

# FOREIGN COMMERCE REGULATION UNDER THE INTERSTATE COMMERCE ACT: AN ANALYSIS OF INTERMODAL COORDINATION OF INTERNATIONAL TRANSPORTATION IN THE UNITED STATES\*

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### I. INTRODUCTION

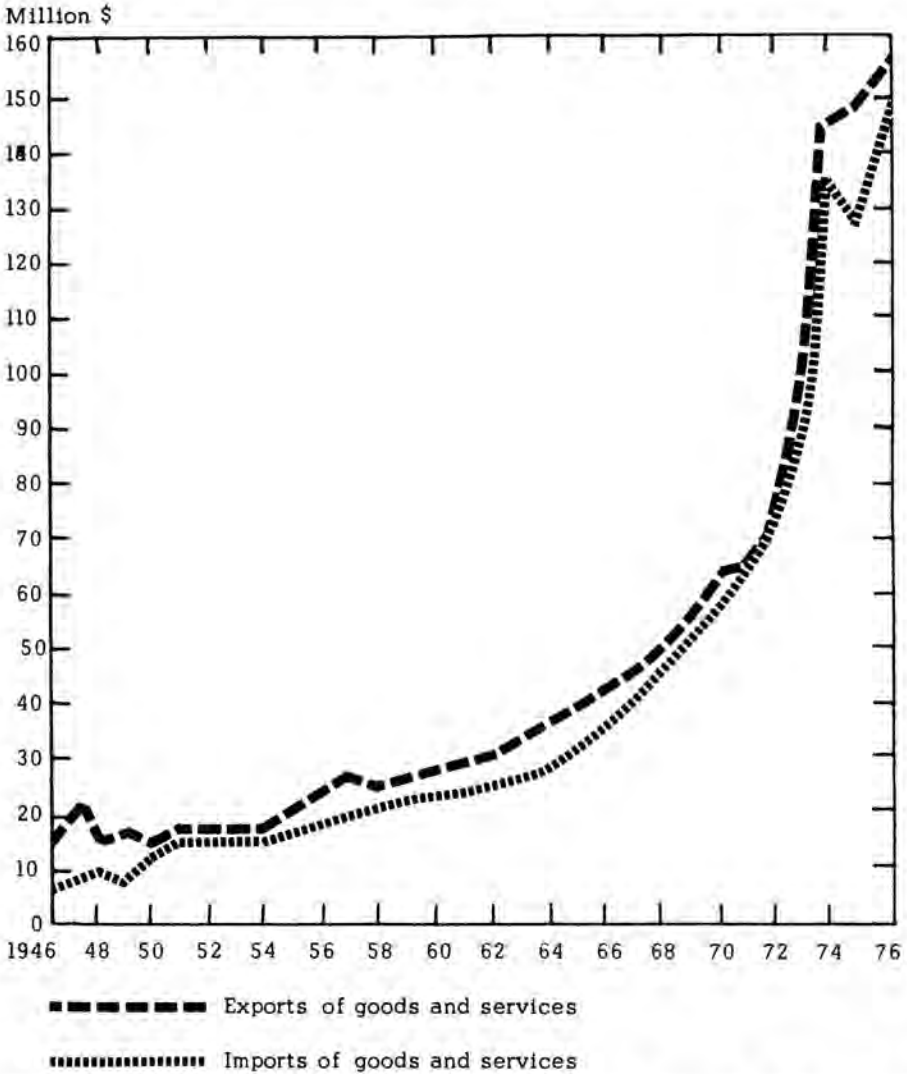
It has traditionally been the policy of the United States to achieve consummation of formal and informal bilateral and multi-lateral agreements designed to minimize the barriers which obstruct the free flow of commerce between nations, and to minimize domestic restraints on transnational commercial activity. Indeed, the United States has assumed a position of world leadership in its efforts to reduce or eliminate tariff barriers, trade inhibitions, and investment restrictions, enabling goods, technology, services, and capital to move freely between states in the international arena.<sup>1</sup> As a part of this effort, the United States has sought to reduce, to the extent practicable, domestic impediments in the field of transportation so as to optimize the unobstructed transit of commodities between inland origins and overseas destinations and between overseas origins and inland destinations. As a result of these efforts, we are witnessing a spectacular increase in the importation and exportation of goods. Chart 1 is demonstrative of the enormous contemporary growth in that sector of international commercial activity in which the United States participates.

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1. The foreign policy of the United States on this issue has been based upon the assumption that world output would be maintained at its optimum level if the movement of capital was unimpeded or uninhibited. Dempsey, *Legal and Economic Incentives for Foreign Direct Investment in the Southeastern United States*, 9 VAND. J. TRANSNAT'L L. 247, 252-53 (1976).

CHART 1

United States Imports and Exports, 1946-1976



Sources: Foreign Transactions, 56 Survey of Current Bus. 68-69 (January 1976),  
Foreign Transactions, 56 Survey of Current Bus. 43 (July 1976).

These overwhelming increases in foreign trade have been brought about, in part, by a diminution in transport inhibitions. In a circular fashion, the present reexamination of the existing legal framework in the field of transportation is, to a certain extent, attributable to these massive increases in foreign commercial activity and the concomitant demands for an efficient and economical transportation network which have inevitably arisen therefrom.<sup>2</sup> It is this contemporary evaluation of traditional legal and technological concepts in the field of international transportation to which this article is addressed.

The economic regulation of the transportation of commodities moving in foreign commerce is, in the United States, divided among three separate and independent regulatory agencies. This analysis shall endeavor to explore the legal developments which have in recent years appeared in the arena of international transportation. More specifically, it shall focus on such regulation as promulgated in the Interstate Commerce Act (ICA)<sup>3</sup> and, concomitantly, the interrelationship of regulatory responsibilities between the separate administrative bodies holding jurisdiction over international transportation and their efforts to stimulate intermodal cooperation.

## II. COORDINATION OF INTERMODAL TRANSPORTATION: A NATIONAL POLICY OBJECTIVE

### A. *The Tripartite Division of Regulatory Responsibilities: ICC, CAB, & FMC*

Initially, it should be emphasized that there is a tripartite division of regulatory responsibility over foreign commerce transportation in this nation among three separate Federal administrative agencies: the Interstate Commerce Commission (ICC),<sup>4</sup> the Civil

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2. The Uniform Commercial Code has also implicitly recognized the contemporary increase in intermodal transportation. For example, the U.C.C. provides that a valid C.I.F. contract may be consummated which involves an intermodal land-sea movement under a through bill of lading, and that shipment from the specified inland point pursuant thereto is timely despite an inadvertently delayed loading aboard the ocean vessel. U.C.C. § 2-320, Comment 13.

3. The Interstate Commerce Act (ICA) is divided into five parts, four of which correspond to different modes of transportation subject to ICC regulation: part I concerns railroads, ICA §§ 1-27, 49 U.S.C. §§ 1-27 (1970); part II deals with motor carriers, ICA §§ 201-228, 49 U.S.C. §§ 301-327 (1970); part III involves domestic water carriers, ICA §§ 301-325, 49 U.S.C. §§ 901-923 (1970); and part IV embraces freight forwarders, ICA §§ 401-422, 49 U.S.C. §§ 1001-1022 (1970).

4. The Interstate Commerce Commission (ICC) regulates domestic common and contract carriers pursuant to the Interstate Commerce Act, 49 U.S.C. §§ 1-27, 301-327, 901-923,

Aeronautics Board (CAB),<sup>5</sup> and the Federal Maritime Commission (FMC).<sup>6</sup> The ICC is by far the largest of the three, regulating the surface transportation of over 18,000 railroads, motor carriers, pipelines, domestic water carriers, brokers, and freight forwarders. The CAB has jurisdiction over the transportation of direct air carriers (airlines) and indirect air carriers (e.g., air freight forwarders) operating within, to, and from the United States. Over eighty domestic air carriers are subject to the jurisdiction of the CAB. The FMC regulates all United States flag and foreign flag carriers operating in foreign commerce, and United States carriers serving Alaska and Hawaii. Almost forty domestic maritime carriers are subject to regulation by the FMC.<sup>7</sup> The agency holds jurisdiction over ocean transportation, in domestic-offshore and foreign commerce, by vessel operators, non-vessel operators (NVOs), and independent ocean freight forwarders.<sup>8</sup>

### B. *The National Transportation Policy*

In 1887 Congress promulgated the Act to Regulate Commerce,<sup>9</sup> creating the ICC and affording to it the primary responsibility to prevent and correct rate discriminations by railroads. It was not until the Transportation Act of 1920,<sup>10</sup> however, that Congress articulated a specific declaration of policy for the agency. That Act requires the ICC "to promote, encourage and develop water

and 1001-1022 (1970).

5. The Civil Aeronautics Board (CAB) regulates air carriers under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970). The regulation of air transportation by the CAB was instituted in 1938 under the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. For an excellent analysis of the historical development of the movement to establish federal regulation of the industry, see Comment, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187, 188-201 (1976). See also Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1072-73 (1962).

6. The Federal Maritime Commission (FMC) regulates ocean carriers pursuant to two statutes: the Shipping Act, 1916, 46 U.S.C. §§ 801-842 (1970), and the Intercoastal Shipping Act, 1933, 46 U.S.C. §§ 843-848 (1970).

7. Davis & Holder, *Does the United States Have a Cohesive National Transportation Policy?—An Analysis*, 41 I.C.C. PRAC. J. 332, 338 (1974).

8. 46 U.S.C. §§ 801-842 (1970); 46 U.S.C. §§ 843-848 (1970).

9. Ch. 104, 24 Stat. 379 (1887), as amended by 49 U.S.C. §§ 1-27 (1970) (now known as part I of the ICA). As originally enacted, it consisted of only nine printed pages. During the intervening years, Congress added over 200 amendments so that the ICA and its index now consist of over 700 printed pages. Moreover, an additional 120 printed pages of regulatory responsibilities were enacted in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.

10. Ch. 91, 41 Stat. 456.

transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."<sup>11</sup> Since 1920, the scope of interstate and foreign commerce subject to the jurisdiction of the ICC has expanded dramatically. For example, the Motor Carrier Act of 1935<sup>12</sup> brought for-hire common and contract motor carriers within the ambit of ICC regulation. This legislation today comprises a massive portion of the ICA (i.e., all of part II) and a substantial portion of the Commission's decisionmaking responsibilities. The Transportation Act of 1940<sup>13</sup> brought interstate water carriers within the Commission's jurisdiction. Two years later, freight forwarders were brought within the regulatory scheme.<sup>14</sup>

It was in the 1940 legislation that Congress expressed its most significant declaration of the national transportation policy. It directs that the ICC shall

provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, *coordinating*, and preserving a national transportation system by water, highway, and rail, *as well as other means*, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.<sup>15</sup>

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11. Ch. 91, § 500, 41 Stat. 499 (current version at 49 U.S.C. § 142 (1970)).

12. Ch. 498, 49 Stat. 543 (current version at 49 U.S.C. §§ 301-327 (1970)).

13. Ch. 722, 54 Stat. 898 (current version at 49 U.S.C. §§ 901-923 (1970)).

14. Part IV of the Interstate Commerce Act, ch. 318, 56 Stat. 284 (1942) (current version at 49 U.S.C. §§ 1001-1022 (1970)). Not only has the enormous regulatory responsibility conferred by Congress upon the ICC grown dramatically since 1920, but this nation's transportation requirements have also become increasingly sophisticated and complex. The ICC today regulates over 18,000 transportation entities engaged in interstate and foreign commerce. See I.C.C. 89TH ANN. REP. 120 (1975).

15. National Transportation Policy, 49 U.S.C. *preceding* § 1 (1970) (emphasis added). The need for coordination of the various transport agencies has long been recognized in this nation. As early as 1933, the federal government took concerted action to effectuate coordination of the several transport modes. Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 GEO. WASH. L. REV. 289, 384-90 (1937).

This expression of policy delegates to the ICC the responsibility for coordinating all modes of transportation, including those not subject to its regulation.

In contrast, however, the Federal Aviation Act of 1958<sup>16</sup> confines its policy declaration to air transportation and directs the CAB to coordinate transportation between air carriers. More specifically, it requires:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.<sup>17</sup>

Similarly, the Merchant Marine Act of 1936<sup>18</sup> emphasizes that the FMC shall concern itself with but a single mode of transportation:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of

16. 49 U.S.C. §§ 1301-1542 (1970).

17. *Id.* § 1302.

18. 46 U.S.C. §§ 1101-1294 (1970).

the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine, and (e) supplemented by efficient facilities for shipbuilding and ship repair.<sup>19</sup>

As can be seen, the ICC has a unique responsibility to foster the coordination of a national transportation system by all modes. Of the several regulatory agencies, the ICC alone is charged with the duty to consider all transportation modes in the exercise of its regulatory functions, and not only those within its jurisdictional ambit. Thus, the "development of a truly coordinated transportation system must, within the terms of [its] statutory mandate, take precedence over the more narrow interests of those carriers directly subject to the Interstate Commerce Act."<sup>20</sup> Moreover, the ICC is charged, under the national transportation policy, with the responsibility to *promote*, as well as to preserve and to protect, the vitality of all modes of transportation. The ICC has recognized that "[t]he shipping public must have available not only a ready choice of all modes of carriage, but also a workable flexibility which will enable them to utilize to the fullest the inherent advantages of each mode in coordinated movements of single shipments."<sup>21</sup> Thus, for example, under section 15(a)(3) of the ICA,<sup>22</sup> the ICC is subject to a unique statutory directive to protect competition among the different modes of transportation subject to its regulation. It may maintain the rates of one carrier to protect the traffic of another if necessary to protect an "inherent advantage" of the latter.<sup>23</sup>

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19. *Id.* § 1101.

20. *Emery Air Freight Corp.*, 339 I.C.C. 17, 35 (1971) (freight forwarder application).

21. *Investigation into Limitations of Carrier Service on C.O.D. and Freight-Collect Shipments*, 343 I.C.C. 692, 729 (1973).

22. 49 U.S.C. § 15a(3) (1970).

23. *Baumol & Walton, Full Costing, Competition and Regulatory Practice*, 82 *YALE L.J.* 639, 653 (1973). See generally *State Corp. Comm'n v. United States*, 184 F. Supp. 691 (D. Kan. 1959); *United States v. Garner*, 134 F. Supp. 16 (E.D.N.C. 1955); *City of Harrisonburg v. Chesapeake & O. Ry.*, 34 F. Supp. 640 (W.D. Va. 1940); *Anchor Coal Co. v. United States*, 25 F.2d 462 (S.D.W. Va. 1928); *Akron, C. & Y. Ry. v. United States*, 22 F.2d 199 (W.D.N.Y. 1927); *Jefferson Island Salt Mining Co. v. United States*, 6 F.2d 315 (N.D. Ohio 1925); *Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 3), 75 *HARV. L. REV.* 1263 (1962); *Rose, Regulation of Rates and Intermodal Transport Competition*, 33 *I.C.C. PRAC. J.* 11 (1965).

Under its power to establish minimum rates, the ICC may disapprove noncompensatory rates so as to avoid rate wars or destructive competition. *Missouri Pac. R.R. v. United States*,



Within this multiagency network, the emergence of the container revolution and the growth of foreign trade has created a need for efficiency and cooperation among individual modes, and for close cooperation among the federal regulatory bodies.<sup>24</sup>

### C. *The Container Revolution*

Containerization, which has undergone an enormous growth in recent years, represents an expeditious, economical, and efficient means of facilitating intermodal transportation. In its simplest form, it involves the shipment of freight as a unit from origin to ultimate destination in vans or boxes.<sup>25</sup> The typical containerized

203 F. Supp. 629, 635 (E.D. Mo. 1962). However, the ICC is prohibited from nullifying the "inherent advantages" of one mode of transportation by increasing the rates of carriers having such advantages. *Malone Freight Lines, Inc. v. United States*, 143 F. Supp. 913 (N.D. Ala. 1956).

24. Schmelzter & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 205 (1970).

In contrast to its "open door" policy with respect to international investment in most industries, the United States Congress has promulgated legislation specifically designed to prohibit or inhibit foreign investment in the field of transportation. Pursuant to the Jones Act, 1920, 46 U.S.C. §§ 861-889 (1970), the coastal and fresh water shipment of commodities or passengers between points in the United States or its territories must be accomplished in vessels which are constructed and registered in the United States, and which are owned by citizens of the United States. Before a corporation will be permitted to register a ship in the United States, the corporation's principal officer and chairman of the board must be U.S. citizens and 75% of its stock must be held by U.S. citizens. 46 U.S.C. §§ 802, 833a, 888 (1970). Exemptions exist with respect to shipments incidental to the principal business of a foreign-controlled corporation which is engaged in mining or manufacturing within the United States, and with respect to the intercoastal transport of empty containers where the nation of the vessel's registry grants reciprocal privileges to U.S. vessels. 46 U.S.C. § 883 (1970).

Foreign ownership is similarly restricted in the field of air transportation. Thus, a foreign air carrier is prohibited from acquiring control of a company engaged in any phase of aeronautics within the United States unless approval is obtained from the CAB. Ownership of 10% or more of the voting securities gives rise to a presumption of control, and aggregate foreign ownership is limited to 25%. 49 U.S.C. §§ 1301, 1378(f) (1970). A foreign air carrier is generally prohibited from performing domestic air transportation within the United States. 49 U.S.C. §§ 1371, 1401(b), 1508 (1970). Such domestic transportation is limited to domestically registered aircraft. Eligibility to register such aircraft is limited to (a) U.S. citizens, (b) partnerships in which all members are U.S. citizens, or (c) U.S. corporations in which the president and at least two-thirds of the board of directors and other officers are U.S. citizens, and at least 75% of the voting stock is owned by U.S. citizens. THE CONFERENCE BOARD, *FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES* 15 (1974); THE INSTITUTE FOR INTERNATIONAL AND FOREIGN TRADE LAW, GEORGETOWN UNIVERSITY LAW CENTER, *LEGAL ENVIRONMENT FOR DIRECT INVESTMENT IN THE UNITED STATES* 28 (1972). *But see* Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253, 294 (1977); Dempsey, *Legal and Economic Incentives for Foreign Direct Investment in the Southeastern United States*, 9 VAND. J. TRANSNAT'L L. 247, 254-55 (1976).

25. Compare H. MERTINS, *NATIONAL TRANSPORTATION POLICY IN TRANSITION* 162 (1972)

export movement, for example, might involve (a) the loading of widgets by their manufacturer into a single van-type container, (b) the movement of the container by motor carrier from the manufacturer's inland domicile to the port facilities of Savannah, (c) the placement at Savannah of the container aboard a maritime vessel destined for Hamburg, (d) the movement at Hamburg of the container from the maritime vessel to a rail flatcar destined for Stuttgart, and (e) the unloading at Stuttgart of the container's contents by the consignee. Had the widgets in the above example not moved via container, their transport would have necessitated individual loading and unloading at each of the aforementioned points, thereby increasing labor costs, time consumption, and damage and loss claims.<sup>26</sup> Containerized transportation, in contrast, obviates the need for individualized handling of commodities at points other than the ultimate origin and destination. Containerization thereby substantially reduces transit time, handling and export packaging expenditures, and the possibility of damage and pilferage.<sup>27</sup> It permits freight to be loaded at inland origins and remain untouched throughout the journey until the containers arrive at inland destinations. Its utilization promises predictability of overall transportation costs, improved control and coordination of intermodal shipments, and rate reductions.<sup>28</sup>

Although containerization has heretofore had its greatest impact in the maritime industry, it is contemplated that an increasing volume of United States foreign trade will be transported by air. The loading and handling efficiency of containerized shipments is a natural complement to the speed of air transportation. New jumbo jets are capable of handling even the bulky containers, and are therefore able to provide coordinated movements in conjunction with water carriers.<sup>29</sup>

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with Angus, *Legal Implications of "The Container Revolution" in International Carriage of Goods*, 14 MCGILL L.J. 395 (1968).

26. See generally Hearn, *Limitations on Liability of International Carriers*, 13 N.Y.L.F. 522 (1967); Sassoon, *Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons*, 3 J. MAR. L. & COM. 759 (1972); Skulina, *Liability of Carrier for Loss or Damage to International Shipments*, 19 CLEV. ST. L. REV. 146 (1970); Zamora, *Carrier Liability for Damage or Loss to Cargo in International Transport*, 23 AM. J. COMP. L. 391 (1975).

27. See Lerner, *Public Policy in the Ocean Freight Industry*, in PROMOTING COMPETITION IN REGULATED MARKETS 113 (A. Phillips ed. 1975).

28. Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 211 (1970).

29. Lang, *Demand and Supply: The Technology of Transportation*, in THE FUTURE OF AMERICAN TRANSPORTATION 54 (E. Williams ed. 1971).

Containerization has had a profound impact, not only upon the technology of transportation and facilitation of international trade, but also upon the procedures of those governmental entities charged with regulating and coordinating foreign commerce movements. Moreover, its full potential has not yet been realized. It is estimated that eighty percent of all general freight cargo in foreign commerce is containerizable.<sup>30</sup>

With the contemporary growth of trailer-on-flatcar (TOFC) operations,<sup>31</sup> the ICC has acquired some measure of regulatory expertise in the coordination of containerized intermodal shipments. TOFC transportation, more popularly known as "piggyback" service, is a bimodal operation involving the movement of commodities, trailers, or semitrailers of motor carriers subject to part I of the ICA on the flatcars of rail carriers subject to part II.<sup>32</sup> Such transportation combines the expeditious and economical advantages associated with rail transport with the versatility of motor carriage.<sup>33</sup> Section 216(c) of the ICA<sup>34</sup> authorizes the voluntary establishment of just and reasonable through routes and joint rates,<sup>35</sup> charges and classifications between motor and rail carriers, or between motor and water carriers (including FMC regulated ocean carriers transporting commodities between Alaska and Hawaii and the contiguous forty-eight states). The ICC has readily approved such arrangements, and its regulatory efforts have been a substantial con-

30. Note, *Legal and Regulatory Aspects of the Container Revolution*, 57 GEO. L.J. 553, 535-37 (1969).

For a succinct examination of the myriad problems the container revolution and the recently increased utilization of intermodal transportation have posed for the traditional international legal framework and its terminology, see D. SASSOON, 5 BRITISH SHIPPING LAWS 20-21 (2d ed. 1975). See also Sassoon, *Trade Terms and the Container Revolution*, 1 J. MAR. L. & COM. 73, 78-84 (1969).

31. TOFC transportation is not a recently developed form of carriage, but has been in existence since the inception of motor carrier regulation. See, e.g., *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435 (1936).

32. See *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301, 326-27 (1964), *aff'd sub nom. American Trucking Ass'ns v. Atchison T. & S.F. Ry.*, 387 U.S. 397 (1967), *rehearing denied*, 389 U.S. 889 (1967). The initiation of TOFC service constituted, in the opinion of the ICC, probably the most significant recent development in transportation. *Atchison T. & S.F. Ry. v. United States*, 244 F. Supp. 955, 958 (N.D. Ill. 1965).

33. Note, *Coordination of Intermodal Transportation*, 69 COLUM. L. REV. 247, 248 (1969).  
34. 49 U.S.C. § 316(c) (1970).

35. A through or joint rate has been defined as a total combined charge for the entire journey of a shipment from point of origin to the ultimate consignee. Such transportation involves the performance of several carriers, frequently of different modes, and ordinarily constitutes a lesser charge than the sum of the single line rates. *McLean Trucking Co. v. United States*, 346 F. Supp. 349, 351 (M.D.N.C. 1972), *aff'd*, 409 U.S. 1121 (1973).

tribution to the expansion of innovative concepts in surface transportation.<sup>36</sup>

The ICC has frequently acknowledged that containerization is a progressive innovation which facilitates the intermodal coordination of operations and the efficiency and economy of transportation, and should therefore be encouraged.<sup>37</sup> Thus, where a public need exists which cannot adequately be satisfied by existing transportation services, authority has been granted for the transportation of empty containers between port cities and inland points.<sup>38</sup> The grant of authority to transport empty containers along with loaded containers obviates the necessity of deadheading containers in return movements to seaports and maximizes the efficiency and economy of such operations by permitting the free transfer of containers from

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36. *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 341 I.C.C. 246, 254 (1972).

The voluntary nature of the establishment of such joint rates has been emphasized, and the ICC is prohibited from requiring their institution. See *Great Western Packers Express, Inc. v. United States*, 246 F. Supp. 151, 154-55 (D. Colo. 1965). However, once two or more carriers have voluntarily entered into through routes and joint rates and have filed such rates and charges with the ICC, neither carrier may subsequently terminate the routes or cancel the rates without demonstrating that the proposed change would be just and reasonable. *T.I.M.E.—DC, Inc. v. United States*, 352 F. Supp. 1238 (N.D. Tex. 1972).

37. *AAA Transfer, Inc.*, 120 M.C.C. 803, 820 (1974) (extension—cargo containers). See generally *Marine Stevedoring Corp.*, 119 M.C.C. 514, 521 (1974) (common carrier application); *Service Transfer, Inc.*, 117 M.C.C. 506, 514 (1972) (contract carrier application); *Moran Towing & Transp. Co.*, 314 I.C.C. 287, 291 (1961), *rev'd*, 315 I.C.C. 591 (1962).

In *Zirbel Transp., Inc.*, 125 M.C.C. 663, 677 (1976) (extension—containers), the benefits accruing from increased utilization of containerized transportation were set forth with particularity:

[I]t has always been the policy of this Commission to encourage the development of intermodal transportation, and we believe that containerization is a useful, innovative tool in that development. The services proposed in this and other recent applications offer numerous benefits directly to the shipping public. Among these benefits are: a reduction in packaging requirements; increased shipment integrity resulting in a reduction in loss, damage, and pilferage; less handling and warehousing; avoidance of terminal congestion and interchange delays; faster transit times; energy conservation; and more efficient use of equipment. The bottom-line benefit is, of course, less costly transportation of goods for the public at large.

This recognition, that containerization is a progressive and innovative development offering more efficient and economical transportation, has also been articulated in decisions in which authority to transport outbound containerized commodities and inbound empty containers has been denied. Compare *Five Transp. Co.*, 125 M.C.C. 381, 387 (1976) (extension—Savannah, Ga.) with *Moran Towing & Transp. Co.*, 314 I.C.C. 287, 291 (1961) (extension—Great Lakes), *rev'd*, 315 I.C.C. 591 (1962). For an earlier expression of the same concepts see *Iron or Steel, In Containers—Central Territory*, 54 M.C.C. 139, 153 (1952).

38. See, e.g., *Berry Transp., Inc.*, 124 M.C.C. 328 (1976) (extension—containers); *Air-Land Transp., Inc.*, 120 M.C.C. 530 (1974) (common carrier application).

interior breakbulk to stuffing points.<sup>39</sup> The grant of authority in such circumstances frequently has the effect of advancing the development of intermodal maritime-land operations consonant with the Commission's declared policies.

### III. ENTRY CONTROL OF MOTOR CARRIERS

Section 207 of the ICA<sup>40</sup> requires that an applicant seeking motor common carrier authority to transport commodities in interstate or foreign commerce establish that the proposed for-hire operations are required by the present or future public convenience and necessity. In evaluating whether and to what extent this statutory requirement has been satisfied, the ICC has traditionally examined (1) whether the new operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served by existing lines or carriers, and (3) whether it can be served by the applicant without endangering the operations of existing carriers contrary to the public interest.<sup>41</sup> In essence, the issue is whether the advantages to those members of the shipping public which would employ the proposed service outweigh the disadvantages (real or potential) to existing services.<sup>42</sup>

The statutory criteria employed in motor contract carrier proceedings are somewhat different. Section 203(a)(15) of the ICA<sup>43</sup> defines a contract carrier as one which engages in motor transportation under continuing contracts with one or a limited number of

39. Brooks, *The Interstate Commerce Commission and Expanding Opportunities in Foreign Commerce* 7 (May 26, 1976) (unpublished speech delivered at Shipper's Dialogue—Mid-America, in Cleveland, Ohio); see *Daily Express, Inc.*, 123 M.C.C. 343 (1974) (extension—intermodal container traffic).

40. 49 U.S.C. § 307 (1970).

41. *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). Compare *Chandler, Convenience and Necessity: Motor Carrier Licensing by the Interstate Commerce Commission*, 28 OHIO ST. L.J. 379 (1967) and *Hutchinson & Chandler, Evidence in Motor Carrier Application Cases*, 11 VAND. L. REV. 1053 (1958) with Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729 (1977).

42. *All American Bus Lines, Inc.*, 18 M.C.C. 755, 776-77 (1939) (common carrier application). Section 207(a) of the ICA also requires that an applicant seeking authority to operate as a motor common carrier in interstate or foreign commerce must be found fit, willing, and able properly to perform the proposed service, and able to conform to the ICA and to the Commission's rules and regulations promulgated thereunder. Thus, a finding of fitness is a statutory prerequisite to the granting of operating authority and stands on equal footing with, and is unrelated to, the determination of public convenience and necessity. *Associated Transp., Inc.*, 125 M.C.C. 69, 72 (1976) (extension—T.V.A. power plant).

43. 49 U.S.C. § 303(a)(15) (1970).

persons.<sup>44</sup> The statute requires that the service rendered by the carrier fall within one of the two following categories: (a) the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (b) the specialized satisfaction of the distinct requirements of each individual customer. Once these definitional requirements have been met, the ICC considers whether the issuance of contractual authority will be consistent with the public interest and the national transportation policy. Section 209(b) of the ICA<sup>45</sup> requires that, in making this determination, consideration be given to (1) the number of shippers to be served, (2) the nature of the proposed operations, (3) the effect of a grant of the application upon protesting carriers, (4) the effect of a denial of the application upon applicant and the supporting shipper, and (5) the changing character of the shipper's transportation requirements.

#### A. *The Land Bridge Exemption*

Under section 202(a) of the ICA,<sup>46</sup> the ICC has jurisdiction over the transportation of passengers and property by motor carriers engaged in foreign commerce. Foreign commerce is defined by section 203(a)(11) of the ICA, as

commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water, (A) between any place in the United States and any place in a foreign country, or between places in the United States through a foreign country; or (B) between any place in the United States and any

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44. The ICC has not established a fixed and rigid number of shippers beyond which a carrier may not contract. However, except where a high degree of specialization is involved, a contract carrier seeking to expand service to "more than six or eight shippers will be scrutinized with great care" to ensure that its operations have not evolved into those of a motor common carrier. *Umthun Trucking Co.*, 91 M.C.C. 691, 697 (1962) (extension—phosphatic feed supplements). Service to more than six or eight shippers is not, however, precluded under the *Umthun* principle; such service will only be examined with careful scrutiny in order to determine a carrier's compliance with the definition of contract carriage in section 203(a)(15) of the ICA. *Contractors Cargo Co.*, 105 M.C.C. 683, 700 (1967) (extension of operations). For an excellent evaluation of the criteria ordinarily employed by the ICC in its determination of what constitutes a "limited number of persons," see *Fast Motor Serv., Inc.*, 125 M.C.C. 1, 4 (1976) (extension—metal containers and metal container ends).

45. 49 U.S.C. § 309(b) (1970); *Robert Neff & Sons, Inc.*, 124 M.C.C. 616, 620-21 (1976) (extension—copying machines); *Dixie Hauling Co.*, 124 M.C.C. 428, 431-32 (1976) (extension—Doraville); *Raymond Killion*, 121 M.C.C. 79, 83 (1975) (contract carrier application); *Franklin Lumber Co.*, 121 M.C.C. 500, 503-04 (1974) (contract carrier application); *Saturn Express, Inc.*, 120 M.C.C. 560, 564 (1974) (extension—Mid-State Tile); *Lisa Motor Lines, Inc.*, 119 M.C.C. 102, 105 (1972) (contract carrier application).

46. 49 U.S.C. § 302(a) (1970).

place in a Territory or possession of the United States insofar as such transportation takes place within the United States.<sup>47</sup>

This statutory provision defines the term "foreign commerce" in such a manner as to create the *land bridge exemption*, whereby commerce moving from a foreign country in a continuous movement through the United States to another foreign country is not subject to economic regulation by the ICC. For example, commodities originating in France and destined for Quebec could be transported from the port of New York to points on the international boundary line between the United States and Canada as an exempt motor carrier movement. The exemption might also encompass a much more lengthy segment of surface transportation. Thus, for example, commodities manufactured in Singapore might be transported by an FMC regulated ocean vessel to San Diego, thence across the United States by motor carrier to Baltimore in an unregulated exempt movement, thence again by FMC carrier to Copenhagen.

The determination of whether a shipment is in foreign commerce, and thus subject to the exemption, is governed by the fixed and abiding intent of the shipper at the time of shipment and throughout the movement, in the absence of an interruption.<sup>48</sup> The contractual details of the transaction, such as through billing, the passage of title, or actual physical continuity, are not determinative of the nature of the shipment when the fixed and abiding intent is

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47. 49 U.S.C. § 303(a)(11) (1970). See *North Carolina Utils. Comm'n v. United States*, 253 F. Supp. 930, 936-37 (E.D.N.C. 1966).

The term "foreign commerce" is also defined to include transportation between points in a foreign country, or between points in two foreign countries, insofar as such transportation takes place within the United States. However, such movements are subject to regulation for purposes of insurance, designation of an agent for service of process, qualification and working hours of employees, and safety. 49 U.S.C. § 303(a)(11) (1970).

Although Puerto Rico is not a foreign nation, it is a place outside the United States within the purview of part III of the ICA. It was declared by specific legislative enactment that the ICA is inapplicable to Puerto Rico. 48 U.S.C. § 751 (1970). Thus, the issue of whether a public need exists for transportation from and to points in Puerto Rico is beyond the jurisdiction of the ICC. *Trans-Caribbean Motor Transp., Inc.*, 66 M.C.C. 593, 596 (1956) (common carrier application).

48. *Melburn Truck Lines (Toronto) Co.*, 124 M.C.C. 39, 48 (1975) (common carrier application).

For an excellent examination of the "essential character of the commerce" (whether intrastate, interstate, or foreign), see *Determination of Jurisdiction over Transportation of Petroleum and Petroleum Products by Motor Carriers Within a Single State*, 71 M.C.C. 17 (1957), and *Rogers Transfer, Inc.*, 126 M.C.C. 448 (1977) (petition for declaratory order). See also *Iron and Steel Articles from Wilmington, North Carolina to Points in North Carolina via General Motor Lines Inc.*, 323 I.C.C. 740, 742 (1965), *aff'd sub nom.* *North Carolina Utils. Comm'n v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966).

otherwise demonstrated.<sup>49</sup> Thus, in *Melburn Truck Lines (Toronto) Co.*,<sup>50</sup> it was held that the transportation by a Canadian carrier of

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49. *Baltimore & O. Sw. R.R. v. Settle*, 260 U.S. 166 (1922); *G. Arredondo Transfer Co.*, 103 M.C.C. 210 (1966) (petition for determination of the Commission's jurisdiction over motor carrier operations between the United States and Mexico at Laredo and Hidalgo, Tex.).

The ICC has determined that the transportation of commodities from or to overseas points by a rail carrier whose operations are confined to a single state is subject to regulation under section 1(2)(a) of the ICA, 49 U.S.C. § 1(2)(a) (1970), regardless of whether the immediately preceding or subsequent transportation is performed in for-hire or proprietary carriage. See generally *Long Beach Banana Distribs., Inc. v. Atchison, T. & S.F. Ry.*, 407 F.2d 1173 (9th Cir. 1969), cert. denied, 396 U.S. 819 (1969); *Southern Produce Co. v. Denison & Pac. S. Ry.*, 165 I.C.C. 423 (1930), modified, 185 I.C.C. 485 (1932), 191 I.C.C. 243 (1933), 205 I.C.C. 7 (1934). However, in a recent decision, the ICC concluded that the single state motor transportation of commodities originating at (or, presumably, destined to) overseas points, although deemed to be in continuous foreign commerce, is not subject to regulation by the ICC if performed subsequent (or, presumably, prior) to movement via private carriage. *J.W. Allen*, 126 M.C.C. 336 (1977) (investigation of operations and practices). In this proceeding, the involved commodities (bananas) originated in Central America, were transported by private maritime carrier to Galveston, Tex., where they were subsequently moved by motor carrier to Fort Worth, Tex. For an analogous decision involving the single state transportation of oil by pipeline having a prior movement by water carrier, see *United States Dep't of Defense v. Interstate Storage and Pipeline Corp.*, 353 I.C.C. 397 (1977).

50. 124 M.C.C. 39 (1975). Before the ICC will issue a certificate or a permit authorizing operation in foreign commerce between points on the international boundary line between the United States and Canada, on the one hand, and, on the other, points in the United States (an operation which is a portion of the carrier's through movement from or to points in Canada), to a Canadian-domiciled applicant, the applicant must submit a sworn statement that he has obtained complementary permission from the proper Canadian authorities. *Leamington Transp. (Western) Ltd.*, 91 M.C.C. 647, 651 (1962) (common carrier application). This requirement need not be met, however, at the time the ICC makes its initial determination as to whether the application for authority to operate within the United States should be granted. At that time, a Canadian-domiciled applicant need only demonstrate that he is diligently seeking complementary permission from the proper Canadian authorities, if it is required, for that portion of the proposed operation which is to be conducted in Canada, and that an appropriate application is then pending. Moreover, a denial of the applicant's first request for complementary Canadian authority is of no significance where another application is pending. *Roger Yelle*, 115 M.C.C. 408, 413 (1972) (contract carrier application).

The ICC has recognized the need for cooperation between the United States and Canada, so that international through transportation regulated by the ICC and the various Canadian provincial governments might be viewed in its entirety and evaluated pragmatically, in order to promote the efficient flow of commerce between the nations. See *Diversified Transp. Ltd.*, 120 M.C.C. 289, 292 (1974) (common carrier application). Where a Canadian applicant seeks authority to operate between points in the United States, and already holds appropriate authority between the Canadian points of origin and points on the international boundary line between the two nations, the ICC will not consider the need for service at points in Canada or the potential effect that a grant of authority might have upon its existing Canadian competitors. A presumption is made that these issues have already been resolved to the satisfaction of the Canadian authorities. *C.H. Norton*, 92 M.C.C. 82, 87 (1963) (common carrier application). Compare *Chemical Leaman Tank Lines, Inc.*, 123 M.C.C. 873 (1975) (extension—Wyandotte chemicals) with *Cadline Transp. Ltd.*, 126 M.C.C. 357 (1977) (common carrier application).

It is well established that authority to serve points in a described territory embraces



bananas (which were harvested in Central America and imported through Atlantic ports) from United States port facilities to Canada was within the *land bridge exemption*, despite the fact that the Canadian destined portions of the involved shipments frequently were not specified until their unloading from the ocean carriers. The decision recognized that the expeditiousness of the transfer at the port facilities, from water to motor carriers, evinced the unbroken continuity of the shipments and therefore did not break the flow of the movement from Central American shippers to Canadian consignees.

However, the ICC has consistently held that the transportation of passengers in round-trip charter operations through points in the United States, beginning and ending at points in a foreign nation, constitutes foreign commerce subject to the jurisdiction of the ICC, if it is the purpose of any passenger transported to visit en route a point in the United States.<sup>51</sup>

In contrast, the transportation of passengers or property between termini in an adjacent foreign country through the territory of the United States is subject to the *land bridge exemption*, when the carrier neither accepts nor delivers shipments in the United States.<sup>52</sup>

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authority to serve ports of entry on the United States-Canada international boundary line within that territory. Freeport Transp., Inc., 121 M.C.C. 66, 71 (1975) (extension—insulation); Maas Transp., Inc., 92 M.C.C. 534, 541 (1963) (extension—salt from Williston, N. Dak.). Thus, for example, a carrier holding authority to transport specified commodities between points in the states of Washington and California would be able to originate such traffic in British Columbia and transport it to points in California, provided the carrier held complementary Canadian authority and provided the movement traversed the international boundary line between Washington and British Columbia. *Compare* Thaddeus H. Gorski, 118 M.C.C. 589, 601 (1973) (extension—chemicals to Canada) *with* Provost Cartage Inc., 117 M.C.C. 459 (1971) (extension—Norfolk, Va.).

51. William Inglis, 31 M.C.C. 209, 210 (1941) (common carrier application); George Thomas Cripps, 24 M.C.C. 19, 21 (1940) (common carrier application). Such round-trip transportation beginning or ending at points in Canada or Mexico, and performed through points in the United States, is not perceived by the ICC as transportation "between places in a foreign country" within the meaning of section 203(a)(11) of the ICA. Instead, a legal fiction is actually attributed to such transportation by constructively perceiving these round-trip operations as two separate movements: (1) from a point in a foreign nation to a point in the United States, it is viewed as transportation for the purposes of sightseeing, pleasure, business, or other reasons; (2) from a place in the United States to the point or origin in Canada or Mexico (when the purpose of the trip has been completed), it is considered to be a constructive delivery and pickup in the United States. *Vancouver Airline Limousines, Ltd.*, 66 M.C.C. 587, 590 (1956) (extension—charter operations), *rev'd on other grounds*, 71 M.C.C. 101 (1957). For a recent decision granting authority to transport passengers in an international tour service, see *All World Travel Inc.*, 126 M.C.C. 243 (1977) (common carrier application).

52. 66 M.C.C. at 589-90.

The *land bridge exemption* is entirely consistent with Article V of the General Agreement on Tariff and Trade (GATT) which provides, *inter alia*, that "[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties."<sup>53</sup> The exemption is also alluded to in most treaties of friendship, commerce, and navigation (FCN) into which the United States has entered with over forty nations. The Treaty of Friendship, Commerce and Navigation, April 12, 1953,<sup>54</sup> for example, includes the typical provision regarding freedom of transit. Article XX provides, *inter alia*: "There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit . . . for products of

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A passenger motor carrier operating between an airport and a point within the same state, selling no through tickets and having no common arrangements with out-of-state or foreign carriers, is not performing interstate or foreign transportation subject to the ICA when those passengers have an immediately prior or subsequent movement by air, regardless of the intentions of any passengers to continue or complete an interstate or foreign journey. Motor Transportation of Passengers Incidental to Transportation by Aircraft, 95 M.C.C. 526, 536 (1964), *aff'd sub nom.* National Bus Traffic Ass'n v. United States, 249 F. Supp. 869 (N.D. Ill. 1965). Similarly, a passenger travel agent arranging tours involving both bus and air transportation is not a broker under section 203(a)(18) of the ICA, 49 U.S.C. § 303(a)(18) (1970), if the motor carrier portion of the involved movement is performed wholly within a single state, "does not involve the honoring or selling of through tickets, [or the performance of] common arrangements between the motor carrier and the connecting out-of-state or foreign air carriers," even though the tour as a whole constitutes interstate or foreign commerce. Wisconsin-Michigan Coaches, Inc., 124 M.C.C. 448, 451 (1976) (petition for declaratory order).

Section 211(b) of the ICA, 49 U.S.C. § 311(b) (1970), requires that an applicant seeking authority to operate as a broker demonstrate that he is fit, willing, and able properly to perform the proposed operations, and that said operations are or will be consistent with the public interest and the national transportation policy. This statutory burden is not as strict as the public convenience and necessity criterion, described above, which governs entry of motor common carriers. Elvira E. Goodman, 125 M.C.C. 223, 229 (1976) (broker application). These criteria have been interpreted as requiring an applicant, seeking authority to operate as a broker, to establish that the proposed operations will serve a useful function and be of benefit to carriers or to the public, that its establishment will not create needlessly duplicative services, and that the proposed service will fulfill a public need which is not already being satisfied. Paragon Travel Agency, Inc., 120 M.C.C. 61, 65 (1974) (extension—Warwick, R.I.). University Travel Serv., Inc., 120 M.C.C. 588 (1974) (broker application).

In Peter Pan World Travel, Inc., 125 M.C.C. 728 (1976) (broker application), the Commission reaffirmed its "policy of encouraging the development of intermodal transportation services" by granting an application for operation as a passenger broker of air and motor movements for the benefit of groups or tourists from foreign nations to make tours in the United States. *Id.* at 735, 737. See also Paragon Travel Agency, Inc., 120 M.C.C. 1 (1974) (extension—Atlanta, Ga.).

53. General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948).

54. United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (effective Oct. 30, 1953).

any origin en route to or from the territories of such other Party. Such [products] in transit . . . shall be free from unnecessary delays and restrictions."<sup>55</sup>

### B. *The Commercial Zone—Terminal Area Exemptions*

The surface transportation of commodities, having a prior or subsequent movement by water between points located within the commercial zone of a port city, generally does not fall within either the "commercial zone" or "terminal area" exemptions to the ICA. Indeed, local motor pickup and delivery services performed in connection with carriers not subject to ICC regulation (such as FMC regulated maritime carriers) are not exempt from the ICA, even though such transportation takes place wholly within a single commercial zone or terminal area. The "commercial zone" exemption of section 203(b)(8) of the Interstate Commerce Act exempts from economic regulation

the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, *except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone . . .*<sup>56</sup>

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55. *Id.* art. XX.

56. 49 U.S.C. § 303(b)(8) (1970) (emphasis added). The common control, management, or arrangement contemplated by section 203(b)(8) of the ICA has been construed by the ICC as one between the carriers participating in the through movement. Pacific Motor Trucking Co., 34 M.C.C. 249, 263 (1942) (common carrier application); Blinn, Morrill Co., 28 M.C.C. 299, 302 (1941) (contract carrier application), *modified*, 41 M.C.C. 817 (1943); Bigley Bros., Inc., 4 M.C.C. 711, 715 (1938) (contract carrier application); 1 FED. CARR. REP. (CCH) ¶ 96.03; 2 Fed. Carr. Cas. ¶ 7720. Thus, local transportation performed under an agreement with a shipper or consignee, and not under an arrangement with a connecting carrier, does not require authorization for performance wholly within a commercial zone. Brashear Freight Lines, Inc., 33 M.C.C. 279, 285 (1942) (common carrier application), *modified*, 42 M.C.C. 753 (1943); Signal Trucking Serv., Ltd., 32 M.C.C. 516, 518 (1942) (contract carrier application). This interpretation is consistent with a previous interpretation made by the ICC in part I of the ICA. Dick's Transfer & Truck Terminal, 20 M.C.C. 785, 791 (1939) (contract carrier application). Yet the apparent purpose of Congress in promulgating the section 203(b)(8) exemption was to remove from regulation those operations which, although in foreign commerce, nevertheless have a distinctly local and urban character. Consolidated Freightways, Inc., 74 M.C.C. 593, 597 (1958) (extension—Seattle, Wash.); Los Angeles, Cal., 3 M.C.C. 248, 252 (1937) (commercial zone); New York, N.Y., 2 M.C.C. 191, 192 (1937) (commercial zone).

One commentator has asserted that a common arrangement under this statutory provision should only be held to exist where (a) "there is no arrangement for an actual *bona fide* through movement with joint responsibility" and (b) "any agreement that does have these

The transportation of traffic moving to or from points outside the United States (e.g., Canada), in foreign commerce, is clearly within the exception (italicized above) to the commercial zone exemption. Nor does such transportation fall within the "terminal area" exemption of section 202(c)(2) of the ICA.<sup>57</sup> That section exempts from economic regulation motor carrier collection, delivery, and transfer services performed for, and within the terminal area of: railroads subject to part I of the Act, motor carriers subject to part II, water carriers subject to part III, and freight forwarders subject to part IV. Ocean carriers operating in foreign commerce, although subject to regulation by the FMC,<sup>58</sup> are not water carriers under part III of the ICA, and, therefore, may not avail themselves of the benefits of the aforementioned exemptions. Thus, the surface transportation of commodities between points in the commercial zone of a port city, as part of a continuous foreign commerce movement in connection with an ocean carrier, requires certificated authority issued by the ICC.<sup>59</sup>

For example, consider the movement of Italian sandals from Naples to a shoe warehousing facility within the commercial zone of Boston. Their movement through the Mediterranean Sea and across the Atlantic Ocean by ocean vessel would be subject to regulation by the FMC. However the subsequent for-hire movement by motor carrier from Boston's port facilities to the inland warehouse would require certificated authority and would fall neither within the "commercial zone" exemption of section 203(b)(8), nor within the "terminal area" exemption of section 202(c)(2) of the ICA.<sup>60</sup>

Moreover, a line-haul motor carrier which holds authority to serve a particular point (as either a terminal or intermediate point) may not at that point perform local cartage operations which are not connected with its own line-haul services. Stated differently, authority to serve a point as a terminal or intermediate point in

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features is not between the carriers involved . . . .<sup>57</sup> Reed, *Commercial Zones and Terminal Areas—What's the Difference?*, Traffic World, Dec. 13, 1976, at 85, 87.

57. 49 U.S.C. § 302(c)(2) (1970).

58. The FMC has jurisdiction over ocean transportation in domestic offshore or foreign commerce by vessel operators, non-vessel operators, and independent ocean freight forwarders. See notes 6 & 8 *supra* and accompanying text.

59. Drive Away Auto Transp., Inc., 99 M.C.C. 75, 79 (1965) (common carrier application). With respect to the transportation of commodities between points within the commercial zone of a United States city situated on an international boundary line, see Adam's Cartage Ltd., 121 M.C.C. 115 (1975) (common carrier application).

60. AAA Transfer, Inc., 120 M.C.C. 803, 821 (1974) (extension—cargo containers); Consolidated Freightways, Inc., 74 M.C.C. 593, 595 (1958) (extension—Seattle, Wash.).

connection with a carrier's authorized regular route operations does not enable it to perform non-exempt local operations, as part of a continuous movement in foreign commerce, which are in no way connected with its line-haul services.<sup>61</sup> Although a carrier may hold extensive authority to serve a port city as both an intermediate and terminal point, such authority does not encompass pickup and delivery services within the commercial zone of a port city for a maritime carrier not subject to part III of the ICA.<sup>62</sup> Thus, in the example above involving Italian sandals, a licensed regular route motor carrier authorized to transport general commodities between Philadelphia and Boston would, nevertheless, not be authorized to transport the sandals from Boston's port facilities to points within the Boston commercial zone.

The ICC has recently granted a number of motor common carrier applications to transport commodities having a prior or subsequent movement by water between points in the commercial zone of a port city.<sup>63</sup> This is entirely consistent with the Commission's established policy of promoting coordination of efficient intermodal transportation services.<sup>64</sup> The intended effect of these efforts has been to "foster the growth of coordinated sealand services [in port cities] in harmony with [the] Commission's policy of encouraging such intermodal development."<sup>65</sup>

#### IV. ENTRY CONTROL OF DOMESTIC WATER CARRIERS

##### A. Containerized Barge Movements

Part III of the ICA deals with the regulation of domestic water carriers. It does not vest jurisdiction in the ICC over transportation from or to a place outside the United States. However, statutory jurisdiction exists as to that segment of water transportation occurring within the United States prior or subsequent to "transshipment" occurring within this nation in a movement from or to a point outside the United States. Specifically, section

61. See *Service Transfer, Inc.*, 115 M.C.C. 29, 34 (1972) (contract carrier application).

62. *Berry Transp., Inc.*, 124 M.C.C. 328 (1976) (extension—containers); *Marine Stevedoring Corp.*, 119 M.C.C. 514 (1974) (common carrier application).

63. See, e.g., *E. E. Henry*, No. MC-123387 (Sub-No. 3) (March 24, 1976) (Norfolk zone); *Trailer Marine Transp. Corp.*, No. MC-141323 (March 22, 1976) (common carrier application); *Merry Shipping Co.*, No. MC-140260 (Sub-No. 2) (Feb. 17, 1976) (common carrier application).

64. *Emery Air Freight Corp.*, 339 I.C.C. 17 (1971) (freight forwarder application).

65. *Holt Motor Express, Inc.*, 120 M.C.C. 323, 329-30 (1974) (extension—Baltimore, Md.).

302(i)(3)(B) of the ICA subjects to the regulatory jurisdiction of the ICC the transportation of property

wholly by water . . . from or to a place in the United States to or from a place outside the United States, . . . only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, . . .<sup>66</sup>

or, in the reverse direction, after such transshipment for further movement to a place in the United States. Thus, where commodities move by water between points in the United States as part of an ocean voyage, the ICC possesses statutory jurisdiction over the domestic portion thereof when preceded or followed by a transshipment of such cargo.

In *Sacramento-Yolo Port District*,<sup>67</sup> the Commission held that the barge transportation of container cargo between ocean common carriers docked in the San Francisco bay area and the port of Sacramento, moving wholly by water between a port in a foreign country or a noncontiguous state or territory and the Port of Sacramento, under a port-to-port ocean bill of lading naming Sacramento as the port of origin or destination, constituted transshipment in foreign commerce within the meaning of the aforementioned statutory provision. The barge transportation was therefore subject to ICC regulation. The extent of ICC jurisdiction, however, is limited to that portion of the transportation service which is performed within the United States. Once the lading is transshipped to the ocean vessel which will carry it to a foreign port, there is no regulation thereof by the ICC regardless of the number of times the vessel may stop and pick up additional cargo. However, if the lading, once loaded in the United States, is transferred to another ship, there is transshipment within the meaning of the ICA; and to the extent that such transportation is performed within the United States, it becomes subject to the jurisdiction of the ICC.<sup>68</sup> The "transfer of lading among vessels generally is sufficient to bring the inland water

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66. 49 U.S.C. § 902(i)(3)(B) (1970). Transportation performed between points in the United States and points in Puerto Rico is deemed to be transportation outside the purview of part III of the ICA. 48 U.S.C. § 751 (1970). Thus, such transportation is a movement from and to a point outside the United States within the meaning of section 302(i)(3) of the ICA. *Trans-Caribbean Motor Transp., Inc.*, 66 M.C.C. 593, 596 (1956) (common carrier application).

67. 341 I.C.C. 105 (1972) (petition for declaratory order).

68. *Id.* at 111.

movement" within the ambit of regulation by the ICC, except where such transfer occurs between vessels under common ownership.<sup>69</sup>

### B. LASH Operations

LASH (lighter-aboard-ship) represents another innovation in the technological development of containerization. Prior to its introduction, the most significant factor in the field was the van-type container system utilizing containers which resemble the ordinary semitrailer body. Containerization typically involves the intermodal coordination of rail, motor and water carriers for the movement of both loaded and empty containers between inland origins or destinations to and from docks alongside oceangoing container ships.

In lieu of the van-type container, the LASH system employs a rectangular single-skin steel box, measuring approximately 61.5 by 31.5 by 14 feet, with a cargo capacity of approximately 370 tons. This box functions as a lighter or barge in inland water transportation. The lighter constitutes a small floating cargo hold designed to be lifted on and off a ship. In a typical inbound LASH movement, for example, commodities are loaded into lighters at Dusseldorf where they are sealed and floated down the Rhine River to Rotterdam. The fully laden lighters or barges are then loaded at the port of Rotterdam onto a mother ship for an ocean movement across the Atlantic in foreign commerce. When the mother ship arrives at the port facilities of New Orleans, the barges are unloaded and separately towed up the Mississippi to various hinterland destinations (e.g., Memphis or St. Louis).

In order to delineate the jurisdictional perimeters of the involved regulatory agencies, a joint statement was issued by the ICC and the FMC on May 12, 1972, regarding LASH operations. It provided, *inter alia*, that:

For purposes of this statement of policy, the transfer of cargoes from one barge to another barge of the same mother vessel or another mother vessel of the same carrier or commonly controlled by it shall not be deemed to constitute transshipment. However, the towage of barges between the United States ports, when undertaken by other than the ocean carrier, is subject to the jurisdiction of the Interstate Commerce Commission.<sup>70</sup>

In *Port Royal Marine Corp. v. United States*,<sup>71</sup> the United

69. *Id.* at 112.

70. I.C.C. 86TH ANN. REP. 50-51 (1972).

71. 378 F. Supp. 345 (S.D. Ga. 1974), *aff'd*, 420 U.S. 901 (1975).

States District Court for the Southern District of Georgia affirmed a decision of the ICC<sup>72</sup> which had held that the transfer of a LASH lighter from a mother vessel to a towboat operator is not materially different from the situation in *Sacramento-Yolo Port District*<sup>73</sup> in which a container was transferred from an ocean vessel to a barge. The court recognized a distinction in method but not in result, insofar as regulatory jurisdiction is concerned, between the discharge of a container from a vessel onto a floating barge and the discharge and tow of a container which itself floats on water. The court held that the movement of cargo by ocean vessels to a central mooring point in the United States where floatable cargo containers are discharged from the mother ship and towed by tug to inland destinations, while not constituting "transshipment" in the traditional sense, nevertheless constitutes transshipment within the meaning of section 302(i)(3)(B) of the ICA.<sup>74</sup>

Had the ICC failed to exercise jurisdiction over LASH operations, it would have taken a position contrary to the underlying purpose of part III of the ICA, which was designed to place inland water carriers under essentially the same regulatory control and protection afforded carriers under parts I and II of the ICA. The transportation in LASH lighters of nonbulk commodities is in direct competition with the movement of similar commodities in conventional barges by ICC regulated water, rail, and motor carriers. Had the ICC not exercised jurisdiction over such operations, "it would have been possible for a towboat operator to include in his tow two shipments of identical commodities between identical points, but subject to different rates."<sup>75</sup> Ultimately, regulated conventional barge services might have found it difficult to compete with LASH operators, which would have been free to adjust their rates to a level below those of regulated carriers. This result would have been inconsistent with the national transportation policy as expressed by Congress.

However, where lighters are transported between a LASH mother vessel and the port at which such vessel is anchored, or between such vessels and points in contiguous harbors, "such transportation is not subject to the regulation of the ICC under the provi-

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72. *Port Royal Marine Corp.*, 344 I.C.C. 876 (1973) (declaratory order—"Lash" operation), *aff'd sub nom. Port Royal Marine Corp. v. United States*, 378 F. Supp. 345 (S.D. Ga. 1974), *aff'd*, 420 U.S. 901 (1975).

73. 341 I.C.C. 105 (1972) (petition for declaratory order).

74. *Port Royal Marine Corp. v. United States*, 378 F. Supp. at 351.

75. *Port Royal Marine Corp.*, 344 I.C.C. at 881-82.



sion of section 303(g)(1)" of the ICA.<sup>76</sup> Indeed, "the intention of Congress was that [water] terminal transportation in connection with foreign commerce is to remain subject to whatever regulation, if any, may be exercised" by the FMC.<sup>77</sup>

#### V. ENTRY CONTROL OF DOMESTIC FREIGHT FORWARDERS

The counterparts of ICC regulated surface forwarders subject to part IV of the ICA are the air freight forwarders (indirect air carriers) and the nonvessel operating common carriers by water (NVO's), which are subject to the regulatory jurisdiction of the CAB and the FMC, respectively. Air freight forwarders, or indirect air carriers, are prohibited by section 1003(b) of the Federal Aviation Act of 1958<sup>78</sup> from establishing joint rates or charges with common carriers subject to the ICA. Nevertheless, it is apparent that an increasing volume of air freight is being handled by air forwarders, and that a substantial portion of such traffic moves to or from points beyond their established terminal areas.<sup>79</sup> The operations and activ-

76. *Id.* at 883. 49 U.S.C. § 903(g)(1) (1970).

77. Evans Transp. Corp., 250 I.C.C. 496, 498 (1942) (contract carrier application).

78. 49 U.S.C. § 1483(b) (1970). Companies engaged in the air express business, however, are not prohibited from establishing such intermodal rates with ICC regulated common carriers. Additionally, air carriers are specifically authorized to establish reasonable through service and joint routes and fares with other common carriers. *Id.* See note 112 *infra* and accompanying text.

Regulation of the domestic air freight forwarding industry by the CAB began on September 8, 1948, as the result of the Air Freight Forwarder Case, 9 C.A.B. 473 (1948). However, in contrast to regulation by the ICC of freight forwarders under its jurisdiction, the CAB has maintained a free entry policy since the inception of such regulation. Stephenson, *Transport Deregulation—The Air Freight Forwarder Experience*, 43 I.C.C. PRAC. J. 39 (1975). Under the free entry policy, an application for authority to operate as an air freight forwarder or an international air freight forwarder will generally be granted by the CAB where it is demonstrated that (a) the applicant is capable of performing transportation as an air freight forwarder, (b) the applicant is capable of conforming to existing relevant statutory provisions, and the rules and regulations promulgated thereunder, (c) the conduct of such operations by applicant will not be inconsistent with the public interest, and (d) the applicant is not requesting authority in the name of or as an affiliate of a long-haul motor carrier or rail carrier. *Id.* at 40, 14 C.F.R. §§ 296.55-57 (1977). An international air freight forwarder is generally defined as an indirect air carrier which engages in overseas or foreign air transportation, and which assembles and consolidates property, is responsible for the transportation thereof from point of receipt to point of destination, and utilizes the services of a direct air carrier. 49 C.F.R. § 296.1(f) (1976).

79. Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 88-90 (1964), *aff'd sub nom.* Air Dispatch, Inc. v. United States, 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd per curiam*, 381 U.S. 412 (1965). The specific regulations governing the relationship between air forwarders and motor common carriers are set forth at 49 C.F.R. § 1082.1 (1976); Investigation into the Status of Freight Forwarders, 339 I.C.C. 711, 727 (1971).

ities of FMC regulated NVO's in foreign commerce are substantially similar to those of ICC regulated freight forwarders in interstate commerce.<sup>80</sup>

All of the definitional elements delineated in section 402(a)(5) of the ICA<sup>81</sup> must be proffered by an applicant before it will acquire the status of freight forwarder.<sup>82</sup> The necessary prerequisites may be paraphrased as follows:

(1) A holding out to the general public as a common carrier (otherwise than as a carrier subject to parts I [such as a railroad], II [a trucker], or III [a domestic water carrier] of the ICA) to transport or provide transportation of property, for compensation, in interstate commerce;

(2) assembly and consolidation, or provision therefor;

(3) performance of break-bulk and distribution, or provision therefor;

(4) assumption of responsibility for the transportation from point of receipt to point of destination;

(5) utilization of the services of a carrier subject to parts I, II, or III of the ICA.<sup>83</sup>

The relevant considerations employed by the ICC, in assessing whether a freight forwarder application should be granted, are the prevailing competitive situation and the ability and willingness of existing freight forwarders adequately to satisfy the demonstrated transportation requirements of the shipping public. Pursuant to section 410 of the ICA,<sup>84</sup> a freight forwarder application may be granted if it appears that the proposed operation is or will be consistent with the public interest and the national transportation policy. This represents a less stringent standard than the "public convenience and necessity" criterion described above, and admits of public interest factors other than those relating to the adequacy of existing services.<sup>85</sup>

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80. See *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 256-57 (1961).

81. 49 U.S.C. § 1002(a)(5) (1970).

82. See *Columbia Shippers and Receivers Ass'n v. United States*, 301 F. Supp. 310, 323 (D. Del. 1969); *National Motor Freight Traffic Ass'n v. United States*, 242 F. Supp. 601, 605 (D.D.C. 1965); *Barre Granite Ass'n*, 265 I.C.C. 637, 639 (1949) (freight forwarder application); *J. Nelson Kagarise*, 260 I.C.C. 745, 747 (1946) (freight forwarder application).

83. 49 U.S.C. § 1002(a)(5) (1970).

84. 49 U.S.C. § 1010(c) (1970).

85. *Alltransport Inc.*, 343 I.C.C. 549, 556 (1972) (extension—export); *D.C. Andrews & Co.*, 326 I.C.C. 743 (1966) (extension—Baltimore, Md.).

### A. Air Freight Forwarders

Section 203(b)(7)(a) of the ICA exempts from regulation "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft."<sup>86</sup> Instead, it is intended that such transportation be subject to the jurisdiction of the CAB and regulated pursuant to section 403(a) of the Federal Aviation Act of 1958 as "services in connection with . . . air transportation."<sup>87</sup> Because these statutes fail to specify precisely when a surface movement ceases to be transportation incidental to air service, the ICC and the CAB, in 1964, promulgated complementary regulations designed to implement their respective statutory obligations. At that time, the CAB approved regulations adopting its previously utilized twenty-five-mile radius limitation, under which a carrier's terminal area (with the exception of a limited number of major air traffic points where larger air terminal areas are recognized) would extend to a distance of twenty-five miles from the airports or cities served by the air carriers. The CAB also promulgated procedures whereby air carriers could file individual tariffs to serve locations beyond the twenty-five-mile limitation.<sup>88</sup> In recognition of these actions, the ICC concurrently adopted regulations providing that motor transportation is incidental to air if performed (a) under a through air bill of lading and confined to a bona fide collection, delivery, or transfer service within the terminal area as set forth in the tariffs of the direct or indirect air carrier on file with, and accepted by, the CAB, or (b) irrespective of the extent of the air terminal area limitations, in emergency situations "arising from the inability of the direct air carrier to perform air transportation due to adverse weather conditions, equipment failure, or other cause beyond the control of the direct air carrier."<sup>89</sup>

Thus, these complementary regulations seek to minimize the potential conflict arising from the CAB's interpretation of section 403(a) of the Federal Aviation Act, and the ICC's interpretation of the partial exemption embodied in section 203(b)(7)(a) of the ICA. The ensuing regulatory framework has been judicially characterized

86. 49 U.S.C. § 303(b)(7a) (1970).

87. 49 U.S.C. § 1373(a) (1970).

88. 14 C.F.R. § 222.2 (1977). For an excellent discussion of the air terminal area exemption, see Philadelphia Int'l Airport, 123 M.C.C. 228 (1975) (exempt zone).

89. Emery Air Freight Corp., 339 I.C.C. 17, 28 (1971) (freight forwarder application); Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71, 95 (1964), *aff'd sub nom.* Air Dispatch, Inc. v. United States, 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd per curiam*, 381 U.S. 412 (1965).

as a "system, devised to avoid interagency conflict while preserving agency sovereignty, [affording the CAB] the first judgment, which shall be given nonconclusive respect by I.C.C."<sup>90</sup>

Indirect air carriers (e.g., air freight forwarders) are statutorily prohibited from participating in joint rates with other carriers.<sup>91</sup> Air forwarders subject to economic regulation under the Federal Aviation Act of 1958 are, however, expressly permitted to tender to or accept from ICC motor carriers shipments not within the aforementioned "incidental to air" exemption without being considered as conducting operations as a freight forwarder subject to part IV of the ICA. The Act permits this provided that, *inter alia*, the air forwarder does not assume liability for any shipment prior to its receipt from or after its delivery to an authorized motor carrier for movement beyond the air forwarder's terminal area. Thus, an indirect air carrier may not offer joint air-motor service from or to points outside its air terminal area and assume responsibility for the entire movement unless it holds appropriate surface freight forwarding authority issued by the ICC and utilizes authorized motor common carrier service for the surface portion of the through movement.<sup>92</sup>

In *Emery Air Freight Corp.*,<sup>93</sup> the first proceeding in which air forwarders sought licensing of integrated surface forwarding operations beyond an air terminal area, the ICC recognized that the proposed coordinated intermodal (air and surface) service, with single-carrier responsibility, would facilitate the tracing of shipments, the servicing of claims, the billing of customers, and the expediting of shipments.<sup>94</sup> The ICC has frequently held that the mere availability of other types of common carriage does not prohibit the institution

90. *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139, 145 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

Beginning in 1964, however, the CAB ended its sole reliance upon geographical criteria in its determination of what constitutes terminal area service. Instead, it began to consider "whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport." 29 Fed. Reg. 6,275, 6,276 (1964) (codified in 14 C.F.R. § 222.2 (1977)). Pursuant to these regulations, the CAB has authorized tariffs for motor carrier service to points up to eighty miles from the air facility involved. Note, *Coordination of Intermodal Transportation*, 69 COLUM. L. REV. 247, 257 (1969). See *National Motor Freight Traffic Ass'n v. CAB*, 374 F.2d 266 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 905 (1967); *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

91. 49 U.S.C. § 1483(b) (1970).

92. *Theodore Savage*, 108 M.C.C. 205 (1968) (contract carrier application).

93. 339 I.C.C. 17 (1971) (freight forwarder application).

94. *Id.* at 31.

of a freight forwarder service of a character not previously available. The concluding paragraph of the *Emery Air Freight* decision represents a succinct but significant expression of the Commission's dedication to the promotion of innovative proposals involving intermodal transportation:

Efforts to effect intermodal coordination and cooperation in large measure must stem from within the industry itself. On the other hand, this Commission has in recent years sought to make a significant regulatory contribution in this vital area by exploring piggyback practices, by examining in depth the "incidental-to-air" exemption, and by joining in cooperative inter-agency liaison programs with the CAB and the Federal Maritime Commission. Our more recent activities, thus, represent our best judgment of what is lawful under the present statutes, and what will, at the same time, encourage fair and orderly development of coordinated transportation for the benefit of the shipping public. The granting of the present applications will, we believe, be another step in the intermodal development being encouraged by this Commission.<sup>95</sup>

#### B. *Sea Freight Forwarders*

In *CTI-Container Transp. Int'l, Inc.*,<sup>96</sup> the ICC had the opportunity to delineate the outer perimeters of its regulatory powers vis-à-vis those held by the FMC. In this decision, the ICC granted the applicant a permit to operate as a freight forwarder so as to enable the performance of a complete service in the forwarding of international containerized shipments in connection with the applicant's existing NVO operations. The ICC emphasized, however, that the applicant would remain subject to FMC regulation when utilizing the services of an ocean carrier,<sup>97</sup> but would come under the ICC's regulation as a freight forwarder under part IV of the ICA when that portion of the through intermodal movement was handled by a carrier subject to parts I, II, or III of the ICA. Thus, a carrier which operates as an NVO remains subject to FMC jurisdiction while utilizing the services of a vessel-operating common carrier by water, but it becomes subject to ICC jurisdiction as a part IV freight forwarder when it utilizes, for example, the services of a part II motor carrier.<sup>98</sup>

95. *Id.* at 37. See *Auto Trip USA, Inc.*, 337 I.C.C. 570 (1970) (freight forwarder application); *Corpus Christi Distrib. Serv., Inc.*, 316 I.C.C. 542 (1962) (extension—Texas).

96. 341 I.C.C. 169 (1972) (freight forwarder application).

97. The ICC expressly disclaimed jurisdiction over an ocean carrier's waterborne operations or its rates, which cover rendition of such services. *Id.* at 186.

98. *Id.* at 187. As has been indicated, ocean carriers regulated by the FMC do not enjoy

Licensing by the ICC of such intermodal forwarding services enables the involved freight forwarder to file and post with the ICC a tariff setting forth both a rate covering solely that portion of the movement utilizing carriers otherwise subject to its economic regulation, and a single-factor, through intermodal rate for informational purposes only. Of course, the FMC retains undiminished authority over the waterborne charges of the NVO that comprise a portion of the total intermodal rate. Indeed, the ICC has emphasized that:

Such a tariff filing, by its terms, does not serve to extend this Commission's jurisdiction into any area reserved by the Congress as within the exclusive province of the FMC. The net result of this treatment, we believe, is a workable partnership between two independent regulatory agencies and the carriers they regulate, designed to achieve a highly efficient, practical, and economical coordinated intermodal transportation service under one-carrier responsibility, fully responsive to the needs of the shipping public.<sup>99</sup>

An NVO is essentially limited to the performance of services pursuant to its ocean carrier's all-water tariff. The acquisition of ICC authority is essential for the coordination of intermodal shipments, for, without appropriate surface forwarding authority, an NVO is prohibited from arranging for surface transportation to its facilities or from its facilities to shipside, from selecting the certificated motor carriers to be utilized, and from paying such carriers directly for their transportation.<sup>100</sup>

It has been established, however, that inasmuch as motor carriers are specifically excluded from the definition of a "freight forwarder" under section 402(a)(5) of the ICA,<sup>101</sup> and from the definition of "broker" under section 203(a)(18) of the ICA,<sup>102</sup> they are not prohibited from arranging for or performing (subject to FMC regulation) those portions of an international through movement not subject to ICC jurisdiction. Nor are they prohibited from combining the inland domestic and ocean functions, in the capacity of an NVO,

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a statutory terminal area exemption. 49 U.S.C. § 302(c) (1970).

99. 341 I.C.C. at 187-88; *Japan Line, Ltd. v. United States*, 393 F. Supp. 131 (N.D. Cal. 1975); *but see IML Seatransit, Ltd. v. United States*, 323 F. Supp. 562 (N.D. Cal. 1971).

100. *Harry H. Blanco & Co.*, 349 I.C.C. 36, 41 (1973) (freight forwarder application), *aff'd sub nom. Aloha Consols. Int'l v. United States*, 395 F. Supp. 1006 (C.D. Cal. 1975); *see IML Sea Transit, Ltd. v. United States*, 343 F. Supp. 32 (N.D. Cal. 1972), *aff'd*, 409 U.S. 1002 (1972).

101. 49 U.S.C. § 1002(a)(5) (1970).

102. 49 U.S.C. § 303(a)(18) (1970).

into a single, integrated operation. Motor carriers may not, however, conduct unlimited forwarding operations. Indeed, the service performed by any motor carrier within the United States is subject to the terms and conditions of its operating authority, and it may not originate shipments at other than its authorized routes.

The expressed policy of the ICC is to foster the expeditious movement of international shipments through intermodal cooperation. To this end, it has regularly granted the motor carrier or freight forwarder the authority necessary for the development of an "intermodal" forwarder service in the public interest and consistent with the congressionally declared national transportation policy.<sup>103</sup>

## VI. INTERNATIONAL TARIFF REGULATION

### A. *Intermodal Joint Rate Establishment in Foreign Commerce: A Desirable Objective*

An international joint rate is a single tariff established by agreement between two or more carriers ordinarily operating in different modes of transportation for through service between points in the United States and points in a foreign country. Containerization has made joint rates practicable because the cumbersome loading, unloading, and reloading necessary for the intermediate transfer of breakbulk cargo has been replaced by the expeditious transfer of containers between carriers.<sup>104</sup>

The advantages to be derived from the establishment of joint intermodal tariffs in international transportation are considerable. The through service, facilitated by containerization and the accompanying through or joint rates, encourages international trade by enabling shippers to contract with but a single carrier for the movement of cargo to its ultimate destination at a total rate published in a single tariff. Through service and joint rates also facilitate the utilization of simplified documentation in international transport, and stimulate carriers in different modes to provide efficient coordination and integration of intermodal services.<sup>105</sup>

103. *Modern Intermodal Traffic Corp.*, 344 I.C.C. 557, 571 (1973) (investigation of operations and practices); Ullman, *The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation*, 2 J. MAR. L. & COM. 625 (1971).

104. Larner, *supra* note 27, at 128.

105. *Id.* at 129. A "joint rate" has been defined as a through rate which has been consummated by the carriers performing their respective transport segments of the through route. A "through route" has been defined as a continuous route effectuated by an express or implied agreement between the connecting carriers involved. *In re Through Routes and Through Rates*, 12 I.C.C. 163 (1907).

Joint international tariffs act as a catalyst for the through transportation of freight by intermodal carriers between the United States and foreign countries. Shippers can more easily engage in foreign commercial transactions when they are able, with the original carrier, to enter into contractual arrangements which cover a movement through to the destination at a total charge published in a single tariff. The ICC has expressly recognized that the national transportation policy would be fostered and the free flow of commerce spurred by the establishment of more economical and integrated transportation services between the United States and foreign nations.<sup>106</sup>

Joint, single-factor rates also permit an exporter or importer to calculate his transportation costs with relative ease and predictability. Theoretically, a joint rate should be lower than the sum of the separate component rates, for it should enable the economies of operation and diminished expenditures to be passed through to the shipper. "Even if joint rates would not always result in lower transportation costs in foreign trade, the increased convenience to the shipper and the possibility for lower costs [would seem to] justify a permissive regulatory policy allowing all carriers to enter into such agreements".<sup>107</sup> Thus, the establishment in the United States of fixed procedures for the intermodal movement of freight to and from interior U.S. origins and overseas destinations is a desirable objective.<sup>108</sup>

### B. Freight Forwarder Tariffs

The ICC has approved innovative freight forwarder rate proposals on freight of all kinds (imported from or exported to foreign nations) including commodities, having a prior or subsequent movement by water, transported in marine or water carrier containers and trailers between inland points and seaports.<sup>109</sup> The Commission

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106. *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 337 I.C.C. 625, 627 (1970), modified, 346 I.C.C. 688 (1974).

107. Note, *Legal and Regulatory Aspects of the Container Revolution*, 57 GEO. L.J. 533, 538 (1969).

108. Ullman, *The ICC's Decision in Ex Parte 261—Its Residual Value*, 4 J. MAR. L. & COM. 455 (1973); Comment, *Rate Regulation in Ocean Transport: Developing Countries Confront the Liner Conference System*, 59 CALIF. L. REV. 1299 (1971).

109. See, e.g., *Freight, All Kinds, Midwest to Eastern Seaports*, 350 I.C.C. 848 (1975).

However, in a significant recent decision, the ICC concluded that freight forwarders lack statutory authority to establish international joint rates with ocean carriers. It further held that rail, motor, and part III water carriers are precluded as a matter of policy from entering



has also approved freight of all kinds rates on intermodal TOFC transportation.<sup>110</sup> Because such proposals have frequently involved movements in foreign commerce, the competitive impact upon domestic carriers has been minimal. This economic attribute has enabled the ICC to further promote the flexibility of intermodal transportation by, in some instances, avoiding rejection of such proposals on the basis of the absence of mixing rules or mixture provisions.<sup>111</sup>

### C. ICC/CAB Rate Coordination

ICC common carriers and CAB direct air carriers are statutorily authorized to establish joint rates and through routes.<sup>112</sup> The rates established for such through service must be just and reasonable, and filed with agencies having jurisdiction over the participating carriers.<sup>113</sup> Jurisdiction over the through routes may be referred to an interagency board consisting of an equal number of participants from both the ICC and the CAB.<sup>114</sup>

### D. ICC/FMC Rate Coordination

In the Alaska and Hawaii statehood acts, Congress expressly reserved jurisdiction over water transportation between the contiguous forty-eight states and Alaska and Hawaii to the FMC.<sup>115</sup> However, exclusive regulatory control over intermodal joint tariffs between these points has, since 1962 (when Congress amended section 216(c) of the ICA),<sup>116</sup> been vested in the ICC.<sup>117</sup> Thus, the ICC has

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into joint rates with NVOs regulated by the FMC. *In re Tariffs Containing Joint Rates and Through Routes—Freight Forwarders and Non-Vessel Operating Common Carriers by Water (NVO)*, *Ex Parte* No. 261 (Sub-No. 1) (Feb. 14, 1977).

110. *See* Freight, All Kinds, Between Illinois and New Jersey, 351 I.C.C. 383 (1975).

111. Freight, All Kinds, Midwest to Eastern Seaports, 350 I.C.C. 848, 854-55 (1975).

112. Federal Aviation Act of 1958, § 1003(b), 49 U.S.C. § 1483(b) (1970). Air freight forwarders, however, are statutorily prohibited from establishing joint rates or charges with common carriers subject to the ICA. *See* notes 78 & 91 *supra* and accompanying text.

113. 49 U.S.C. § 1483(b) (1970).

114. Federal Aviation Act of 1958, § 1003(c), 49 U.S.C. § 1483(c) (1970); Note, *Coordination of Intermodal Transportation*, 69 COLUM. L. REV. 247, 254-61 (1969).

115. Alaska Statehood Act of 1958, § 27(b), 48 U.S.C. *preceding* § 21 (1970), provides:

Nothing contained in this or any other Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Alaska and other ports in the United States, its Territories or possessions, or as conferring upon the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

*See also* Hawaii Statehood Act of 1959, § 18(a), 48 U.S.C. *preceding* § 491 (1970).

116. 49 U.S.C. § 316(c) (1970). This statutory provision authorizes the voluntary estab-

already acquired some measure of expertise over certain intermodal tariffs in which FMC carriers participate.<sup>118</sup> However, should the maritime carrier decide to terminate the underlying joint movement, the ICC has determined that it has no authority to prohibit cancellation of the corresponding tariff.<sup>119</sup>

Prior to 1969, the ICC took the position that it was not statutorily authorized to accept for filing the tariffs establishing joint international rates between common carriers subject to its jurisdiction and ocean carriers subject to the jurisdiction of the FMC. Although existing regulations had permitted the filing of rail tariffs embracing every type of through international rate,<sup>120</sup> and although existing motor carrier regulations did not expressly preclude their filing,<sup>121</sup> nevertheless the existing practice of the ICC had been not to accept them.

Import-export tariffs had, however, been utilized by railroads in shipments between the United States and the adjacent nations of Canada and Mexico since the earliest days of transport regulation.<sup>122</sup> As originally enacted in 1887, section 1 of the ICA provided

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shipment of through routes and joint rates, charges, and classifications between motor common carriers of passengers or of freight and common carriers by water. The term, "common carriers by water," is defined to include water common carriers subject to the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, entities which hold themselves out as able to transport commodities by water but which do not own or operate maritime vessels. 49 U.S.C. § 316(c) (1970). See also 49 U.S.C. § 905(b) (1970).

117. Pipe Line Mach. & Equip., Various States to Alaska, 349 I.C.C. 799, 806 (1975). Jurisdiction of the ICC exists, to the exclusion of the FMC, over combined motor-water transportation services performed between the contiguous forty-eight states and Alaska or Hawaii, even where the motor portion of the movement is confined to pickup delivery in port cities. *Sea-Land Serv., Inc. v. FMC*, 404 F.2d 824 (D.C. Cir. 1968). Although the FMC holds jurisdiction over the interstate water movement between these points, where such transportation is combined with the services of an ICC motor carrier, the jurisdiction over through routes and joint rates rests with the ICC. *Alaska Steamship Co. v. FMC*, 399 F.2d 623 (9th Cir. 1968).

118. See *Sea-Land Serv., Inc. v. FMC*, 404 F.2d 824 (D.C. Cir. 1968); *Alaska Steamship Co. v. FMC*, 399 F.2d 623 (9th Cir. 1968).

119. See *Joint Rail-Water Rates to Hawaii*, *Matson Navigation Co.*, 351 I.C.C. 213 (1975).

120. 49 C.F.R. § 1300.67 (1976).

121. 49 C.F.R. §§ 1307.22 and 1307.24 (1976).

122. *In re The Publication and Filing of Tariffs on Export and Import Traffic*, 10 I.C.C. 55 (1904). It was established that, where carriers subject to ICC jurisdiction voluntarily established joint through rates with foreign carriers between points in the United States and points in Mexico or Canada, the ICC held jurisdiction to evaluate their reasonableness and to require U.S. carriers to abstain from joining in the maintenance of unlawful rates. *E.A. Brown Produce Co. v. Atchison, T. & S.F. Ry.*, 278 I.C.C. 433 (1950); *W.C. Reid & Co. v. Boston & M.R.R.*, 276 I.C.C. 397, 399 (1949).

However, with respect to traffic originating in Canada or Mexico, or destined for those

that its provisions applied to common carriers engaged in

the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment . . . from any place in the United States to an adjacent foreign country . . .<sup>123</sup>

Pursuant to this statutory authorization, the ICC recognized in 1888 that tariffs might be filed by railroads "jointly with one or more other carriers" on foreign commerce movements.<sup>124</sup> Nevertheless, it was consistently held that this statute conferred jurisdiction only over that traffic moving between the United States and *adjacent* foreign nations.<sup>125</sup>

The Transportation Act of 1920, however, amended section 1 of the ICA so as to delete the language limiting its application to

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nations, the ICC asserted rate jurisdiction only over that part of the movement performed within the territorial perimeters of the United States. *Albee Fruit Co. v. Atlantic Coast Line R.R.*, 293 I.C.C. 785, 787 (1955); *Clark-Cutler-McDermott Co. v. New York, N.H. & H. R.R.*, 293 I.C.C. 773, 775 (1954), *modified*, 298 I.C.C. 237 (1956); *Consolidated Mining & Smelting Co. v. Baltimore & O.R.R.*, 286 I.C.C. 313, 317 (1952); *Joseph J. Barshop v. Atchison, T. & S.F. Ry.*, 277 I.C.C. 17, 18 (1950). The ICC exercised no jurisdiction over transportation occurring wholly within a foreign nation at a separately published rate. *Marine Eng'r & Supply Co. v. Pacific Electric Ry.*, 294 I.C.C. 276, 276-77 (1955). The ICC found itself without authority to determine the reasonableness of a rate from a Canadian origin to the international boundary line between the United States and Canada. *Western Peat Co. v. Illinois Cent. R.R.*, 297 I.C.C. 273, 275 (1955), *modified*, 303 I.C.C. 65 (1958); *Elliott Packing Co. v. Duluth, W. & P. Ry.*, 292 I.C.C. 12, 13 (1954). The ICC asserted no jurisdiction to require the establishment of through international rates or to require U.S. carriers to participate in such through rates or charges. *Dallas Produce Co. v. Atchison, T. & S.F. Ry.*, 278 I.C.C. 746, 750 (1950); *Great N. Ry. v. Sullivan*, 294 U.S. 458 (1935); *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931); *News Syndicate Co. v. New York Cent. R.R.*, 275 U.S. 179 (1927); *Publication of Rates on Traffic Between the United States and Canada*, 147 I.C.C. 778 (1928); *Black Horse Tobacco Co. v. Illinois Cent. R.R.*, 17 I.C.C. 588 (1910). Moreover, a *land bridge exemption* was held to exist with respect to rates involving the transportation of commodities between two points in a foreign nation, but traversing the United States, under subsections 1(1)(a) and (b) of the ICA. *Iron Ore from Norfolk, Va., to Toledo Dock, Ohio*, 291 I.C.C. 93, 94 (1953).

123. An Act to Regulate Commerce, ch. 104, § 1, 24 Stat. 379 (1887) (current version at 49 U.S.C. § 1(1)(a) (1970)) (emphasis added).

124. *Re Publication of Export Tariffs*, 2 I.C.C. 9 (1888).

125. *See, e.g., R.S. Hill v. Nashville, C. & St. L. Ry.*, 44 I.C.C. 582 (1917); *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I.C.C. 266 (1908). In the *Cosmopolitan* decision, it was specifically held that the ICC possessed no jurisdiction over transportation from U.S. ports to points in foreign nations, except for the inland portion of the movement prior to transshipment. The ICC recognized a clear statutory distinction between the movement of traffic between the United States and adjacent and nonadjacent nations. *Id.* *See generally Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *Denver & R.G.R. Co. v. ICC*, 195 F. 968, 971-73 (Comm. Ct. 1912).

adjacent foreign countries. It provided that the provisions of part I of the ICA apply to common carriers engaged in

[t]he transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; . . . from or to any place in the United States to or from a foreign country, but only in so far as such transportation . . . takes place within the United States.<sup>126</sup>

There was no legislative history to explain the deletion of the word "adjacent," and the ICC continued to construe the statute as if the word were still present.<sup>127</sup> It exercised jurisdiction over tariffs establishing through routes and joint rates between the United States and the adjacent nations of Canada and Mexico (although it held no jurisdiction over the participating Canadian or Mexican carriers),<sup>128</sup> but it declined to accept the filing of tariffs which would have established joint rates for through movements by rail and water carriers between the United States and nonadjacent foreign countries (apparently because it held no jurisdiction over the participating water carriers).<sup>129</sup>

In response to Congressional inquiries, and subsequent to an exhaustive review of the legislative history of the ICA, the ICC announced on April 1, 1969 that it was of the opinion that it held statutory authority to accept joint rail-ocean rates, and that this jurisdiction also encompassed the filing of joint international rates between common carriers by motor vehicle or water and ocean carriers.<sup>130</sup> As has been indicated, section 202(a) of the ICA<sup>131</sup> enables

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126. Transportation Act, 1920, ch. 91, § 400, 41 Stat. 456 (current version at 49 U.S.C. § 1(1)(a) (1970)).

127. Goodman, *Recent Trends in Transport Rate Regulation*, 70 MICH. L. REV. 1223, 1272-74 (1972).

128. See, e.g., *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931); *News Syndicate Co. v. New York Cent. R.R.*, 275 U.S. 179 (1927).

129. *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 337 I.C.C. 625, 628 (1970), *modified*, 346 I.C.C. 688 (1974). However, the ICC's exercise of jurisdiction over transportation between two points in the United States, but performed partly outside the territorial waters of the United States, was upheld in *Pennsylvania R.R. v. United States*, 55 F. Supp. 473 (D.N.J. 1943), *modified*, 323 U.S. 612 (1945).

130. *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 341 I.C.C. 246, 249 (1972); *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 337 I.C.C. 625, 628 (1970), *modified*, 346 I.C.C. 688 (1974).

131. 49 U.S.C. § 302(a) (1970).

the ICC to assert jurisdiction over the transportation of property by motor carriers engaged in foreign commerce. Moreover, section 216(c) of the ICA provides, *inter alia*, that:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water . . . .<sup>132</sup>

This provision accords to the ICC authority over tariffs of joint international rates involving motor carriers subject to its jurisdiction.<sup>133</sup> Similarly, sections 302(i) and 305(b)<sup>134</sup> confer jurisdiction to the ICC over through routes and joint rates of domestic water carriers engaged in foreign commerce.

In the aggregate, these statutory provisions authorize the ICC to accept for filing the tariffs of international joint rates and to regulate them to the extent of the participation of carriers subject to its jurisdiction. There is no prohibition against the voluntary filing of joint intermodal rates by rail, motor, and water carriers subject to its control.<sup>135</sup> The ICC has emphasized, however, that:

Though this agency is authorized to accept for filing and to regulate the joint rates to the extent transportation occurs within this country, we are not thereby empowered to preempt any of the statutory duties that have been conferred by Congress on the Federal Maritime Commission. Accordingly, nothing stated herein should be construed as having the effect of barring that Commission from directing the participating water carriers to file tariffs with it, at the same time joint rate tariffs are filed with us, so that it can properly discharge its duties.<sup>136</sup>

132. 49 U.S.C. § 316(c) (1970).

133. 337 I.C.C. at 630-31. The ICC emphasized, however, that it was not deciding that FMC ocean carriers were under ICC jurisdiction, even when joint rates were established.

134. 49 U.S.C. §§ 902(i), 905(b) (1970), respectively. The latter provision requires that water carriers subject to the regulation of the ICC shall establish reasonable through routes and rates with rail carriers. It further provides that such carriers may establish reasonable through routes and rates with motor common carriers and with FMC ocean carriers (insofar as transportation is performed between the contiguous forty-eight states and Alaska and Hawaii).

135. 337 I.C.C. at 632.

136. *Id.* at 631. *See, e.g.*, 46 U.S.C. § 817 (1970). The ICC neither has, nor claims to have, jurisdiction over the ocean portion of rates charged by FMC carriers, nor is it concerned with the activity or conduct of such carriers. The ICC was not constituted to regulate ocean transportation practices or rates, and possesses neither the power nor the responsibility to enforce the provisions of any act relating to shipping. *Texas v. Seatrains Int'l, S.A.*, 518 F.2d 175, 178 (5th Cir. 1975).

On July 31, 1969, in *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*,<sup>137</sup> the ICC instituted a rulemaking proceeding designed to amend existing tariff rules, or to promulgate new ones, pertaining to export and import tariff via rail, motor, or part III water common carriers which operate within the United States in conjunction with FMC regulated ocean carriers operating in foreign commerce. In *In re Tariffs*, the ICC adopted comprehensive regulations governing the filing of joint international rates, including the requirement that tariffs containing such rates shall be published, filed, and posted in conformity with the provisions of the ICA and that the rules of the tariff circular shall include the names of all participating carriers, a description of the services to be performed by each participating carrier, and a statement of the division of the joint rate to be received by the participating carrier subject to ICC jurisdiction.

These regulations were ultimately promulgated in January 1976.<sup>138</sup> They seek, whenever possible, to attain coordination between FMC and ICC requirements. Thus, for example, ICC tariff publishing regulations are relaxed to permit the publication of tariffs by ocean carriers in conformity with the FMC in respect to (a) the symbols utilized to indicate increases, reductions, and changes effectuated by tariff amendments, and (b) the class rating of articles in the tariff index of commodity rate items. Similarly, only that portion of the joint tariff accruing to carriers subject to ICC regulation need be stated in terms of United States currency.<sup>139</sup> The ICC has also expressed an intention to be liberal in accepting intermodal tariffs which depart in minor respects from the regulations governing tariffs filed by domestic carriers.<sup>140</sup>

Where carriers have established through rates between points in the United States and points in a foreign country, the ICC has jurisdiction to pass on the reasonableness thereof, and to determine the lawfulness of such rates, insofar as the transportation takes

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137. 337 I.C.C. at 625-26.

138. The regulations are codified in 49 C.F.R. §§ 1300.0, 1300.67, 1305.0, 1307.22, 1307.49, 1308.0 (1976). See generally *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 351 I.C.C. 490 (1976).

139. 351 I.C.C. at 492. See also *Uniform System of Accounts for Maritime Carriers*, 349 I.C.C. 636 (1974); 49 C.F.R. pt. 1208 (1976).

140. 351 I.C.C. at 492-93. However, tariffs filed with the ICC must be printed in English. The regulations also prohibit NVO participation in international joint through rates. *Id.* at 493.

place within the United States.<sup>141</sup> When a carrier performing transportation within the United States enters into a joint through international rate encompassing transportation in the United States and abroad, the ICC retains jurisdiction to determine the reasonableness of the entire joint rate.<sup>142</sup> However, should the joint rate be found to be unlawful, the orders resulting from such proceedings operate only against the domestic carriers and not against the foreign carriers. This is consistent with sections 1(1), 203(a)(11), and 302(i)(3) of the ICA which, as noted above, confer upon the ICC jurisdiction to regulate foreign commerce only insofar as such transportation occurs within the territorial limits of the United States. However, it must be admitted that when the ICC requires that carriers under its jurisdiction cancel their participation in a joint international rate, the requirement has the practical effect of rendering the entire joint rate inoperable.<sup>143</sup> In fact, no joint rate can survive without the approval of both the FMC and the ICC.<sup>144</sup> However, should the joint rate become inoperable, the FMC may nevertheless permit carriers subject to its jurisdiction to charge their proportional rates for the port-to-port services they render.<sup>145</sup>

## VII. CONCLUSION

Intermodal foreign commerce and governmental regulation thereof have been stimulated by an enormous growth in awareness of the transportation requirements of importers and exporters of commodities. Contemporary legal developments in the area of foreign trade demonstrate that government can adequately adapt to the needs of the shipping public. For example, the ICC and the FMC have rectified their primary jurisdictional problems and cur-

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141. M. FAIR & J. GUANDOLO, *TRANSPORTATION REGULATION: PRACTICE AND PROCEDURE BEFORE THE INTERSTATE COMMERCE COMMISSION* 19-21 (7th ed. 1972). See also *Anglo-Canadian Pulp & Paper Mills, Ltd. v. Alberdeen & Rockfish R.R.*, 351 I.C.C. 325 (1975).

142. *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182, 183-84 (1966) (per curiam). The authority of the ICC to suspend joint international rates has been proclaimed in a number of investigation and suspension proceedings. See, e.g., *Iron or Steel Wire from Buffalo, N.Y., to Kitchener, Ontario, Canada*, 294 I.C.C. 515 (1955); *Cyanamid and Crude Cyanide from Niagara Falls, Ontario, to Eastern Trunk Line, New England, and C.F.A. Points and Virginia Cities*, 155 I.C.C. 488 (1929).

143. *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 350 I.C.C. 361, 365 (1975); *In re Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries*, 346 I.C.C. 688, 696-97 (1974).

144. 350 I.C.C. at 367.

145. *Id.* at 368.

rently have on file some 150 effective rules and rate tariffs filed by carriers of various transport modes. The Interagency Committee on Intermodal Cargo, composed of representatives of the ICC, FMC, CAB, and the Department of Transportation, is meeting monthly in order to explore areas of agency concern which might create difficulty for intermodal cargo movements.<sup>146</sup> Both government and business are coordinating their efforts in order to discern means to overcome existing inhibitions to the attainment of more expeditious, more satisfactory, and less expensive intermodal freight operations.<sup>147</sup>

As improved transportation overcomes distance and physical barriers between nations, trade and cultural contacts will proliferate. This shrinking of the planet, hastened by recent developments in technology and in law, increases the opportunity and the necessity for cooperation among nations in commercial, political, and cultural matters.<sup>148</sup> "With foreign trade balances assuming an increasing importance in the maintenance of economic strength, a coordinated national transportation system must be capable of extending beyond [the territorial boundaries of this nation] to provide a smooth and efficient funnel for exports."<sup>149</sup> The regulation of transportation in this nation exemplifies an awareness of these principles and a dedication to their attainment.

World trade has grown enormously in recent years, as has United States participation therein. Innovative developments in transportation have been paralleled by innovative developments in regulation. Both the former and the latter have been designed to facilitate the efficient, expeditious, and economical movement of foreign commerce. It is incontrovertible that the flow of commerce between nations is enhanced by a technologically sophisticated and governmentally facilitated means of transportation.

It is the interrelationship between the different transport modes and the jurisdictional division of regulatory authority among three federal agencies that provides the labyrinth through which foreign commerce flows in and out of this nation. It is this labyrinth to which this article has addressed itself, with the intent of elucidating the regulatory complexities involved in foreign commerce movements.

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146. *The Week in Transportation*, Traffic World, Oct. 18, 1976, at 21.

147. *Wanted: More Vitality for Intermodality*, Traffic World, Oct. 18, 1976, at 1.

148. M. FAIR & E. WILLIAMS, *ECONOMICS OF TRANSPORTATION AND LOGISTICS* 45 (1975).

149. Note, *Legal and Regulatory Aspects of the Container Revolution*, 57 GEO. L.J. 533 (1969).