

The UNCTAD Liner Code: United States Maritime Policy at the Crossroads, by Lawrence Juda

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BOOK REVIEW

THE UNCTAD LINER CODE: UNITED STATES MARITIME POLICY AT THE CROSSROADS, by Lawrence Juda. Boulder, CO, Westview Press, 1983, 168pp.

Vast changes in the character, volume, and transportation of world trade have precipitated an attempt by less developed countries to obtain a degree of control and benefit from their visible maritime links to the developed world. This, in turn, has contributed to an introspective review in the United States of the status of the U.S. fleet and the promotional maritime mechanisms that were established nearly 50 years ago, as well as the regulatory framework established in 1916 under the Shipping Act.¹

A beneficial outcome, in terms of an "adequate and balanced" U.S. fleet, is very much in question. The outcome for the maritime interests of other countries is much less in question. It is essential at the present time, which may later be viewed as a watershed in U.S. maritime affairs, to analyze with uncanny clarity. Rather than mere pragmatic adjustments, fundamental changes are at issue which will affect shipping and trade for years to come. To change something that we really do not understand is to virtually guarantee its destruction. *The UNCTAD Liner Code: United States Maritime Policy at the Crossroads (The UNCTAD Liner Code)* should receive high marks for contributing to our understanding even if we differ from the author's conclusions and recommendations.

The Convention on a Code of Conduct for Liner Conferences (Liner Code or Code) is an international treaty drafted under the auspices of the United Nations Conference on Trade and Development (UNCTAD). The Liner Code developed, in part, as a result of UNCTAD's general efforts to create a new international economic order. The stated purpose of the Liner Code is to ensure that liner or common carrier fleets will share equitably in the carriage of their sponsoring countries' trade.

It is an anomaly of the Liner Code that its mechanism for achieving such equitable participation is not derived from a clear statement of its true objective (i.e., an expanded fleet), but rather from an uncertain perception and unclear expression of its means. The means of implementing the Liner Code is a mandated cargo share. In essence, all cargoes are to be split on a 40/40 basis between ships of the trading countries, with the remaining 20 percent reserved for ships of other nationalities (so-called "cross-traders"). This is the central provision of the Liner Code; many related provisions

1. Shipping Act of 1916, 39 Stat. 728.

would be rendered ineffectual without it.

Although, under the Liner Code, participation is gauged by the cargo tons that support the ships rather than by the actual number of ships themselves, the lack of large national fleets was perhaps the primary motivation for developing the Code. A major shortcoming of the Liner Code, however, is that a percentage share of the cargo is mandated without regard to the attendant economic consequences. These economic consequences may ultimately constrain the desired growth of national fleets.

Cargo sharing is a topic that, in part because of our antitrust history, taps great wells of antipathy in American government. The Shipping Act of 1916 has roots in the Interstate Commerce Act of 1887² and the entire antitrust ambience of the period. Simply stated, the U.S. government is anti-code, and its policy makers find themselves, including those responsible for promoting shipping interests, in the paradoxical position of resisting an international treaty which seems to hold promise of expanding the U.S. fleet. The Liner Code came into force in October 1983 and is finding expression in gradually evolving national policies of countries throughout the world. Of the major developed countries, only the United States has refused to give serious consideration to ratifying the Code.

While it seems to this reviewer that *The UNCTAD Liner Code* tends to exaggerate the importance of liner shipping and the Code in the overall objective of fleet development, nevertheless it is truly outstanding in respect to its historical analysis of events which have an impact upon currently evolving issues. Westview Press, which provided a quick method of printing so that the time between authorship and distribution was brief, has done the topic a great service considering its currency in government and industry circles. We are provided with a scholarly work dealing with an intensely misunderstood and difficult area of U.S. federal policy.

Lawrence Juda is Chairman of the graduate program in marine affairs at the University of Rhode Island and the author of another work on U.S. shipping policy. In this book, Juda has placed U.S. shipping policy in the context of an international arena which is truly symptomatic of the times in which we live. Adequate or not, effective or not, fair or not, UNCTAD is a point of confrontation whose multiplying aspects increasingly lay bare the distress that we can expect into the 21st Century. The complexities of adjustment to new international regimes dealing with trade and transportation is a primary area of friction between the increasingly interdependent, self-assertive, and desperate peoples of the world.

Perhaps the most refreshing note in Juda's work is his success in dealing with the topic of U.S. maritime policy without obscuring it with exten-

2. Interstate Commerce Act of 1887, 49 U.S.C. §1 et seq. (1983).

sive and basically irrelevant discussions of the historic context and justifications of U.S. federal maritime involvement with, and support of, its merchant ships. Juda has challenged his readers to rise to new levels of sophistication. While taking a clear line in favor of ratification of the Code, he has not pretended to insist unequivocally and dogmatically on a particular course of action, thus revealing his personal appreciation of the dynamic world circumstances which are influencing trade and international relations. It is therefore surprising that his analysis still suffers from an inadequate statement of the entire situation, particularly with regard to the expansion of world trade and the unavoidable and intimately associated growth of contract carriage. The stagnant common carrier trade (which in terms of proportion of trade is relatively diminishing) is incapable of responding to the aspirations of either developed or developing countries for a larger fleet. Juda fails to analyze the probable consequences of implementing the Code, that is, in terms of a larger fleet.

As we know them today, common carriers are survivors of a doctrine in English law that prescribed obligations for a variety of business activities serving the general public. The "common callings" doctrine imposed, through common law courts, the fixing of reasonable rates, available to all, within the limits of capacity, without discrimination. These obligations became more explicit in the United States through a variety of statutory and regulatory provisions, particularly through the Interstate Commerce Act (regulated by the Federal Maritime Commission). The counterpart of the common carrier is the proprietary carrier, or the for-hire "contract carrier." These are more deeply identified with the corporate management's proprietary prerogative to fulfill its own transportation needs.

In the modern era, the common carrier had virtually exclusive access to U.S. international trade until the post-World War II period. Since that time, trade in many commodities has expanded, for a variety of historical reasons, to such an extent that management can now afford to rent and even own its own shipping, thereby lessening demand for common carriers. Dry cargo contract trade has expanded from the level of 10 million tons per year in the 1930s to the level of 400 million tons per year in the 1980s, while concurrently the common carriers have experienced no growth whatsoever in their cargo base. The common carrier shipping companies serving the United States have had a static base of approximately 50 million tons of cargo per year since even before the turn of the last century. The implications of these facts seem to escape the attention of analysts and policy makers. Perhaps this is because of preoccupation with the large number of individual trading companies that are characteristic of common carriage as well as with their attendant political strength.

This brief recapitulation points us to four key ideas which could help to bring about an effective renovation of maritime promotional policy; a policy

that is consistent with established concepts from the past while simultaneously recognizing the changed, and changing, world-wide shipping environment:

The current level of U.S. trade in dry cargoes (other than petroleum and related energy products) is about eight times the level of the 1950s;

The transportation requirement for the "ton miles" of U.S. trade, not the intrinsic value of the cargo itself or a multiplicity of shippers, justifies the number of ships employed;

The employment of about five of every six ships in U.S. dry cargo trades is determined by the cargo-owning interest rather than the carrier, and the carrier plays the role of a price competitive U-Haul It Company;

Maritime promotional policies that are based on the historical dominance of the liner or common carrier, as does the UNCTAD Code, are anachronistic and will continue to fail to produce a desired larger fleet.

In the United States, this latter point is exacerbated by a need for flexible, multipurpose shipping consistent with our national defense needs and our unique international role. Containerized common carriers, singular in purpose, are no match in this respect to the flexible general purpose vessels of the contract trades — often misleadingly described as "bulklers."³

The Code is in logical succession to a series of modern international commercial agreements affecting transportation. They have their origins in the technological revolution that was prompted in part by rising American labor costs, and was made possible by the concurrent American prosperity, excess capital, and unbounded expectations of the post war period. The so-called "container revolution" was an open invitation to international regulation. Putting truck bodies on ships and then moving them overland in other countries did indeed create a new need for standard treatment. The revolution also transferred some of the capital intensive, labor saving system costs of the new automated age to the still labor intensive, socio-economic environment of poorer trading partners. Demands for huge new cranes and terminals, highway and rail construction, and a multiplicity of correlative technological advances put forth by the major conference-oriented carriers drew the resistance, criticism, and animosity of capital-importing countries already overburdened with unemployment.

First came the Customs Convention on Containers, largely a product

3. "Bulklers" is a term of art originating in the exclusions to the Interstate Commerce Act of 1887. Usage of the term persists, but has been perverted so that it can, and does, refer to all types of contract carriage.

of developed countries. This was superceded by the International Convention for Safe Containers, similarly produced by the developed countries. Then came the Combined Transport Convention.⁴ In this case, however, the Economic and Social Council of the United Nations assigned the topic to the care of the developing countries as represented in the UNCTAD. It seeks to create a new legal personality known as the "Combined Transport Operator." Each of these Conventions established new concepts of responsibility, liability and ownership in a somewhat evolutionary and accumulative manner, in many ways mimicing and borrowing from precedents and concepts which we can discover and associate with the relatively high sophistication of the American transportation system and its jurisprudence.

The Liner Code, also assigned to the UNCTAD, was susceptible to the concerns of the developing countries relating to their perception of the seemingly octopus-like nature of multinational corporations. This was identified by the people of these countries with the most obvious presence of foreign influence within their territories — the ocean carrier and its ships, flying the flag of another country. The Code took on an altogether different character from earlier conventions. It became politicized as none of its predecessors had, even more than the Combined Transport Convention with all its intriguing newness.

When it came to the Code, its preceptors in UNCTAD understood that prestige and national pride were involved in a very visible way and, at last, there appeared to be a controllable, regulatable, and guilty party that they could reach out and touch, communicate with and command, namely the seemingly monolithic conference of shipping companies serving a particular trade route. Conferences are international instruments of the common carrier. They act to stabilize rates and service in the unique environment of shipping so that the "common callings" doctrine can have practical meaning in an otherwise multilateral and uncontrollable environment. Without them the stability required for the vast maritime investments would be impossible and would ultimately constrain world trade. From this perspective, the non-conference carriers, the so-called "independents" and "outsiders," are uncomfortable. They are a destabilizing influence which otherwise reasonable legislators and regulators tolerate, perhaps out of some blind allegiance to vague principles of free trade or, more likely, a rather frank ac-

4. The 1956 Customs Convention on Containers was replaced by the International Convention for Safe Containers and a Customs Convention on containers at the United Nations/ Inter-Governmental Maritime Consultative Organization Conference on International Container Traffic (Geneva, Switzerland, 1972). See YEARBOOK OF THE UNITED NATIONS, 1972, at 511-12. The United States adopted this convention by the International Safe Container Act, Pub. L. No. 95-208, 91 Stat. 1476 (1977) (codified as amended at 46 U.S.C. §1501 et seq. (1975 & Supp. 1984)).

quiescence to the many trading participants that seek the lowest shipping cost, oblivious to the consequences regarding other legitimate national concerns such as a viable fleet of useful ships in time of war. A case can be made that insofar as the Code and Juda support non-conference operations, they both are inconsistent with the functioning of the Code and the objective of the less developed countries. Non-conference carriers destabilize the Code's regulatory framework by introducing nonregulated entities.

It seems to this reviewer that the loudness of industry opposition to the Code, and devotion to "open" competition in liner trades (one of Juda's recommendations) is in direct proportion to either ownership of "independent," "outsider" or "non-conference" shipping, or participation in "cross-trades," i.e., trade between countries to which ship owners owe no allegiance. Juda's book offers a strong case for ratification of the Code by the United States and, indirectly, for a clearer, cleaner definition and practical expression of the concept of common carriage which would concomitantly result in enlightened international regulation. This runs contrary to current de-regulation trends in the United States, as evidenced in the recently enacted "Shipping Act of 1984." This legislation introduces and legitimizes "contract" rates for large shippers on liner, common carrier ships. The "common callings" doctrine has thus been breached in a most significant way since two rates will now be applied on the same merchandise on the same vessel, based solely on the size of the shipper. This is at least paradoxical, if not contradictory, in the United States where nothing seems more at home than fairness, protection for the small businessman, and equal access to businesses regulated in the public interest.

In the United States promotional programs, which are charged with the balance and adequacy of the American merchant marine, acknowledgement has been given, by implication at least, to the public utility nature of publicly assisted liner shipping on "essential trade routes." In former years, our government insisted that these companies belong to strong conferences. The price stability thus achieved enhanced the effectiveness of the government's cost-parity based aid to these companies. Much of today's shipping depression, and the precarious condition of those companies that have somehow managed to survive, can reasonably be attributed to influences which failed to allow the investors in shipping innovation to receive a fair return on investment. In this respect, Juda's book succeeds in explaining some of the potential for good inherent in the Code and the international agreements it is spawning.

Mr. Juda makes an impressive case for the modified ratification of the Code, showing how it can be in our enlightened self-interest. We may hope that he now turns his considerable ability to a more direct correlation of legitimate shipping aspirations with the realities of world shipping, based on a broader vision of the importance of contract trade. The Code's objective

in the liner and contract trades will have positive meaning only when it has been synchronized with the underlying economics of world trade so that trade growth is enhanced. Promotional schemes such as the Code, if they result in higher product costs, can be self-defeating. Few products in world trade have an exclusive source or lack an alternative and, ratification by the U.S. or rejection notwithstanding, trade must be served with the most effective and appropriate transportation available. This requires planners and politicians alike to define their objectives and means with great understanding and clarity. Juda has served this cause well, even if partially.

*Bernard M. Collins**

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