5) Prescribed and complex dispute settlement arrangements to resolve differences between shippers councils, conferences and carriers.

Obviously, were the U.S. to decide to ratify to the Code, it would require many fundamental changes in current U.S. legal and institutional approaches to the international ocean shipping regime.

The Code, unfortunately, presents many problems.

The Code is an Inadequate Legal Document

While we can generally support its broad political and economic objectives, the Code, as it stands, is an inadequate and insufficient legal basis for establishing a workable arrangement for regulating the maritime relationships of participating countries. The Code purports to establish a legal regime to regulate a very wide range of commercial activities in international transportation, containing articles which attempt to govern freight rate determination, relationships between shipper associations and shipping conferences, relationships between carriers and shippers and other carriers and methods for settling disputes. To my knowledge, no other international convention attempts to intervene so completely and at such a detailed level into private commercial contractual relations as does this code.

It is axiomatic that a legal system which attempts to codify and regulate private contractual relationships where disputes involve considerable sums of money must have the capability of rendering definitive and enforceable judgements. The Code provides no system to bring about such quick and final settlements and thus falls far short as a complete, uniform legal regime for international shipping. While the Code requires mandatory conciliation, the system mandated is ad hoc, cumbersome, and lacks any means to require and then enforce a final judgement. The problem is accentuated by the imprecision, ambiguity, and complexity of many of the Code provisions touching on its most basic elements-- a result of arduous negotiations, political compromise, and the inadequacies of eleventh-hour drafting of most of the key provisions.

In sum, adoption of the Code could complicate and slow the settlement of international shipping disputes rather than facilitate them. Moreover, where disputants do not accept the results of "International Mandatory Conciliation" procedures, final settlements would still depend in the last analysis on obtaining redress through the various national court systems.

The Code will not Lead to a Uniform International Ocean Shipping Regime

One of the main arguments in support of the Code is that it would lead to a more uniform system of relationships between the shipowning nations of the world. In fact, the Code is destined to fall short of this aim both because of its exclusions and because of reservations by ratifying countries.

For example, the statement of the delegate for Poland on behalf of Group D (the non-market economy countries) at the closing session of the Geneva conference declared that the Code would not apply to intergovernmental joint liner services operated by socialist governments. Specifically, he said:

"With respect to joint liner services which are established under intergovernmental agreements to serve bilateral trade, the delegations of the socialist countries of Eastern Europe consider that the provisions of the Code do not apply to such services. Our governments reserve the right to make possible reservations to that effect when ratifying the convention on the Code of Conduct for Liner Conferences."

Similarly, the delegate for India speaking for the Group of 77 said:

"The Group of 77 had, therefore, proposed that the definition for Liner Conference or Conferences in the Code of Conduct should clearly exclude intergovernmental shipping services from the definition of the conference."

The Group of 77 gave notice that individual countries would reserve this right when ratifying. No definition is available for an "intergovernmental shipping service."

With respect to the "short sea trades", the delegate for Finland closed with a statement including these remarks:

"I would like to note here some 95 percent of the liner shipping of Finland takes place between industrialized countries, mostly in short sea trade in Europe. We see no justification for extending this system of bilateral cargo sharing (Code Article 2.2) to these trades."

However, no usable definition of "short sea trades" was forthcoming and the question arises as to just what constitutes such trade.

An even more novel approach is being considered by the European Economic Community (EEC). It is considering ratification of the Code, but on very special terms which disavow key portions. The EEC proposes to apply the Code in its trade with developing countries but essentially ignore it in its intra-EEC and intra-OECD trade. Since by far the largest share of the EEC trade is with OECD partners (over 80 percent), the effect will be to apply one set of rules to trade with developing countries and another set of rules to trade with developed countries.

The Code was made purposely ambiguous in many respects at its adoption in order to try to accommodate the varying needs and philosophies of the industrial countries (Group B), the socialist countries (Group D), and the developing countries (Group of 77). Additional ambiguity is imposed by the possible reservations and exclusions. Indeed, there are so many ways that governments may disavow the Code when it does not suit their purposes that we need to ask whether it would not simply add a new layer of bureaucracy and regulation over maritime transport to all the conflicting approaches currently in place.

In sum, our concern in this area is that the Code would not promote uniformity but, rather, add the type of superfluous regulation that this Administration is trying to eliminate.

With these two general comments, I would now like to turn to some of the specific substantive matters the Code deals with.

Conference Organization

An important aspect of the Code is how it treats the organization of shipping conferences. As you know, the Shipping Act of 1916 requires open conferences in the U.S. trades. By contrast, Article I of the Code, covering conference membership is based upon an assumption of closed conferences. We have not in the past been willing to accept closed conferences in our trades, though some have attempted to legislate in this area. Ratification by the U.S. of the U.N. Code of Conduct for Liner Conferences would, then, seek to do by treaty what the Congress has so far not seen fit to do directly by legislation. In the past, shippers groups and port interests have generally been opposed to closed conferences in the U.S. trades and there would seem to be no reason for them to be less opposed to such arrangements introduced under the Code. Since there are no provisions in the Code for open conferences, U.S. law would have to be amended to accommodate those signatories who insisted on closed conferences in their trade with the U.S.

Shippers Councils

In another departure from present U.S. law, the Code would authorize the creation of shippers councils. To provide an effective counterbalance to the closed conferences, shippers councils would have to have sufficient market power to deny cargo to such conferences.

Substitution of shipper council consultation for many of the provisions in the 1916 Act intended to protect shippers and ports would be a significant change from current U.S. practice. While legislation authorizing shippers councils has been introduced in the last two sessions of Congress, there has not to date been sufficient agreement on either the need for or the form of authorizing legislation to achieve passage.

Cargo Sharing

Probably the central feature of the Code is its provisions for cargo sharing. The Code provides for cargo sharing between the bilateral trading partners on an equal basis and indicates that third flag shipping be permitted to participate on some basis such as 20 percent. This formulation produces the 40-40-20 cargo sharing formula usually associated with the Code. The Shipping Act of 1916 makes no such provision, although Section 15 does permit the filing of conference agreements and these agreements may include pooling provisions (i.e., agreed cargo shares).

In practice, the United States has generally sought to rely on a market allocation of commercial ocean transportation shares rather than on allocation by arbitrary administrative formulas. Any extensive cargo sharing regime such as that envisioned by most proponents and signatory nations of the Code would require significant government oversight and supervision to operate effectively and fairly. Such government involvement would introduce government regulation into private contracting for ocean transportation services. Shippers in some cases might, for example, be directed to one or another of a limited number of choices on the basis of private pooling agreements sanctioned by the participating governments and governments might have to enforce such pooling agreements.

Time Spaced Intervals Between Rate Increases

The Code also intervenes in the rate setting process by mandating at least fifteen months between general rate increases. The Shipping Act of 1916, by contrast, does not control rates except when they are judged so high or so low as to affect adversely the commerce of the United States or, in the case of state-controlled shipping lines, so low that they adversely affect service by privately owned shipping.

These arbitrary limits in the Code on the intervals between general rate increases are somewhat ameliorated by the ability to change

individual commodity rates, surcharges and currency adjustments and to put them into effect immediately or on short notice.

To conform with this rate setting aspect of the Code, the Shipping Act of 1916 would have to be amended to place time limits on general rate increases. It might be noted that under such a regime it would be difficult to limit effectively general rate increases during a period of rapid inflation because of the carriers need to anticipate future inflation far in advance, rather than to react more frequently in a more incremental fashion to actual past inflation.

Dispute Settlement Procedure

As mentioned earlier, one of the most troubling aspects of the Code has to do with the resolution of disputes. While the Code specifies complex and detailed dispute settlement procedures, there are, in fact, no effective enforcement provisions. By contrast, the Shipping Act of 1916 provides for hearings before the Federal Maritime Commission with ultimate resort to the courts if one of the disputants remains unsatisfied. Thus, in this respect, a level of regulatory burden is added were the U.S. to adhere to the Code and contractually bind its citizens and firms to participate in the Code's "International Mandatory Conciliation" procedures.

Other Problems

Several other problems afflict the Code. For example, there is a lack of a clear definition of what constitutes a "national line." The Code does not require "national shipping lines" to operate under the national flag in the manner that our shipping interests are accustomed to interpret the term. (Shippers as well as carriers in our country may possibly be disadvantaged if the U.S. were to ratify the Code and require our national lines also to be national flag lines while other nations do not.) The Code's definition of a national shipping line also allows a joint venture to be recognized as a national shipping

line of each of the participating countries having a substantial interest so long as the head office is located in one of the countries concerned. Because most of our shipping lines are subsidized and historically have not participated in joint ventures, U.S. flag lines could be disadvantaged in attempting to maintain their competitive position in developing country trades.

In yet another area--the structure of conferences--much of the Code's language assumes that a conference agreement is limited to the trade between two countries and that conference agreements are simple and exclusive and thus concern only the trade between two countries. The reality of the international ocean trades is far more complicated. There may be more than one conference serving a trade, or more often, a single conference will serve several country-pair trades. A conference may also involve a network of agreements where there are subconferences within a larger overall conference. Under the Code, U.S. shipping lines could face conflicting obligations because governments are likely to take a keen interest in pooling agreements. Moreover, under the Code, "appropriate authorities" may participate in conference deliberations affecting their trade, and U.S. lines on long trade routes could find themselves in difficult bargaining positions where the rational management of their business conflicts with arbitrary cargo allocation requirements of the Code.

Although the UNCTAD Code's emphasis on closed conferences and cargo sharing would appear to place participating ocean carriers in a more secure position vis-a-vis their competitors, that may be an illusory advantage in view of the variety of reservations being attached to the Code by acceding parties and the resulting lack of uniformity in its implementation. Moreover, any additional security achieved through the closed conference mechanism would be obtained at the expense of competition, and it is not at all clear that we should view such a trade-off as being in the public interest.

Need to Defend the Interests of U.S. Carriers

An important criterion by which to evaluate any proposed ocean shipping regime is the extent to which it permits the United States Government to protect the legitimate interests of the U.S. flag fleet in competing in worldwide international markets. The Department of Transportation is aware of the difficulties faced by U.S. firms in this regard, particularly where competing foreign flag lines are supported, either overtly or covertly, by their governments.

In assessing the UNCTAD Code of Conduct, it will be necessary to determine whether ratification would enhance or reduce the U.S. Government's capability to ensure that U.S. flag lines have equitable access to fair competitive opportunities in the trades they seek to serve. It is our preliminary impression that the Code would not, in fact, improve our capability in this respect. Experience has demonstrated that recourse to cumbersome international dispute settlement procedures is not likely to be an efficient means of protecting our commercial interests.

Much, of course, remains to be done to enhance the competitive opportunities of U.S. flag carriers. For example, we will be looking closely at how to use existing provisions of the Shipping Act more effectively, as well as the recently enacted controlled carrier and anti-rebating amendments to that Act. We are also considering whether existing provisions of other laws, including the Trade Act of 1974, can be of value in addressing imbalances in the competitive environment in which our carriers operate. Lastly, we will want to explore the advisability of further revisions of the Shipping Act with these objectives in mind. We will also be reviewing the reform legislation considered in the last Congress. We will want to work closely with the staff of this Committee, as well as with the members of the Federal Maritime Commission and the Maritime Administration, in this effort.

With respect to the goal of enhancing the competitive opportunity of U.S. flag carriers, there is considerable apprehension that much tonnage might be displaced from its historic trading pattern if the Code becomes effective, and that most of it would try to enter our open conference trades.

Additionally, it should be noted that if the U.S. were to accept the EEC compromise Code reservation, which the EEC countries have offered to their OECD partners on a reciprocal basis, U.S. trades would remain open to OECD cross traders if we maintained our traditional open conference system while our OECD partners would be free, as they always have been, to maintain closed conferences and commercial pooling agreements in their non-U.S. trades. This unbalanced set of obligations would be a considerable disadvantage to our carriers, who would have to enter the European closed conference trades as cross traders on the basis of privileges rather than rights.

We would have to take steps to protect our flag lines in the event that under either of these conditions large amounts of tonnage sought to enter our trades in a precipitous manner. On the other hand, a large increase in world tonnage would not automatically occur simply as a result of the Code's entry into force, so there is no reason to believe that any large amount of tonnage would seek to enter our trades immediately.

Summary

We find ourselves at odds with prevailing practices and policies of much of the rest of the world -- with state trading nations to whom marketplace freedom is both foreign and antithetical, with third world countries whose aspirations for equality in the maritime trades are reflected in much of the formulations of the UNCTAD Code, and with many of the traditional maritime nations who share

our general economic philosophy and practices, but take a different approach to their implementation. In these cases, we have a plethora of competing interests and considerations and finding the proper balance will be both complicated and difficult.

Mr. Chairman, that completes my prepared statement. I will be pleased to try to answer any questions the Committee may have.