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Dennis James Burnett

Shipping Retaliations Under United States and International Law

Dennis James Burnett*

Each nation has the right to control its domestic and foreign commerce.[1] But the commerce of any nation becomes less its exclusive concern as commercial relationships with other nations grow. The growth of multi-national corporations and the increase of foreign direct investments make the acts of any nation affecting its domestic commerce have greater ramifications on the economic interests of other nations. The effects are even greater in foreign commerce. Any tendency towards chauvinism in foreign commerce has a direct impact on the economies of two or more nations. As protective devices and artificial diversions of trade multiply and become more sophisticated, the number of conflicts between economic interests is bound to increase. The procedures for resolving these conflicts will be put to greater tests. An industry which has been particularly subject to these types of conflicts is the ocean liner industry. The past and present means of resolving trade carriage conflicts used by the United States are therefore worthy of examination for ascertaining their applicability to other areas of commerce.

Most of the world trade moves on ocean vessels.[2] Importing and exporting nations are dependent upon the services offered by the ocean liner industries for efficient and reliable movement of their goods and the maintenance of international commercial ties. It is also important for nationals at both ends of a trade route to be involved in the carriage of their trade because such participation reduces the level of reliance a nation has on the services of the ocean liners of another nation and stems a large drain on currency. As an example, Great Britain maintained a positive balance of payments position for years even though imports were greater than exports because her merchant marine trade income dominated her import and export markets.[3]

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* Attorney, Office of General Counsel, Federal Maritime Commission; Member of the Bar of the State of Nebraska; L.L.M., 1976, Georgetown University Law Center; J.D., 1973, University of Nebraska College of Law; B.S., 1970, Nebraska Wesleyan University.

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[1] Some authors assert the existence of *jus communicationis*, but it is not the prevailing doctrine. *See* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §10, at 181 (1965); and, *infra* note 35 and accompanying text.

[2] For example, in the U.S. foreign trade, vessels carried 58.71% of the exports and 66.29% of the imports from January 1, 1975, to September 31, 1975. U. S. Bureau of Census, *Highlights of the U. S. Export and Import Trade*, REPORT FT99 (Sept. 1975).

[3] " [T]he British Government described as 'Great Britain's invisible exports, 'viz, the return to Great Britain of the receipts from the operation of the British owned merchant

Many nations, including the United States, have therefore endeavored to establish and promote their own merchant marines.[4] Such efforts often conflict with interests of other nations. The most pernicious of these promotional acts blatantly discriminate against the national flag vessels of other countries and adversely affect the movement of goods in international trade. When such acts occur, international conflicts of interest result.

Absent any special compact for the resolution of their differences, nations have the right to resort to self-help[5] since the law of nations lacks the positive international sanctions which render the same self-help measures unlawful under municipal codes.[6] "Each state is also entitled to judge for itself, what are the nature and extent of the injuries which would justify such means of redress."[7] The means of self-help or redress available to nations are referred to as retorsions, retaliations, and reprisals.

The word retorsion is derived from *retorquere* signifying to twist or turn back.[8] Retorsions can be divided into two sorts, *retorsio juris* or *retorsio de droit,* and *retorsio facti.*[9] A *retorsio juris* is a lawful measure taken in compensation for a violation of comity,[10] a violation of an imperfect obligation, or a hostile policy.[11] Such measures are implementations of the right of the state to regulate its domestic and foreign commerce.[12] A *retorsio facti,* on the other hand, is a positive measure inflicted upon an offending state for violations of internationally recognized rights[13] for the purpose of securing compensation or acting as a deterrent.[14] A *re-*

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marine, of a sum sufficiently great to not only compensate for the excess of Britain's exports over imports, but to insure an additional balance in favor of Britain, sufficiently large to have always forced the flow of gold from other nations to Britain . . ." Memorandum from R.A. Dean, General Counsel, United States Shipping Board, SENATE COMM. ON COMMERCE, PROMOTION AND MAINTENANCE OF THE AMERICAN MERCHANT MARINE, S. REP. No. 573, 66th Cong., 2d Sess., 6, 7 (1920).

[4] *See generally,* Shipping Act, 1916, 46 U.S.C. §801 (1970); Merchant Marine Act, 1920, 46 U.S.C. § 861 (1970); Merchant Marine Act, 1928, 46 U.S.C. §891 (1970); Intercoastal Shipping Act, 1933, 46 U.S.C. § 843 (1970); Merchant Marine Act, 1936, 46 U.S.C. § 1101 (1970); Merchant Ship Sales Act of 1946, 46 U.S.C. App. § 1735 (1970). *See* note 72 and accompanying text *infra.*

[5] H. WHEATON, ELEMENTS OF INTERNATIONAL LAW, 309 (1889).

[6] Constrained, of course, by the U.N. Charter and its prohibition of the use of armed force. *See,* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 288 (1954).

[7] H. WHEATON, *supra* note 5, at 309.

[8] 2 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 588, n. 3, (2d ed. 1945).

[9] HALLECK, INTERNATIONAL LAW, 470 (3d ed. 1893); H. TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 435 (1901).

[10] H. WHEATON, *supra* note 5, at 309.

[11] H. TAYLOR, *supra* note 9, at 470.

[12] *Id.*

[13] H. TAYLOR, *supra* note 9, at 435.

[14] 2 J. WESTLAKE, INTERNATIONAL LAW 6 (1907).

torsio facti may therefore be an act which would otherwise be contrary to international law.[15]

Retaliation is another kind of self-help. The word retaliation is derived from the Latin verb *retaliare* signifying the return of like for like.[16] It is a method for obtaining satisfaction by making another suffer precisely as much evil as he has done.[17] Under Roman law it was called *lex talionis;* in the Bible, the taking of an eye for an eye.[18] The term retaliation is properly used "only for that kind of retorsion in which the thing done is the same as that complained of."[19] Retaliation may properly be described as a retorsion in kind.[20]

Another measure of self-help is a reprisal. The technical meaning of reprisal is a "taking in return."[21] Reprisal may properly be "defined as the taking possession, at sea or on land, of the ships or other property of a foreign state or subject, with a view either to put pressure on that state for the redress of a wrong alleged to have been done to it or by one of its subjects, or to the application of such property as compensation for such alleged wrong."[22]

These etymologically based definitions do not, however seem to conform to the usage of many authors. The majority of authors seem to use the terms quite differently from their technical meanings. The term retaliation is commonly used to encompass all measures of retorsion, both *facti* and *juris*.[23] The term retorsion is normally restricted to meas-

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[15] 2 C. HYDE *supra* note 8, § 588, called "vindictive" retaliation; H. WHEATON, *supra* note 5 at 309.

[16] 2 C. HYDE, *supra* note 8, § 588 at 1658.

[17] E. VATTEL, THE LAW OF NATIONS § 399 (1817).

[18] 2 J. WESTLAKE, *supra* note 14, at 6.

[19] *Id.*

[20] 2 C. HYDE, *supra* note 8, § 588 n. 3.

[21] "Although the word reprisal and its equivalents in the Latin languages are . . . of relatively modern origin, the conduct they were used to describe had a very early beginning. Grotius was quick to discern the similarity between the law of reprisals of the seventeenth century and the custom of the Athenians known as *androlepsia* . . . that custom permitted the relatives of an Athenian murdered by a foreigner, if satisfaction were refused, 'to seize three fellow-countrymen of the murderer and hold them for judicial condemnation to compensation, or even to the death penalty . . .' According to Gustave Glotz, *androlepsia* was not a custom peculiar to the law of the Greeks, but prevailed also among the Romans, as well as among the Ossetes, and was seen also in the early Irish law . . . ." 2C. HYDE, *supra* note 8, § 589 n. 5.

[22] J. WESTLAKE, *supra* note 14, at 7-8.

[23] *See generally* C. FENWICK, INTERNATIONAL LAW 635 (4th ed. 1965); W. HALL, A TREATISE ON INTERNATIONAL LAW 381 (4th ed. 1895); HALLECK, INTERNATIONAL LAW 470 (3d ed. 1893); 2 C. HYDE, *supra* note 8, § 588; 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW 1096 (1906); L. OPPENHEIM, INTERNATIONAL LAW §29 (H. Lauterpacht ed., 7th ed. 1952); 3 R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 63 (1857); 1 G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 173 (4th ed. 1960); VERDROSS, VÖLKERRECHT 425 (1964); H. WHEATON, *supra* note 5, 308; Schoen, *Zur Lehre von den völkerrechtlichen nichtkriegerischen Mitteln der Selbsthilffe*, 20 ZEITZCHRIFT FUR VÖLKERRECHT 14 (1936); Tomu-

ures which have been defined above as *retorsio juris*.[24] Reprisal is generally used for measures employing armed force which have been defined as *retorsio facti*.[25] While less technically correct, these commonly used definitions have the advantage of being more consistent with everyday usage. To avoid confusion, the term retorsion shall be used to mean internationally legal measures taken in response to unfriendly or damaging but nevertheless internationally legal measures of a foreign state. Reprisals shall refer to measures which, though otherwise illegal, are taken in response to internationally illegal acts of a foreign state. As used herein, reprisal may or may not involve the use of armed force. The term retaliation shall encompass both retorsions and reprisals. These definitions are consistent with the case of *Baranyai v. Yugoslavia*[26] which held that the government of Yugoslavia could not repudiate a treaty obligation in response to an act which was unfriendly but which was not contrary to any internationally recognized right.[27]

A reprisal may not be legally employed as a retorsion. Since a retorsion is by definition a legal act, there are no international legal restraints upon their use. International law does, however, put restrictions upon the use of reprisals. Reprisals may be taken only when (1) there has been a breach of international law, (2) a request for redress has been made and refused or met without success,[28] and (3) the measures taken correspond to the wrong done.[29]

These measures of self-help may be used to accomplish different objectives. One of the oldest purposes of retaliations is to:

> make another suffer precisely as much evil as he has done. Many have explained that law as being founded in the strictest justice: —and can we be surprised at their having proposed it to princes, since they have presumed to make it a rule even for the deity himself? The ancients called it the law of Rhadamanthus. The idea is wholely derived from the obscure and false notion which represents evil as essentially and in its own nature worthy of punishment . . . .[30]

Retaliations are more, however, than mere attempts to punish evil acts. Passive forms of retorsion by which the subjects of a foreign nation are treated in the same manner as the subject of the retorting nation are "con-

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schat, *Repressalie und Retorsion, Zu einigen Aspekten ihrer innerstaatlichen Durchfürung*, 33 ZEITSCHRIFT FÜR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 179 (1973).

[24] *See* note 10, *supra*, and accompanying text.

[25] *See* note 13, *supra*, and accompanying text.

[26] 7 Trib. Arb. Mixte 858 (1927).

[27] *Id.* at 865.

[28] "Remonstrance and refusal of satisfaction ought to proceed . . ." citing opinion of Thomas Jefferson, quoted in 3 F. WHARTON, A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES § 318 at 85 (2d ed. 1887).

[29] Nauliaa Case, 8 Trib. Arb. Mixte 409, 422-3 (1929); *see* J. STONE, *supra* note 6, at 289.

[30] E. VATTEL, *supra* note 17, § 339; HALLECK, *supra* note 24, at 470.

formable to justice and sound policy. No one can complain on receiving the same treatment which he gives to others . . . ."[31] Retaliations therefore work to balance out the detriments and to deny the initiator any artificial advantages created by his acts. Retaliations may also be used to deter future similar conduct, to obtain redress by persuading the other state to abandon or cease its actions or policies, or to obtain satisfaction.[32] When a nation uses its powers over its foreign and domestic commerce in a manner detrimental to the interests of another nation, any resulting retaliations would most naturally be expressions of the other nation's power over its foreign and domestic commerce.

The Constitution of the United States, in Article I, Section 8, Clause 3 vests the exercise of the powers of the United States over foreign and domestic commerce in Congress. It provides that

> Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, . . .

It is well recognized that the power of Congress over foreign commerce is absolute.[33] Participation in the foreign commerce of the United States is a privilege granted by the sovereign which may be terminated, conditioned, or limited.[34]

These Congressional powers over foreign commerce naturally extend to shipping and enable Congress to retaliate against discriminations against United States vessels. As early as 1818, the United States closed its ports to British vessels arriving from British colonies in retaliation for the exclusion of American ships from the trades of those British colonies.[35] Congress retained the powers of retaliation against shipping discriminations in foreign commerce until the United States Shipping Board Bureau (Shipping Board) was created by the Shipping Act of 1916.[36] In creating the Shipping Board, Congress delegated certain of its functions (with regard to the formulation of retaliatory legislation) to the new Shipping Board and the President. Section 2 of the Shipping Act of 1916[37] states:

> The board shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the action of any foreign Government with respect to the privileges afforded and burdens imposed upon vessels of the United States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign Government operate in such a manner that vessels of the United States are

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[31] E. VATTEL, *supra* note 17, § 342.

[32] J. STONE, *supra* note 6, at 289.

[33] Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1 (1824).

[34] Bd. of Trustees of Univ. of Ill. v. United States, 289 U. S. 48 (1933).

[35] 3 Stat. 432 (1818); 7 J. MOORE, *supra* note 24, at 106.

[36] 46 U.S.C. § 801 (1970).

[37] 46 U.S.C. § 825 (1970).

> not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, whether in trade to or from the ports of such foreign countries or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the board to report the results of its investigation to the President with its recommendations and the President is hereby authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by a special message, if deemed important in the public interest, in order that proper action may be taken thereon.

However, with the election of a new Congress, the intervention of the First World War, and the excess of ships in the commercial trades, an impatience with the procedures of section 26 of the Shipping Act of 1916 developed. When H.R. 10378, an Act to promote and establish the Merchant Marine, was passed from the House of Representatives to the Senate in 1919, hearings before the Committee on Commerce sparked an idea which was to grow into section 19 of the Merchant Marine Act of 1920-38.[38]

A comment about the British orders in council during a discussion of the ability of Great Britain to maintain her large Merchant Marine was the first indication that a new procedure for shipping retaliations might be desired.

> *Senator Chamberlain.* May I interrupt just here to ask how Great Britain is managing this whole system? Have they a minister of marine?
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> *Mr. Rosseter.* They have a ministry of shipping, and up to the early days of January the ministry of shipping had apparently a very great discretion in the affairs of British shipping; but at some date in January, accurately not known to me, much of this power was taken from the ministry of shipping and control returned to the so-called regular lines, as distinguished from tramp steamers. Changes of this sort are accomplished very expeditiously by an "order in council."
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> *Senator Chamberlain.* They have that great advantage of us and always will have, that an order in council, which is simply a decree of the King, meets the situation at once, while we have to do it through the Congress.
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> *Mr. Rosseter.* Yes, Senator, that is true.
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> *Senator Chamberlain.* Is not that a very great advantage to them?
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> *Mr. Rosseter.* It is. About the time I was negotiating with the ministry of shipping looking to a stabilizing of freight rates and recognition of certain mutual interests, negotiations were suddenly terminated, and I was notified by one of the conference lines that certain

[38] 46 U.S.C. § 876 (1970).

> plans of their own would be put into effect in 48 hours. I had the distinct impression at the time that the British steamship companies had decided it was a good time to swat an infant shipping industry.[39]

It was not until the testimony of Mr. William I. Clark that the Commerce Committee began to formulate a delegation of retaliatory powers with regard to shipping.[40] This testimony caused another senator to ponder the legality of such delegations.[41] Finally, a proposal was made.[42]

When H.R. 10378 was reported out of the Committee on Commerce and submitted to the Senate as a whole, it contained for the first time a

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[39] COMMITTEE ON COMMERCE, HEARINGS ON THE ESTABLISHMENT OF AN AMERICAN MERCHANT MARINE, 66th Cong., 2d Sess. 299, 300 (1919).

[40] *The Chairman.* Let me ask you right there. Has the board of trade anything like legislative powers? That is, as I understand it, it can do practically anything it thinks wise to promote shipping unless it is prohibited by statute. How about that?

Mr. Clark. The English law is different from ours and more flexible in this respect. In addition to the law they have what is known as the "order in council", and the "order in council" may be likened to the cracker of the whip of English law, and just as a first-class "mule-skinner" will be able to take his whip and fleck a fly from off his leaders with great detriment to the fly and none to the leaders, so the British official with the "order in council" is able to destroy the foreign competition without injury to British interests anywhere, while apparently actually conforming to the law. *Id.*, at 1432.

[41] *Senator Chamberlain.* Well, I have often wondered if there was any way in the world in which the United States under its Constitution can adopt any regulations or can confer any powers which would meet these constant orders in council, which may change every 24 hours to meet a good situation.

Mr. Clark. Senator Jones offered one in the Senate. It was accepted in the Committee as a whole, and was voted out, however, in the Senate in connection with the railroad bill. The point was this: It was about as near to a flexible law as you could provide in the United States. In other words, they would be permitted to participate in the carriage so long as they did not cut rates, but if they cut rates the American carriers would not be permitted to carry the freight offered by the foreign carrier.

Senator Chamberlain. I have often thought that a power could be conferred upon the Board enabling us to meet that order in council. It affects us not only in Canada, but in America, everywhere.

The Chairman. Why could we not give power to the Shipping Board to pass regulations to meet the situation started by the orders in council?

Senator Chamberlain. That is the only way we could protect ourselves.

Mr. Clark. If there were some way that we could devise a department somewhat similar to the British Board of Trade, it would be of great benefit to us. The British Board of Trade protects British shipping in every way possible. That protection is always presumed to be in the general British interests, and all matters of regulation are therefore worked out in harmony with British commerce and British shipping, protective of both, and I have no criticism of that. I think that it is a proper system. Some have accused me of disliking Great Britain. On the contrary, I greatly admire them. I think they are the most remarkable commercial nation on the face of the earth, because they have never had to be aroused to the national interest; they have always been awake to that patriotic necessity; and they make their laws to protect Great Britain against all the commerce and all the shipping of the world, and that is as it should be.

Senator Chamberlain. And they can change it.

Mr. Clark. And whenever it does not fit the case it is waived in a measure. *Id.*, at 1464.

[42] *The Chairman.* Here is an idea I would like to see incorporated into law if we could do it, and I want to suggest it for your consideration, to authorize the Shipping Board to make such rules and regulations as may be necessary from time to time to conform our practices and methods in connection with the merchant marine as nearly as may be to the English laws and regulations, except where it is otherwise expressly provided by law, or make our

section delegating retaliatory powers to the Shipping Board. The Committee stated:

> Far-reaching power is placed in the Shipping Board to make and control rules and regulations affecting shipping, and to meet foreign competition. We must do something of this kind, if we would meet the practices and methods of other countries. Through their orders in council and other semi-legislative acts of administrative bodies they interfere with and handicap our merchant marine in many different ways. This must be met in a similar way . . . .[43]

H.R. 10378 was passed by the Senate and sent to conference with the House. When it emerged from conference and was passed, it had a section delegating powers of commercial retaliation to the United States Shipping Board Bureau.

> Sec. 19. (1) The Board is authorized and directed in aid of the accomplishment of the purposes of this Act:
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> * * * *
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> (b) to make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, and which arise out of a result of foreign laws, rules, or regulations, or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country;[44]

These retaliatory powers, delegated to the United States Shipping Board in 1920 were passed to the United States Maritime Commission in 1936,[45] to the Federal Maritime Board in 1950,[46] and finally to the Federal Maritime Commission [Commission] in 1961.[47] In order to understand

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regulations conform to those of our principle competitors, in any particular section or route. That is in line with the idea you have there.

Mr. Clark. I think that is a very excellent suggestion, and it would serve to take care, in that connection, of the question of difference in measurement of vessels, it offers a very good substitute for board of trade regulatory power in those particulars.

The Chairman. Take care of everything that we did not especially provide by law. The only question is whether we could do it under our form of government, whether we could give that power or not to an administrative body. Under that they could not overnight do like they do with these orders in council. They could meet these orders in council very promptly.

Mr. Clark. They could do specific things without undue delay. I think that would be very desirable legislation, in whatever form it might be devised, so as to conform to their requirements of all law making authority. *Id.*, at 1484.

[43] S. REP. No. 573, *supra* note 3, at 5.

[44] 46 U.S.C. § 876 (1970).

[45] Merchant Marine Act, 1936, Ch. 858, § 204(b), 49 Stat. 1987 (1936).

[46] Reorganization Plan No. 21, 1950, § 104(3), 64 Stat. 1273 (1950), *formerly*, Ch. 858, §204(b), 49 Stat. 1987 (1936).

[47] Reorganization Plan No. 7, 46 U.S.C. § 114(b) (1970), *formerly*, § 104(3), 64 Stat. 1273 (1950).

the retaliatory powers delegated to the Commission, it is necessary to closely examine section 19(1)(b) [section 19].

The Commission is authorized to make rules and regulations affecting shipping in the foreign trade "in order to adjust or meet" general or special conditions. Conditions can be adjusted or met by: (1) achieving redress by elimination of the conditions; or, (2) balancing the detriments by creating situations which nullify or neutralize the conditions. The creation of new conditions indirectly acts to deter similar actions by the same or different states. Clearly, Congress did not intend section 19 to be used to secure compensation for damages done to the United States because of the policies or practices of another state. The Commission does not have the authority under section 19(1)(b) to order the seizure of a foreign flag vessel to compensate for damages caused by discrimination.[48] Nor was it the intent for section 19 to be used to punish acts which the Commission would regard as evil or immoral. Regulations under section 19 may therefore be issued to achieve redress or to balance detriments.

The power to adjust or meet conditions also entails broad discretion as to the choice of the kinds of retaliation which may be used. The Commission is not limited to the use of the technical retaliation—the return of like-kind.[49] It is the effect of the retaliation which is limited by section 19 and not the vehicle by which it is accomplished. That is not to say, however, that the Commission is not constrained in the choice of acts which it may use for the purpose of retaliation. Since section 19 is a delegation of the Congressional power to regulate foreign commerce, any action taken by the Commission under section 19 must be consistent with the power to regulate commerce. For instance, the Commission could not order the seizure of a vessel since such an action would be beyond the power to regulate commerce, but it could prohibit the discarge or picking up of any cargo by a foreign vessel in a U.S. port.[50]

The standard of "adjusting or meeting" general or specific conditions imposed by section 19 also conforms with the requirement of international law that reprisals be proportionate to the wrongful acts to which they respond.[51] Proportionality is easily met where the retaliation is of a like-kind since no one can complain of being treated in the same manner as others.[52] The determination of proportionality does become more difficult, however, when the retaliation is not of like-kind.[53] Under international law, there is no way of ascertaining the excessive-

[48] The powers of reprisal are limited to the delegation of power for the regulation of foreign commerce. 46 U.S.C. § 876 (1970).

[49] *See* text accompanying note 16, *supra*.

[50] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 82 (1824).

[51] *See* text accompanying note 3, *supra*.

[52] *See* text accompanying note 32, *supra*.

[53] 1 G. SCHWARZENBERGER, *supra* note 24, at 173.

ness of a reprisal short of a special arbitration[54] or a special procedure such as set forth in Article XXIII of GATT.[55] If one nation believes another nation's reprisal is excessive, their remedy is to make a reprisal to that portion of the other country's reprisal which is considered to be excessive. This type of procedure creates the possibility of escalation.

The standards imposed upon the Commission by section 19 with regard to retorsions are more stringent than the international standards. Under international law, there is no requirement that retorsions be proportional since the retorsion is a legal act. However, section 19 requires that both retorsions and reprisals be proportionate.

A further requirement of section 19 is that the conditions be "unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, . . ."[56] Therefore, before regulations to achieve redress or balance grievances under section 19 may be issued, a finding must be made that unfavorable conditions do exist.[57] Regulations may not be issued based upon speculation, probability, or in anticipation of conditions unfavorable to shipping in the foreign trade. An understanding of section 19 therefore requires an understanding of what is meant by "shipping."

In common usage, "shipping" would refer to the transportation of goods by many different means. But, in the context of the Merchant Marine Act (1920), "shipping" must clearly refer to transportation by ocean-going vessels. Unlike the Shipping Act of 1916, the application of section 19 is not limited to regular liner service or service by a conference, but also includes service by vessels known as tramps.[58] The term "shipping" encompasses more than vessels since it refers to the whole transportation service performed by the merchant marine. The interests of the United States are not limited to the operation of U. S. flag vessels but extend to the efficiency, availability, economy, and reliability of the transportation of U. S. import and export commerce by the whole merchant marine industry. While the protection of the equality of opportunity of U. S. flag vessels to fairly compete is a primary function of section 19, it is not its only function.

For example, if a U. S. exporting industry relies on a specialized service offered only by vessels owned and operated by the citizens of a foreign country, would not the actions of a foreign government which would eliminate or reduce those services be detrimental to shipping? In such a situation, the effect upon the transportation service, and not

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[54] A procedure as was agreed to in the Nauliaa Case, *supra* note 30.

[55] *See*, Hudec, *Retaliation Against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461 (1975).

[56] 46 U.S.C. §876 (1970).

[57] Grace Line, 7 F.M.C. 432 (1962).

[58] *Section 19 Investigation*, 1 U.S. Ship. Bd. Bur. 470, 498 (1935).

the flag of the vessel, is the determining factor. Conditions affecting shipping should be defined as conditions which affect: (1) U. S. flag vessels; (2) vessels calling at United States ports; or, (3) vessels used for the transportation of commerce of the United States.[59]

"Foreign trade" is also a term which needs to be defined in the context of section 19. The statute indicates its meaning by referring to "foreign trade, whether in any particular trade, or upon any particular route or in commerce generally."[60] Thus, it may be inferred that "foreign trade," as used in section 19, has a more expansive meaning than "foreign trade" as defined by the Shipping Act of 1916 which limits use of the term to transportation directly between ports in the United States and ports in foreign countries.[61]

Commerce of the United States moves not only between U. S. and foreign countries but also among foreign countries. Therefore, the application of section 19 must also extend to transportation between foreign ports. Under this application, shipping in foreign trade would be properly defined as all shipping which is not in interstate or intrastate commerce. Making commerce between foreign ports subject to the regulatory scheme of section 19 is consistent with the scope of section 26 of the Shipping Act of 1916 which expressly covers transportation of goods in U. S. vessels between foreign countries.[62]

The conditions which may be adjusted or met are conditions which "arise out of or result from foreign laws, rules, or regulations or from competitive methods or practice employed by owners, operators, agents or masters of vessels of a foreign country."[63] Fortunately, regulations have never been promulgated to adjust or meet conditions arising out of or resulting from foreign laws. Only rarely have such regulations even been proposed.

The first regulations were not proposed until 1959. At that time, the Republic of Ecuador began to levy a consular fee equal to 8½ per cent of the f.o.b. value of goods imported on Ecuadorian national lines or on lines associated with Ecuadorian national lines. In contrast, a 9½ per cent consular fee was levied on goods shipped on lines which were neither Ecuadorian nor associated with Ecuadorian lines.[64] Regulations were proposed by the Federal Maritime Board which would have levied an equalizing charge of one per cent on goods carried on the Ecuadorian

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[59] *See* R. DE KERCHOVE, INTERNATIONAL MARITIME DIRECTORY (2d ed. 1961).

[60] 46 U.S.C. § 876 (1970).

[61] Section 1 of the Shipping Act, 1916, defines shipping in the foreign commerce as " . . . between the United States or any of its Districts, Territories, or possessions and a foreign country . . ." 46 U.S.C. § 801 (1970).

[62] 46 U.S.C. § 825 (1970). *See* text accompanying note 38, *supra*.

[63] 46 U.S.C. § 876 (1970).

[64] 24 Fed. Reg. 5422 (1959).

lines or on carriers associated with Ecuadorian lines.[65] But the regulations were never adopted because the consular fees were equalized before the regulations became effective.

In 1961, the staff of the Federal Maritime Board prepared regulations to counteract discriminatory practices of the government of Chile. Decrees had been passed which reserved to the national flag vessels of Chile "50 per cent of the maritime transportation of cargo, both import and export, between Chile and the countries served."[66] A ten per cent penalty of the c.i.f. value of the cargo shipped on non-Chilean vessels or non-Chilean associated vessels was used to carry out the decrees. The staff countered by preparing an offsetting regulation which would have imposed an equalizing charge of ten per cent of the c.i.f. value of cargoes shipped on Chilean vessels or on vessels associated with Chilean lines.[67] The regulations prepared by the staff were forwarded to the Department of State so that the Government of Chile could be informed of the type of countervailing regulations the Federal Maritime Board might promulgate. However, a compromise between U. S. and Chilean carriers negated the discriminatory effects of the Chilean Decrees before the Federal Maritime Board acted on the regulations.

In 1961, the Federal Maritime Board also proposed the issuance of regulations which would have adjusted or met conditions created by the laws of the government of Venezuela. Decrees provided for "total or partial exoneration of import duties when transported on the Venezuelan national lines or line associated therewith.[68] A countervailing regulation would have imposed an equalizing charge of fifty per cent of the revenue accrued by the Venezuelan lines or the Venezuelan associated lines in excess of their relative percentage of the trade as determined by a base period.[69] Again, the regulation was not adopted because a compromise was reached by U. S. carriers which eliminated the discriminatory effect of the Venezuelan law.

In 1963, the Federal Maritime Commission proposed regulations to countervail conditions created by law of the government of Uruguay.[70] Preferences had been established for goods shipped on Uruguayan national vessels by a decree dated June 13, 1963, which provided:

> (a) Articles, merchandise, products and goods imported in national flag dry cargo ships shall be exonerated from 50% of the surcharge established by Article I of the Decree dated April 14, 1963. (This surcharge amounts to 20% C.I.F. value.)

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[65] *Id.*

[66] Unpublished draft regulations of the Federal Maritime Board.

[67] *Id.*

[68] Alcoa Steamship Co., 7 F.M.C. 345, 376 (1962).

[69] *Id.*

[70] 29 Fed. Reg. 16195 (1964).

> (b) Articles, merchandise, products and goods not subject to surcharge and included within the provisions of Article V of Law 12670 of December 17, 1959, shall be exempted from the 6% tax on transfer of funds abroad established by Article VI of Law 11924 of March 27, 1953, when they are imported in national flag dry cargo ships.[71]

In order to adjust or meet the conditions imposed by the laws of the government of Uruguay, the Federal Maritime Commission passed a regulation which stated:

> the owner or operator of each favored vessel carrying exports between the United States and Uruguary shall be subject, in so far as goods covered by Article I of the Decree of April 14, 1963 are concerned, to an equalizing charge of 10% of the c.i.f. value of all such cargoes covered. On the cargoes which are covered by the provisions of Article V of Law 12670 of December 17, 1959, an equalizing charge of 6% of the c.i.f. value shall be assessed . . . .[72]

But while the Federal Maritime Commission was in the process of issuing these regulations, the government of Uruguary increased the surcharge from 20 to 30 per cent.[73] The Federal Maritime Commission countered by increasing the equalizing charge from 10 to 15 per cent of the c.i.f. value on goods covered by the new Uruguayan decree. These regulations were to go into effect on January 4, 1965.[75] However, on January 4, 1965, the Commission suspended the effective date of those regulations because the government of Uruguay communicated that it was submitting a proposal to its Parliament for a new merchant marine law designed to promote and support their merchant marine fleet without reliance on measures which discriminated against United States vessels.[76]

It is interesting to note that all of these cases involved laws which directly affected shippers rather than carriers. By making it cheaper to transport goods on national lines because of lower import, excise, surcharge, or even income taxes, cargo can be artificially diverted to national flag carriers. A proliferation of these inventive diversions prompted the Federal Maritime Commission to put foreign governments on notice that laws which:

> (a) Impose upon vessels in the foreign trade of the United States fees, charges, requirements, or restrictions different from those imposed on other vessels competing in the trade, or which preclude or tend to preclude vessels in the foreign trade of the United States from competing in the trade on the same basis as any other vessel;

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[71] *Id.*

[72] *Id.*

[73] 29 Fed. Reg. 17121 (1964).

[74] *Id.*

[75] *Id.*

[76] 30 Fed. Reg. 35 (1965).

> (b) Reserve substantial cargoes to the national flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in the foreign trade of the United States;
>
> (c) Are otherwise unfavorable to shipping in the foreign trade of the United States;
>
> (d) Are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors and which cannot be justified under generally-accepted international agreements or practices and which operate to the detriment of the foreign commerce or the public interest of the United States;[77]

are unfavorable to shipping in the foreign trade of the United States.

Section 19 applies to conditions other than those resulting from foreign laws. Conditions which arise out of or result from "competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country;"[78] may also be countervailed. This aspect of section 19 has been used only to countervail two kinds of conditions. In a *Section 19 Investigation,* the Shipping Board found,

> the following practices are hereby specifically condemned as unfair and detrimental to the commerce of the United States and the development of an adequate merchant marine:
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> 1. The solicitation or procurement of freight by offers to underquote any rate which another carrier or carriers may quote.
>
> 2. The use of rate cutting as a club to compel other carrier to adopt pooling agreements, rate differentials, spacing of sailing agreement or other measures.[79]

These findings were followed with regard to the underquoting of rates in the case of *Cargo to Adriatic, Black Sea, and Levant Ports.*[80] They were also followed in the case of *Rates, Charges, and Practices of Yamashita Kisen Kabushiki Kaisha and Syosen Kabwsiki Kaisya* involving a foreign carrier quoting rates based on abnormal factors which made them differentially lower than those of other carriers in the trade.[81] However, there may be some doubt as to the current applicability of these holdings.

In 1935, when the *Section 19 Investigation* was reported, carriers were not required to publish or post their rates. Rates on a commodity could be changed by the minute. A non-conference carrier could always maintain lower rates than a conference carrier by simply telling a shipper that he would create a new rate at a certain percentage lower than any rate that the conference carrier would quote.[82] Not only did this practice

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[77] 46 C.F.R. § 506.3 (1975).

[78] 46 U.S.C. § 876 (1970).

[79] 1 U.S. Ship. Bd. Bur. 470, 498 (1935).

[80] 2 U.S. Mar. Comm. 342 (1940).

[81] 2 U.S. Mar. Comm. 14 (1939).

[82] 1 U.S. Ship. Bd. Bur. 470, 475 (1935).

make it difficult for the conference carrier to compete on the basis of rates because they could not find out what the competitor's rates were, but also made it too hard for the conference carrier to meet the non-conference rates because of the differential. Consequently, the Shipping Board proposed rules and regulations to "require complete rate publicity in a manner that will afford equal opportunity for all shippers to avail themselves of such rates and full opportunity to competing carriers to meet such rates . . ."[83]

Some of the stigma which the Shipping Board attached to differential rates was removed by the Federal Maritime Board when it held that the practice of citing rates proportionately lower than conference rates was not illegal *per se.*[84] Furthermore, the conditions which made differentials so pernicious were removed by amendments to section 18 of the Shipping Act of 1916.[85] The amendments prohibit common carriers by water in the foreign commerce of the United States from charging or receiving a greater, less, or different rate of compensation for the transportation of property than specified in their tariffs that must be filed with the Commission in order to be given effect.[86] Moreover, the grant of rule-making authority to adjust or meet conditions created by foreign shipowners and operators appears to be out of place in this section on retaliatory powers.

Perhaps it would be best to interpret this grant of rule-making power against foreign shipowners and operators as acts which take place outside the legislative jurisdiction of the United States. For example, the acts of a foreign carrier to shut a U.S. carrier out of a foreign - to - foreign trade route would not be within the legislative competence of the United States. But the power to control transit of those foreign carriers in and out of the territorial waters of the United States could be used to obtain fair treatment for U.S. carriers. This interpretation would make the scope of section 19(1)(b) strictly one of retaliation and would leave the acts of foreign shipowners and operators which are otherwise within the legislative competence of the United States subject only to the substantive provisions of the Shipping Act of 1916[87] and other relevant statues.

The final qualification on the issuance of rules or regulations under section 19 is that they must not be "in conflict with law."[88] The law of the United States comes from many sources including international law.[89] Under the law of nations, remonstrance, refusal, and proportionality

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[83] *Id.* at 498.

[84] Anglo Canadian Shipping Co. v. Mitsui Steamship Co., 4 F.M.B. 535, 542 (1955).

[85] 46 U.S.C. § 817(b)(1970), *amending* 46 U.S.C. § 817 (1964).

[86] 46 U.S.C. § 817(b) (1970).

[87] 46 U.S.C. § 801 (1970).

[88] 46 U.S.C. § 876 (1970).

[89] The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815).

are necessary components of reprisals. But there are no such restraints on the use of retorsions.[90] Section 26 of the Shipping Act of 1916,[91] the predecessor to section 19, requires remonstrance and refusal to precede a recommendation by the President for Congress to take action.[92] Congress, if it chooses to enact a reprisal, is constrained to act proportionally only in so far as it desires to adhere to international law. In contrast, regulations promulgated under section 19 must be enacted for the purpose of adjusting or meeting conditions unfavorable to shipping. Therefore, any retorsion or reprisal issued pursuant thereto must be proportional. However, there is no express requirement that remonstrance and refusal precede promulgation of any regulations under section 19. But since all regulations issued under section 19 must be consistent with law and since international law is considered to be a part of the law of the United States, any reprisal enacted under section 19 must be preceded by both remonstrance and refusal.

On the other hand, there is no requirement under international law that retorsions be preceded by either remonstrance or refusal. Nevertheless, the Commission has made it a policy to notify the Secretary of State when it appears that conditions unfavorable to shipping in the foreign trade may exist.[93] In certain circumstances, the Commission may also ask the Secretary of State to seek a diplomatic solution by a specified date.[94] Regulations which amount to retorsions will, therefore, always be preceded by some form of notice to the foreign country through the Secretary of State. The Commission is not required to wait for diplomatic solution or formal refusal before issuing a retorsion.

The "not in conflict with law" requirement also raises the question of whether the issuance of a reprisal is thereby prohibited. An act of reprisal, which ordinarily would be in violation of international law, may be internationally lawful when in retaliation for a violation of international law.[95] Therefore, regulations otherwise properly enacted by the Commission under section 19 are not "in conflict with law" because they constitute acts of reprisal.

The procedures set up by the Commission for the issuance of regulations under section 19 are fairly straightforward.[96] The procedure may be initiated by petition or a motion by the Commission.[97] If initiated by petition, relevant statistics and information must be provided show-

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[90] *See* text accompanying note 10, *supra*.

[91] 46 U.S.C. § 825 (1970).

[92] *See* text accompanying note 39, *supra*.

[93] 46 C.F.R. § 506.8 (1975).

[94] *Id.*

[95] *See* text accompanying note 15, *supra*.

[96] 46 C.F.R. § 506 (1975).

[97] 46 C.F.R. § 506.5 (1975).

ing the effects of the complained law or practice.[98] The petitioner must also request his remedy in the form of a proposed regulation.[99] If it appears that conditions unfavorable to shippers may exist, the Secretary of State is notified.[100] The Commission then must determine if conditions unfavorable to shipping exist. If they do, appropriate countervailing regulations are considered. Depending upon the circumstances, these determinations may be before or after notice and hearing.[101] In situations where there are serious dislocations of trade caused by discriminatory laws, the Commission must be able to promulgate countervailing regulations quickly before extensive damage to carriers or permanent diversions of carriage occur. In less urgent situations, interested parties should be granted notice and hearing.

The most difficult decision the Commission must make in issuing regulations under section 19 is the policy decision concerning whether countervailing regulations should be promulgated. Even if conditions unfavorable to the foreign trade are found to exist, the Commission has the discretion to decide not to issue regulations.[102] This decision is difficult because most of the laws which create conditions unfavorable to shipping are not enacted with the intent of harming the vessels or the commerce of the United States but are intended to foster the growth of foreign merchant marines.

The United States finds its conduct in this regard not much different from other countries. The United States has determined that there are benefits from the maintenance of a viable merchant marine which must be considered against the benefits of competition in a free trade international economy. For instance, the United States supplements the competitive capacity of its own merchant marine by grants of construction differential subsidies[103] and operating differential subsidies.[104] A foreign trading partner would be perfectly justified, if not engaging in the same or similar conduct, in imposing an offsetting fee on U.S. vessels receiving such subsidies. The lack of any countervailing fees against U.S. vessels and the weak posture of the U.S. merchant marine attest to the fact that differential subsidies do not actually divert the carriage of trade to a significant extent. The subsidies merely enable the United States to maintain an acceptable minimum level of participation in the carriage.

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[98] 46 C.F.R. § 506.6 (1975).

[99] 46 C.F.R. § 506.6(e) (1975).

[100] 46 C.F.R. § 506.3 (1975).

[101] 46 C.F.R. § 506.10 (1975).

[102] *c.f.* Alcoa Steamship Co. v. Federal Maritime Commission, 321 F.2d 756, 761 (D.C. Cir. 1963).

[103] Merchant Marine Act of 1936, 46 U.S.C. § 1151 (1970).

[104] 46 U.S.C. § 1171 (1970).

When the Federal Maritime Commission is faced with a foreign law which creates conditions unfavorable to shipping, it must consider that both the United States and its trading partners desire the maximum efficiency, economy, quality, and availability of service along with maximum participation in the carriage. Many countries, particularly the developing ones, consider the degree of participation susceptible to formulas. A forty per cent participation of the trade has been put forward as the minimum to which every country is entitled.[105] Many developing countries, as well as the United States, have rejected this approach as too rigid and as lacking in consideration of other important benefits derived from competition, such as efficiency, economy, and quality of service.[106] At present, there is no international consensus as to the degree of participation in carriage to which a country is entitled in its foreign trade, except to the extent that each country is due a significant percentage. Until a consensus is reached, the Federal Maritime Commission must consider that each country is entitled to a significant share of the carriage of its trade as long as efficiency, economy, quality, and availability of service are not unduly harmed. Therefore, a set solution for all cases of direct and indirect trade diversions is not possible because all the relevant factors in each case have to be considered.

If the retaliatory powers of section 19 are to be implemented successfully, the powers of retaliation cannot be used to frustrate absolutely the development of merchant marines in foreign countries. The fundamental purpose of retaliation is to deter the abuse of the right of a foreign country to control its foreign commerce. If retaliation in the form of controls on the foreign commerce of the United States becomes abusive, then the retaliation will become counterproductive as a deterrent. Certainly other nations would regard the frequent use of section 19 to frustrate all efforts to develop their domestic merchant marine fleets as an abuse of the power by the United States. This would be viewed as unacceptable interference with foreign commerce of other nations.

Fortunately, the Federal Maritime Commission fully appreciates these considerations. The absence of any final enactment of regulations under section 19 attests to the prudent employment of section 19. That is not to say that the retaliatory powers of section 19 are not necessary. Quite to the contrary, the experiences of the Commission with the governments of Ecuador, Chile, Venezuela and Uruguay demonstrate that the ability to retaliate is necessary for the resolution of some international trade conflicts.

Generally, the power of retaliation appears necessary as a sovereign right in international law for the protection of international commerce,

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[105] *See* Comment, *The Liner Conference Converntion: Launching an International Regulatory Regime*, 6 L & POL. INT'L BUS. (1974).

[106] *Id.* at 533.

particularly in international shipping, to lessen the influences of nationalism. The successful use of power to retaliate depends upon the adherence to the principles of remonstrance, refusal and proportionality, tempered by a sophisticated appreciation of the commerce involved and the needs and aspirations of the countries concerned.