

On the Regulations of the People's Republic of China on International Maritime Transportation

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INTRODUCTION

The Regulations of the People's Republic of China on International Maritime Transportation (the "Regulations") adopted at the 49th executive meeting of the State Council, came into force on 1 January 2002. The Regulations are applicable to international shipping business to and from the ports of the P.R.C. and the auxiliary business of the international shipping, which includes the services of international shipping agency, international ship management, loading and discharge, storage and warehousing of international shipments and international maritime container station and container yard, etc. The aim of the Regulations, which consist of 7 chapters and 61 articles, is to provide concrete legal safeguard for administration of international shipping business, maintenance of fair competition, market order and protection of the legitimate rights and interests of the parties in international shipping business. In accordance with the Regulations, the Ministry of the Communications (the "MOC") has formulated *The Implementing Rules of the Regulations of the People's Republic of China on International Maritime Transportation* (the "Rules") which are composed of 5 chapters and 70 articles, and which have been in effect since 1 March 2003.

One of the legal grounds of the Regulations is the Chinese Maritime Code 1992³ (the "CMC") which has been in force since 1 July 1993. Article 6 of CMC stipulates:

"All matters pertaining to maritime transport shall be administered by the competent authorities of transport and communications under the State Council. The specific measures governing such administration shall be worked out by such authorities and implemented after being submitted to and approved by the State Council."

The Regulations, by nature, are administrative rules regulating the administrative legal relationship arising from the governmental administration of international shipping business rather than regulating the civil legal relationship between market entities

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³ Article 2 of the Regulations.

arising from business activities. The Regulations therefore shall be categorized as public maritime law. The Regulations demonstrate the Chinese government's policy of integration of deregulation and regulatory administration in the international shipping business; reflect the commitments made by the Chinese government during the negotiations for China's entry into WTO; establish a series of systems in the administration of the international shipping business in the market economy; lay down rules in respect of investigation into and disciplinary measures against conducts detrimental to fair competition in the international shipping market; and set out penalty rules against violations of the Regulations. In accordance with the Regulations the competent authorities of the State Council and those in local municipal governments shall exercise supervisory and administrative functions on international shipping business and its auxiliary business in pursuance of the provisions of the Regulations⁴. The Regulations have also made it clear that where any country or region adopts any discriminatory prohibition, restriction or other similar measures against China's international shipping operators, ships or crew, the Chinese government shall take appropriate countermeasures on reciprocal basis⁵. The enactment of the Regulations is an important move adopted by the Chinese government subsequent to her entry into WTO. It has changed the longtime situation in which China's international shipping regulations and rules were inadequate, low-ranking and less authoritative; and this marked a step forward in the legal administration of international shipping business. The Regulations are a part of legislation which integrates deregulation and regulatory administration and it is bound to have a far-reaching impact on further and healthy development of the Chinese international shipping industry.

FURTHER OPENNING OF THE CHINESE SHIPPING MARKET

China is a nation that attaches much importance to faith, honour, commitment and responsibility. During the negotiations with various countries for its WTO entry, the Chinese government made a series of commitments in relation to the access to China's international shipping market and all these commitments have now been transformed into the "Special Provisions on Investment in and Operation of International Maritime Transportation and Auxiliary Business Relating thereto by Foreign Investors" in Chapter IV of the Regulations. In accordance with the provisions of this chapter, foreign investors could, upon approval of the competent authorities of the State Council, establish Chinese-foreign equity joint ventures or contractual joint ventures to engage in auxiliary business of international shipping. For enterprises engaged in

⁴ Article 4 of the Regulations.

⁵ Article 5 of the Regulations.

international shipping services and international shipping agency services, foreign investment, if any, shall not exceed 49% of the total investment and such investment proportion is also applicable to Chinese-foreign contractual joint ventures. Also, upon approval of the competent authorities of the State Council, foreign investors could invest in China to establish Chinese-foreign equity joint ventures, contractual joint ventures or wholly foreign owned enterprises to provide such routine services as freight soliciting, bill of lading issuance, freight settlement and service contract for vessels owned or operated by the foreign investors. For those foreign companies that have not established such enterprises in China, a Chinese international shipping agency must be appointed to undertake the above-mentioned routine services. Foreign shipping companies and auxiliary business service providers could, upon approval of the competent authorities of the State Council, set up representative offices in China, but such representative offices may not engage in operational business activities.

It can be seen that as a developing country, China has made significant progress in many aspects in opening her shipping market to the rest of the world, and in some aspects it even takes a leading role in the global shipping industry. Of course, this does not necessarily mean that there is no limitation whatsoever for foreign investors to enter China's international shipping market. For instance, foreign investors are as yet not allowed to operate auxiliary businesses in China in the form of wholly foreign owned enterprises, nor are they allowed to hold controlling shares in Chinese-foreign equity joint ventures or contractual joint ventures that are engaged in international shipping business or international ship agency business.

Permission by the Regulations to foreign investors to enter various sectors of the Chinese international shipping market is based on the significant improvements of China's overall strength gained in the past two decades of reform and opening. This indicates that China has the confidence and the capability in facing challenges and competition after her entry into WTO. As a matter of fact, the substantial part of the provisions in Chapter IV has already become a reality. For example, by the end of 2005, there have been 260 international ocean transportation companies and about 160 international marine liner including 110 overseas liners. The number of NVOCC was exceeding 1600. There have been more than 1100 international ship agencies. And

more than 300 overseas shipping companies established their subsidiaries in China. In addition, the number of a variety of institutions including performing international shipping and its auxiliary business as well as all kinds of representative offices was exceeding 4000. The major international shipping countries and the top 20 international container liners established their wholly owned subsidiaries, joint ventures or representative offices. The ships flying Chinese flag traveled to more than 100 countries and regions as well as 1200 ports⁶.

Currently, among the vessels sailing each month from Chinese ports, about 70% of the vessels on the Atlantic route and 47% of the vessels on the Far East route are owned or operated by overseas shipping companies. The shares of the Chinese carriers in the market have decreased from over 60% at the end of 1980s to less than 35% as of now; their shares in the international container shipping market have decreased from 50% at the beginning of 1990s to approximately 20% as of now. Notwithstanding such decreases, the development of the Chinese international shipping industry as a whole has not been jeopardized. On the contrary, great progress has been achieved not only in fleet size and operation, but also in human resources and management skills. The economic globalization will be reflected first in shipping industry. Where there is trading, there will be shipping, and shipping by nature is international. While China opens her market to the rest of the world, Chinese shipping companies are also allowed to enter foreign markets, each is inside of the other. In such an open, competitive and co-existent environment, Chinese domestic shipping companies have developed and China has become one of the most influential countries in the international shipping community. We therefore have reasons to believe that China's international shipping, having gone through more than two decades of reform and opening, is bound to achieve more and better developments in the process of further opening in the future.

DEREGULATION AND REGULATORY ADMINISTRATION

It is law that rules the market economy, and a state in the market economy make "rules of the game" to maintain market order and ensure fair competition. Whilst the Chinese water transportation industry is transforming from a planned economy to a market

⁶ The 2005 Report on China's Shipping Development ,P.10, People's Communications press.

economy, the competent authorities of the government shall speed up the transfer of their functions, minimize direct administrative interference and restriction, bring the market into play□exercise administration by economic, legal and other indirect forces, provide more autonomy for the enterprises in the market. For this purpose, the Regulations have substantially cut down the items that require government approval. Under the Regulations, except for international shipping business to which a permit system is still applicable, NVOCC business, international liner services, international shipping agency services and international ship management services are subject only to registrations. Detailed provisions can be found in the Regulations in relation to registration procedures, conditions for entry and duration for review of the above-mentioned businesses. To ensure that the registration system is operative, the Rules specify in detail the mechanism of the system. Compared to the previous management model in the Chinese shipping industry characterized by an application-and-approval system, the registration system now is obviously a huge step forward reflecting the government’s policy of gradual deregulation in the international shipping industry. Such a system will surely help achieve the transformation of government functions and formalisation of government administration and will therefore fit into the administration model generally adopted globally.

The Regulations on the one hand have eased the government control in many aspects, but on the other contain provisions where regulatory administration is necessary. The Regulations allow the MOC, when examining and approving applications for international shipping business, to take into account the nation’s policies for development of its shipping industry as well as the competition conditions in the international shipping market. In other words, as far as international shipping business is concerned, an applicant who meets the four requirements contained in Article 5 of the Regulations will not automatically be granted the permission to operate□the MOC has the macro—control discretion. At the same time, in order to ensure that the MOC exercises this discretion appropriately, Article 4 of the Rules provides:-

“The Ministry of Communications shall on its government website and other appropriate media publish the competition situations in the international shipping market and the nation's policies on development of international shipping business in due time. In case that such situations and policies are not published, they cannot be

used as the reasons to reject an application.”

This restrictive rule requires the competent authorities to carefully exercise their macro-control discretion, which is in line with the doctrine of administration by law.

With the development of containerised transportation, NVOCC has begun to play its roles in the international shipping community. As far as the civil legal relationship is concerned, the law governs the rights and obligations of the parties to the contracts of carriage of goods by sea, i.e. the rights and obligations among carriers, shippers and consignees. In defining the term “carrier”, the law does not care whether the carrier owns a ship or not. In other words, a party that enters into a contract with a shipper for carriage of goods is a carrier⁷. However, for the sake of protection of cargo owners' interests, it perhaps matters a great deal whether an international shipping business operator owns a ship or not. To a certain extent, a carrier owning a ship is more reliable than an NVOCC, because when there is a cargo damage claim or a maritime fraud, it may be more convenient to pursue a claim against the carrier owning a ship as the ship itself can be a kind of security. Therefore, in the American Shipping Reform Act 1998, one can find the provisions on the nature of NVOCC, permission for NVOCC business, surety bond, etc. It is also provided that the Federal Maritime Committee (the “FMC”) is empowered to strictly implement the Act. Judging by the managerial results, the introduction of strict provisions in American law in respect of NVOCC did effectively protect cargo interests and help eliminate maritime fraud. The question for us is whether it is necessary for China to, using American experience as an example, formulate similar provisions in respect of NVOCC business? The answer is affirmative. Before the enactment of the Regulations, NVOCC was operating in a market where there were no particular provisions of law, it was not uncommon that an NVOCC grabbed the freight of the cargo interests and fled away, or simply it had no capability to perform the contractual obligations. How to protect the cargo interests and how to administrate NVOCC business became the pressing tasks of the industry. It was in such circumstances that the Regulations, having taken into account the American Shipping Reform Act 1998 and the Chinese market reality, have defined NVOCC business and provided that one who is to engage in NVOCC business in China must form a corporate entity in China, register bills of lading and provide a deposit of RMB800,000

⁷ Article 42 of CMC.

as the security for the debts which may arise from non-performance or improper performance of NVOCC's obligations or administrative penalty which may be imposed upon the NVOCC⁸.

INVESTIGATION AND FAIR COMPETITION

The laws in both America and EU have specific provisions dealing with investigation and disciplinary measures against violation of fair competition, and such provisions are highly operative. Chapter V of the Regulations, taking into account of the relevant foreign laws and practice as well as the Chinese reality, contains provisions for investigation into violation of fair competition. Those provisions deal with the circumstances when investigation is necessary, how investigation shall be conducted, time limit of the investigation, and constitution and authority of the investigation team. It is provided under Article 40 of the Regulations that if conduct detrimental to fair competition is verified by the investigation, the competent authorities for investigation may take such prohibitive or restrictive measures as compelling amendment of the relevant agreements, restraining the frequency of liner services, suspending the use of freight tariffs or acceptance of freight filing, or demanding regular reporting of relevant information, etc. However, before making the decision to take prohibitive or restrictive measures, the investigation authority shall notify the party concerned of its right to have a hearing and shall hold such a hearing when the party concerned so requires⁹. In addition to this, Chapter 6 of the Regulations also expressly provides for the penalties of violations including termination of operation, cancellation of the operation permit, prohibition of ships from entering PRC ports, confiscation of illegal income, imposing of fines and even criminal charges. The Rules have detailed procedural provisions with respect to Chapter V and VI of the Regulations so as to facilitate practical implementation of the Regulations. On 30 December 2002, the MOC issued Notice No.9 announcing that at the request of China Foreign Trade Economic and Cooperation Committee, the MOC shall, in accordance with Article 35 of the Regulations, conduct an investigation to determine whether there is a violation of law in the collecting of the Terminal Handling Charges (the "THC") by international liner companies from Chinese cargo owners and shippers.

The China Shippers' Association alleged that from December 2001 the liner

⁸ Article 7,8 of the Regulations.

⁹ Article 41 of the Regulations.

conferences such as the Transpacific Stabilization Agreement(TSA) □ the bound Transpacific Stabilization Agreement(WTSA) □ the Intra-Asia Freight discussion agreement □ the Far East Freight Conference etc □ and the liner companies □ through their freight agreement collect THC at the Chinese ports from the same time and with the same level □ Such activity was against the provisions of the United Nations Convention on A Code of Conduct for Liner Conferences, 1974 and the Regulations of the PRC on International Maritime Transportation etc □ The China Shippers' Association alleged that THC should be a part of the freight □ The party who pays the freight shall pay the THC. They further alleged that the liner conferences and the freight discussion agreements failed to conduct meaningful negotiations with the Chinese shippers □ It is a compulsory business transaction of the liner companies to detain the bills of lading and the cargoes by abusing their dominant position when the Chinese shippers fail to pay the THC □

The liner conferences and the international liner operators alleged that the single out of the THC is for the purpose of transparent freight tariff quoting by showing to the shippers the cost components of THC and the ocean freight □ The collection of THC is a normal business conduct in the international shipping market which is commonly accepted in the world □ Such a business conduct does not violate any international conventions and Chinese laws and regulations □

The investigatory authorities verified the facts provided by the shippers and the carriers and listened to their views and propositions □ After verifying facts □ collecting evidence □ conducting public hearing and consulting experts □ on 18 April 2006, they drew the following conclusions:

1 □ THC is by nature a component of international container transport freight □ It is a practice in the major trading countries (regions) that the liner companies collect THC at the port of loading from the consignors and collect THC at the port of discharge from the consignees □ Meanwhile □ the investigatory authorities noticed that the shippers' associations in some countries and regions opposed the collection of THC by the liner companies.

2 □ Given the fact that the liner conferences and freight discussion agreements decided

to collect the THC for the international liner services in which Chinese ports are involved (starting at the same time as January 2002 and at the same level)□the investigator authorities held that the liner conferences and international liner operators were entitled to collectively reach freight agreements in accordance with the provisions of the Regulations of the PRC on International Maritime Transportation and the United Nations Convention on A Code of Conduct for Liner Conference&1974 acceded to by China□However□such agreements shall not be detrimental to the fair competition and disturb the order of international shipping market□Moreover□such agreements shall be filed with the Ministry of Communications of the PRC□

3. The liner conferences and freight discussion agreements□through collective agreements□announced in the form of joint notices or declarations that they would start to collect THC in China at the same time and the same level□It was not stated in those joint notices or declarations that the decision of collecting THC was not compulsory to the members of the liner conferences or freight discussion agreements and the members had the right to act independently□Such a decision de facto limited the right of shippers to choose carriers freely□It was not good for the normal price competition among liner companies and disturbed the order of the international shipping market to a certain extent□The investigatory authorities made the following decisions in accordance with the provisions of the Regulations of the PRC on International Maritime Transportation□

a. The Ministry of Communications of the PRC shall give an exhortation to the above mentioned liner conferences and freight discussion agreements as well as their members to avoid the same practice from happening again in the future and order the liner conferences and freight discussion agreements to revise the notices or declarations□

b. The Ministry of Communications of the PRC will,in accordance with Article 48 of the Regulations of the PRC on International Maritime Transportation□impose penalty on the members of liner conferences and freight discussion agreements who had reached the collective freight agreements but failed to fulfill the required filing procedures□

4. The international container liner transportation is an important means of transport that serves the foreign trade in China. The relevant authorities of the Chinese

government strictly observe the obligations conferred as provided for in the international conventions, maintain the order of the international shipping market, protect the legitimate rights and interests of the carriers and the shippers for the healthy development of the Chinese container transportation.

a. The investigatory authorities urged the liner conferences and the freight discussion agreement to set up an effective consultation mechanism with the shippers or shippers' associations in China for the purpose of full and effective consultation on issues of mutual interests before the implementation of freight agreements and various surcharge agreements that involve Chinese ports.

b. The liner conferences and the freight discussion agreements shall appoint their points of contact or representatives within the Chinese territory when they carry out the activities in China within the Chinese legal framework. The names and the addresses of such points of contact or representatives shall be known to the public and filed with the Ministry of Communications.

5. The Ministry of Communications issued a notice of investigation On 30 December 2002 to ask the international liner operators who collected THC at Chinese ports to submit their reports. The Ministry of Communications will in accordance with Article 53 of the Regulations of the PRC on International Maritime Transportation impose penalty to those international liner operators who failed to submit their reports as required.

6. For the allegation by the China Shippers' Association that the liner companies had detained the bills of lading and cargoes when the Chinese shippers failed to pay the THC, the investigatory authorities held that if the case was true, it was related to the formulation or performing of the transport contracts. Therefore, the relevant parties shall settle the case through judicial channels in accordance with the Maritime Law of the PRC and the other relevant laws and regulations.

The investigation in respect of THC is the first one which is conducted at the request of the parties concerned after the enactment of the Regulations and it has attracted the attention of the various parties concerned both at home and abroad. It is also, in a sense, a demonstration of the importance of the Regulations in administration of China's international shipping industry.

CONCLUSION

The Regulations are the first legislation in China administratively governing the international shipping business and its auxiliary business. It reflects the current development and administrative level of China's international shipping market and plays an important role in the Chinese shipping legal system. In the long run, however, the Regulations are only a "transitional" law. With the continual development of the market economy and with the further reform and opening, the administrative ability of the government as well as the legal system will be improved. As an important maritime nation, China should, the sooner, the better, enact a comprehensive administrative law so that the national policy and administration on water transportation, including river, coastal and ocean transportation, can be founded on a unified legal basis.