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FREEDOM OF NAVIGATION FOR INTERNATIONAL RIVERS: WHAT DOES IT MEAN?

*Ralph W. Johnson**

Is the principle of free navigation, as applied to international rivers, relevant to present-day political and economic reality? Ordinarily, the first thing to be done in an article such as this is to define the principal term, *i.e.*, "free navigation," or "navigational freedom." In this case it is impossible to give a single definition. The term, idea, concept, or rationale is a chameleon, changing its meaning from place to place and from time to time. A number of the following pages will be devoted to tracing these various meanings and showing the confusion that arises from their existence. Briefly, there are at least five major meanings that must be dealt with: (1) physical freedom of movement of vessels up and down a river, without regard to trading opportunities or access to port facilities; (2) physical freedom, plus complete *laissez faire* opportunity for trading among riparian countries; (3) physical freedom, plus the realistically limited trading opportunities of nineteenth century Europe; (4) physical freedom, plus the realistically limited trading opportunities of present-day western Europe; (5) physical freedom, plus the realistically limited trading opportunities of present-day eastern Europe. There is also confusion between the idea of navigational freedom on the one hand and the international commissions sometimes created to assure such freedom on the other. There are other meanings and submeanings to these terms, but those noted above are the most commonly encountered. No one, it seems, has ever successfully settled the definition, although the author has concluded that the most commonly intended meaning is number (2) above. In most instances authors simply fail to indicate which of the various meanings they intend. Unless otherwise indicated, the number (2) definition above will be used in this article.

Among many writers on the subject, such as Westlake, Hall, Eagleton, Ogilvie, Kaeckenbeeck, Chamberlain, Smith, DeVisscher, and Schwarzenberger, there has been not only a lack of agreement as to the meaning of the concept, but also wide disagreement as to how well "it" (by whatever definition) has been accepted, or should be accepted, by the nations that control the inter-

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national rivers of the world. Nevertheless, it is undeniable that the concept has formed the verbal, if not real, cornerstone of numerous treaties and conferences on international rivers, from the Vienna Conference of 1815 to the Belgrade Conference of 1948. At present, it is apparently about to be reconfirmed as the lodestar for the drafting of international river agreements, this time by the International Law Association.¹

The purpose of this paper will be to analyze the origin of the concept, trace its (their) development, point out the most commonly used meanings, and then demonstrate the substantial irrelevance of the concept, by any of these definitions, to present-day river navigation and trade problems.

Europe's acceptance of the principle of free navigation for international rivers, manifested by the Act of the Congress of Vienna, 1815,² the Mayence Convention, 1831, the Mannheim Convention, 1868, the Treaty of Paris, 1856, the Berlin Treaty, 1885, the Belgrade Convention, 1948, and others, is unique, and has not been repeated in other parts of the world. In South America, during the latter part of the nineteenth century, navigation on the Amazon, Orinoco, Rio de la Plata, and some other rivers was made available to international use by legislation, executive proclamation, or bilateral treaty. In North America, on the St. Lawrence, the United States was guaranteed navigational rights by the Treaty of Washington of 1871, but no "regime" of "navigational freedom" has ever been established.³ The tendency

¹ This question is currently under consideration by the International Law Association. At its September 1961 meeting, the Committee on the Uses of the Waters of International Rivers of the International Law Association adopted Draft Articles Concerning Navigation which affirm and carry forward the provisions of the Barcelona Convention of 1921 concerning navigable freedom, albeit in slightly different terminology and with a few minor changes. In the comment accompanying the draft articles the committee reviewed the various treaties and conventions concerning navigation on international rivers (nearly all of which are before 1921) and commented at 42: "A movement for the recognition of free navigation on international rivers set in at the end of the eighteenth century and was developed in the 19th century. It would be a good thing if this development would continue at present." The draft contains no significant analysis of how the principle of navigational freedom is supposed to fit into the very different political-economic setting of today. In this connection, cf. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 207 (1957); I HYDE, *INTERNATIONAL LAW* 565 (2d rev. ed. 1945).

² In the Act of the Congress of Vienna of 1815 (Article 15) the concept of navigable freedom for international rivers was called "part of the public law of Europe." During the nineteenth century some eminent legal writers spoke of a "legal right" of free navigation. See WESTLAKE, *INTERNATIONAL LAW* 142-59 (1904).

³ See Lawford, *Treaties and Rights of Transit on the St. Lawrence*, 1961 *CAN. B. REV.* 577.

in the Americas has been *not* to enunciate navigational freedom as the guiding principle of law, but rather to regard the right to use a river as a privilege to be granted or denied at the will of the territorial sovereign.⁴ Also, no successful effort has ever been made to establish the European type of international commission to administer international rivers in the Americas. Similarly, the principle of navigational freedom has not been accepted by the Asians as the guiding principle for international river control.⁵

In Europe the acceptance of the navigational freedom principle reached a high point immediately after the First World War, as illustrated by the post-war treaties, the writings of the time,⁶ and the convention approved at the 1921 Barcelona Conference. The post-war treaties declared freedom of navigation for the Rhine, upper and lower Danube, Elbe, and Oder. The European Danube Commission and the Central Commission of the Rhine were confirmed and new international commissions, with non-riparian representation, were created for the fluvial Danube, the Elbe, and the Oder. A general conference on the question of legal regimes for international rivers was called for the near future, and was held in 1921 at Barcelona. The conference delved into the various methods of controlling navigation on international rivers, finally adopting a convention incorporating the navigational freedom principle in much the same terms as used in prior treaties and conventions concerning Europe's rivers. Some effort was exerted to make the basic convention extend the principle of navigational freedom to internal rivers, but this effort failed. Instead, an additional protocol was prepared, permitting states to apply the principle to their internal rivers if they so desired. In the years following the Barcelona Conference hopes for widespread ratification, or at least acceptance, of the Barcelona principles gradually died. At present, of those states that are riparian to navigable international rivers, seven have ratified: Austria, France, Bulgaria,

⁴ See I HYDE, *op. cit. supra* note 1, at 524-34.

⁵ Those who have made a special study of this matter do not report treaties, conventions, or other sources from Asia which attempt to apply the navigational freedom concept. See, *e.g.*, *id.* at 524-65; the Report of the Committee on the Uses of the Waters of International Rivers of the International Law Association, which was tentatively approved at the Brussels Conference (1962); FENWICK, *INTERNATIONAL LAW* 288-310 (1934); I WHEATON, *INTERNATIONAL LAW* 384-404 (6th ed. 1929); India's "denunciation" of the Barcelona Convention, effective March 26, 1957, 230 U.N.T.S. 448.

⁶ See, *e.g.*, EAGLETON, *INTERNATIONAL GOVERNMENT* 243-44 (1932); KAECKENBEECK, *INTERNATIONAL RIVERS* § 275 (1918); OGILVIE, *INTERNATIONAL WATERWAYS* 168 (1920). Some writers took a more moderate view. See I WHEATON, *op. cit. supra* note 5, at 385.

Czechoslovakia, Hungary, Rumania, and India. An additional thirteen nonriparians ratified.⁷ At present, of the riparians, only France would seem to be still adhering to the Convention. Four of the original riparians—Bulgaria, Czechoslovakia, Hungary, and Rumania—are members of the 1948 Danube regime which, although articulating some of the navigational freedom words, actually operates under a different set of principles.⁸ In 1960 Austria also joined this regime.⁹ In 1956 India filed with the United Nations a “denunciation” of the Barcelona Convention, effective March 26, 1957.¹⁰ In summary, it may be said that the present trend among states is away from the general convention or universal solution approach to navigational control problems and toward solution by specific limited agreements.¹¹ This trend is further illustrated by the marked decline in the fortunes of the international commissions established in Europe to assure navigational freedom, which, presumably, were to serve as the examples for similar organizations throughout the world.

Since the early 1930's there has been a steady crumbling of those European regimes which purport to assure international freedom of navigation. The 1856-1919 regime for the Danube was modified virtually out of existence by the 1936 Sinaia agreement, signed by Great Britain, France, and Rumania, and approved by Italy, which transferred most of the powers of the European Danube Commission to Rumania. The river thus became subject to Rumanian municipal law.¹² In 1948 the Soviet-dominated Belgrade Conference established an entirely new Danube regime, under the control of the Communist riparians and thus subject to extensive planning and government control rather than to a “navigational freedom” policy.¹³ The 1919 regime for the Oder was suspended with the German invasion of Poland in 1940. Since the

⁷ Albania, the British Empire, New Zealand, Chile, Denmark, Finland, Greece, Italy, Luxemburg, Norway, Sweden, Thailand, Turkey. LEAGUE OF NATIONS OFF. J., 20th & 21st Ass., Spec. Supp. No. 192-195, at 89 (1939-46).

⁸ See Johnson, *The Danube Since 1948*, 1963 YB. OF WORLD AFFAIRS 236; Cattell, *The Politics of the Danube Commission Under Soviet Control*, 19 AM. SLAVIC AND E. EUROPEAN REV. 380 (1960); Gorove, *Internationalization of the Danube: A Lesson in History*, 8 J. PUB. L. 125 (1959).

⁹ Austria's joinder was completed in January 1960. BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH Nr. 40 (1960).

¹⁰ Effective March 26, 1957. 230 U.N.T.S. 448.

¹¹ See DE VISSCHER, *op. cit. supra* note 1, at 207.

¹² For comment on the Sinaia agreement, see Sinclair, *The Danube Conference of 1948*, 1948 BRIT. YB. INT'L L. 398-404 (1948); Gorove, *supra* note 8, at 125-54.

¹³ See Johnson, *supra* note 8, at 236.

Second World War the river has been in Communist territory, and the 1921 regime has not been reconstituted. The 1919 Elbe regime similarly went into eclipse in the late 1930's with the rise of the Third Reich. The river is now cut in two by the East-German, West-German zonal border, and no navigation of any kind passes that line. Although the portion of the Elbe in West Germany is navigated extensively, it is under the control of the West German Federal Republic. The last of the great international river commissions to remain in effect is on the Rhine, where the famous Central Commission still operates. But the hopes of some of the creators of this regime that it should gradually be expanded to include the Moselle, and the Rhine above Basle,¹⁴ have not materialized.¹⁵ Further, the navigational freedom provisions of the Rhine conventions have been gradually altered and eroded by activities in other fields, such as pooling agreements allocating cargoes among ship companies, national economic planning by riparians and, more recently, the supra-national economic planning and regulation of the European Communities.

To what can we ascribe these severe changes in Europe's international river regimes? It is apparent that an examination of the basic legal documents will not reveal a complete explanation, because in many instances these documents still speak with the voice of the nineteenth century.¹⁶ We must instead turn to relevant economic and political data for the answers.

¹⁴ See CHAMBERLAIN, *THE REGIME OF THE INTERNATIONAL RIVERS: DANUBE AND RHINE* 277-78 (1923).

¹⁵ The Moselle is now subject to the special jurisdiction of a new international corporation, by virtue of a Franco-German agreement of 1956. See JESSUP & TAUBENFELD, *CONTROLS FOR OUTER SPACE* 129 (1959). The Rhine above Basle is still controlled by the riparians.

¹⁶ It is somewhat surprising to observe that the freedom of navigation concept appears in essentially the same form in the Treaty of Vienna in 1815, the Mayence Convention on the Rhine in 1831, the Treaty of Paris on the Danube in 1856, the Mannheim Convention on the Rhine in 1868, the Berlin Treaty on the Congo and Niger Rivers in 1878, the Versailles and other treaties on the Rhine, Danube, Elbe, and Oder in 1919, the Barcelona Convention in 1921, even the Belgrade Convention on the Danube in 1948, and now the 1962 draft articles of the I.L.A. Committee on International Rivers.

The most important early statement of this principle appeared in the Treaty of Vienna in 1815. The Treaty there adopted said:

"The navigation of . . . [Europe's international] . . . rivers, along their whole course, . . . from the point where each of them becomes navigable, to its mouth, shall be entirely free, and shall not, in respect to commerce, be prohibited to any one; it being, however understood, that the regulations established with regard to the policing of this navigation shall be respected; as they shall be framed alike for all, and as favourable as possible to the commerce of all nations." Treaty of Vienna, June 9, 1815, articles concerning Navigation on the Rhine, Art. I. 1 HERTSLET, *COMMERCIAL TREATIES* 19 (1840).

Politics and Economics

"Navigation, in and for itself, is worthwhile only to a few yachtsmen; it is because they can carry cargoes and passengers that ships are sailed. The right, therefore, to navigate a river is of value only if the riparian state or states permit ships to trade at their ports so that freedom of navigation of a river implies freedom to take part in commerce at the river ports."¹⁷

If a political approach is taken, one can argue that the changes

In 1831 the Mayence Convention for the Rhine set out a similar provision which was then carried forward into the 1868 Mannheim Convention:

"La Navigation dans tout le cours du Rhin, du point où il devient navigable jusqu'à la mer, soit en descendant, soit en remontant, sera entièrement libre, et ne pourra, sous le rapport du Commerce, être interdite à personne, en se conformant toutefois aux réglemens de police, exigés pour le maintien de la sureté générale, et aux dispositions arrêtées par le présent Règlement.

"Sa Majesté le Roi des Pays-Bas consent à ce que le Leck et l'embranchement dit le Waal, soient tous les deux considérés comme la continuation du Rhin dans le Royaume des Pays-Bas." Mayence Convention, March 31, 1831, Art. I. 18 BRITISH AND FOREIGN STATE PAPERS 1077-1078 (1833).

This convention also created the famous Central Commission of the Rhine to carry out the purposes of the Treaty. This Treaty and the Central Commission still control navigation on the Rhine today.

In 1856 the Treaty of Paris established the famous European Danube Commission and provided for free navigation on the Danube. This theme was confirmed in the World War I Treaty of Saint-Germain-en-Laye, Sept. 10, 1919, which provided:

Art. 291. "The following river is declared international: The Danube from Ulm; together with all navigable parts of this river system which naturally provide more than one State with access to the sea, with or without transshipment from one vessel to another. . . ."

Art. 292. "On the waterways declared to be international in the preceding Article, the nationals, property and flags of all Powers shall be treated on a footing, . . . of perfect equality, no distinction being made, to the detriment of the nationals, property or flag of any Power, between them and the nationals, property or flag of the riparian State itself or of the most favoured nation." 29 HERTSLET, COMMERCIAL TREATIES 436-37 (1923).

The control of the lower Danube was effectively handed over to Rumania by the Sinaia agreement of 1936 between Rumania, Great Britain, and France; however, no change was made in the navigational freedom formula by the new decision-makers. Even the Soviet-controlled Belgrade Convention of 1948 continued essentially the same verbal form:

"Navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all states, on a footing of equality in regard to port and navigation charges and conditions of merchant shipping. The foregoing shall not apply to traffic between ports of the same state." 33 U.N.T.S. 197-222 (1949), Art. I.

In 1885 the Berlin treaty concerning the Congo and Niger Rivers provided:

"The navigation of the Congo, without excepting any of its branches or outlets, is, and shall remain, free for the merchant-ships of all nations equally, whether carrying cargo or ballast, for the transport of goods or passengers. It shall be regulated by the provisions of this Act of Navigation, and by the rules to be made in pursuance thereof.

"In the exercise of this navigation the subjects and flags of all nations shall in all respects be treated on a footing of perfect equality . . ." Art. XIII, Treaty of Berlin, Feb. 26, 1885. 17 HERTSLET, COMMERCIAL TREATIES 68 (1890).

This treaty provided for the creation of an international commission to administer navigation on these African rivers, but the Commission was never formed.

¹⁷ CHAMBERLAIN, *op. cit. supra* note 14, at 282.

in Europe's international river regimes have resulted from political and military power shifts over the past thirty or forty years. The 1856 Danube regime was a product of British power in the Black Sea area after the Crimean War and of the British desire to nourish her considerable commercial interests there; the 1885 Congo regime was a product of European dominance in Africa during the late 1800's and of a fairly evenly balanced, mutual desire by the Europeans to exploit the Congo's resources peacefully; the post-World War I regimes for the Danube, Rhine, Elbe, and Oder were the products of the Allied victory in the First World War and of the desire by the victors to subject the fallen Germany to as much international, non-German control as possible. The allies also sought to assure their commercial shipping access to east European markets. But this part of the picture does not explain the absence of new regimes guaranteeing navigational freedom on the same and other rivers, reflecting a more current power picture. Nor does it explain why "navigational freedom" is becoming less relevant to the reality of traffic and regulations on the Rhine in recent years. An examination of relevant economic factors sheds more light on the problem.

Grotius argued that navigational freedom on the high seas sprang from a rationally based natural law.¹⁸ It now seems apparent that the basis of the principle as applied to international rivers lies in the capitalistic, *laissez faire* economic system which began to replace European mercantilism in the eighteenth century and, with the help of Adam Smith, Bentham, Locke, and others, attained widespread acceptance in the nineteenth century. In connection with international trade this system held that the greater the freedom, the greater the over-all economic progress. This in turn supported the principle of navigational freedom for international rivers.

Not only did the *laissez faire*, free trade system of the nineteenth century give rise to the navigational freedom concept, it also provided the economic setting within which that concept was meaningful, *i.e.*, a situation in which shipowners could obtain cargoes by making their price and quality of service competitive, and could stay in business by earning profits from their efforts. They could freely contact different individuals or companies to induce cargoes onto their vessels. Presumably their continuation

¹⁸ GROTIUS, DE JURE BELLI AC PACIS (1625).

in business resulted more from their greater efficiency vis-à-vis their competitors, than from governmental subsidies, favoritism in state regulation, or monopolistic agreements with manufacturers and purchasers.

It may be readily admitted that even in the nineteenth century heyday of the *laissez faire*, free trade system it could not be said that all purchases, sales and carriage agreements were solely the product of "market" factors. The influence of the state, in the form of protective tariffs, import quotas, exchange controls, subsidies and the like, intervened to influence the market. However, there is little doubt that market factors played a greater part than they do today. Europe, with much of the rest of the world, has now passed into the era of the "planned" economy.

Business and informed public opinion both now accept the notion that national governments ought to participate in the planning of key aspects of economic life. In the past fifteen years there has been a remarkable acceptance in Europe of the notion that supranational "governments," such as the European Economic Community and the Coal and Steel Community should engage in such planning activity. This new function of government, at all levels, is especially manifest in the transport industry, and its existence there as elsewhere changes significantly the setting in which navigation occurs on international rivers. It necessarily also changes the meaning of the term "navigational freedom." This change was aptly put by the District Court of the Hague in the 1952 *Restraint at Lobith* case.

"[T]he Court must make the preliminary remark that reference to a principle laid down in the Convention of Mannheim, which was approved by a Netherlands Act of Parliament, was a reference to a Treaty and a law dating from the year 1868 and 1869, that is, from a period when regulations ordering the economic life of a country, such as have become an urgent necessity in present circumstances, were, if not entirely unknown, at least considered of so little importance that no attention was paid to them: certainly no account was taken of them when the principles of the Convention of Mannheim were formulated. In the course of years, however, economic conditions in the world have undergone changes of so important a nature—even leaving aside reasons of a political nature—that it has become essential for the Government, with a view to serving the general, not to say national, interest, to

make all kinds of regulations applicable to the Rhine, without any direct bearing on free navigation on that river. The economic life of a country and the regulations enacted on its behalf have nowadays become respectively so wide in scope, and so sweeping, that provisions intended to operate in a particular field are necessarily bound to produce, or may easily produce, effects elsewhere which may prove to be inconvenient and troublesome for persons not directly interested. It does not follow, however, that such regulations must be regarded as unlawful so that in case of damage a claim for compensation arises. Suppose, to quote an example, that the fixing of very high coal prices in the Netherlands, necessitated by a stress of economic conditions, becomes so onerous for towing companies that they might be forced to abandon competition with foreign towing companies, would it be reasonable, on the sole ground of violation of an abstract principle formulated in former years by the Convention of Mannheim, to reproach the Government of an independent country for fixing such high prices? Present day economic conditions, to take another example, frequently require persons engaged in various industries and occupations to register with or become members of a recognized body, failing which they will not be allowed to work in those industries or occupations. Would it not seem odd if, supposing that such a requirement were imposed upon shippers or shipowners in general those navigating on the River Rhine would be exempt solely because the Mannheim Convention of 1868 recognizes the principle that 'la navigation du Rhin sera libre; il ne sera apporté aucun obstacle, quel qu'il soit, à la libre navigation,' although this principle has nothing whatsoever to do with the control of industry?"¹⁹

In 1934 the World Court had to deal with the impact of the change in economic setting on navigational freedom in the celebrated *Chinn*²⁰ case, concerning the Congo River. The implication of the *Chinn* decision is that the navigational freedom concept is concerned essentially with physical freedom of navigation and not with the economic environment in which that navigation takes place. The case merits special comment.

¹⁹ *Boon & Chantiers Navals du Rupel v. State of the Netherlands*, 1952 Int'l L. Rep. 149, 150-51. The particular Dutch law in question was later struck down by the Dutch Supreme Court as in conflict with the navigable freedom provisions of the Mannheim Convention. See note 21 *infra*. But the Supreme Court decision does not detract from the language quoted above.

²⁰ *Oscar Chinn*, Permanent Court of Int'l Justice No. 63, ser. A/B (1934).

Chinn, a British subject, operated freight vessels on the Congo. UNATRA, a Belgian company, was a competitor in which the Belgian Government owned a controlling interest. Chinn complained that the Belgian Government was violating the navigational freedom provisions of the Congo Act of 1885, as revised by the Treaty of St. Germain of 1919, by extending special privileges to UNATRA and thus permitting it to drive its competitors from the field. The court decided, by a vote of six to five, that the measures in question did not violate the treaty, that the Belgian Government was acting in a private capacity, as a stockholder of UNATRA, and not governmentally, and that such action posed only a threat of private competition to Chinn, of which he could not complain. In so holding, the court was apparently impressed by the argument that the Belgian action was a small part of a larger plan, the purpose of which was not, primarily, to interfere with river navigation, but rather to alleviate the Congo's economic crisis of 1931.

A lesson to be drawn from this decision is that the navigational freedom concept as applied by the World Court gives protection primarily to the physical freedom of movement of vessels and is not directly concerned with the economic environment in which such movement takes place.²¹ This approach tends, in a very real way, to render the free navigation principle feckless.²² Why did

²¹ The 1952 decision of the Netherlands Supreme Court in the *Restraint at Lobith* case, *Boon & Chantiers Navals du Rupel v. State of the Netherlands*, 1952 Int'l L. Rep. 149, takes a slightly broader view of the legal effect of the navigational freedom concept as it appears in the Mannheim Convention. In that case, Boon, a Netherlands subject, and Chantiers Navals du Rupel, of Belgium, sued the Netherlands Government for damages for stopping plaintiff's vessels at the Dutch-German border. The vessels were stopped because plaintiffs could not produce certificates from either of two Dutch organizations, membership in which and compliance with the regulations of which were, by Dutch law, made a condition to navigation on the Rhine. The purpose of the regulations was to make a fair apportionment of freight among vessel operators. The Dutch Supreme Court held for the plaintiffs, saying that the Dutch law was invalid because in conflict with the navigable freedom provisions of the Mannheim Convention. It said at 154:

"In the present case, however, the regulations were exclusively concerned with international inland navigation, and as appears from the names of the prescribed organizations, with international Rhine traffic more especially; they do not only influence traffic conditions indirectly, they affect navigation directly. Even if the regulations concerned were indispensable for the Netherlands economy, they could still not be legally enacted as long as the Convention of Mannheim remains in force unaltered." (Emphasis added.)

In view of the emphasized comments of the court it seems fair to assume that the decision does not proscribe Dutch legislation of a general character which might have an indirect or incidental effect on Rhine navigation. It speaks only to the question of regulations "exclusively concerned with international inland navigation" on the Rhine.

²² Dr. Schwarzenberger, in 1 INTERNATIONAL LAW 236 (3d ed. 1957) comments on this aspect of the *Chinn* decision and criticizes the court for suffering "from a too static view

the court so hold? It is impossible to know precisely, but one may observe that the decision is consistent with the fact that (1) national economic planning is now a commonplace and expected activity of the modern state government, and (2) a court of law would find it practically impossible effectively to limit such economic planning on the basis of the very generalized navigational freedom provisions of the 1885 and 1919 treaties.

Thus, the effect of the *Chinn* case is to give an aura of legality to a host of governmental economic planning maneuvers which also have an incidental, but significant effect on international river navigation. Such maneuvers include exchange controls, quota restrictions, tariff barriers, regulation,²³ subsidization, ownership, or control of internal transport which connects or competes with international river transport, and regulation, subsidization, ownership, or control of international transport where such action is part of a plan to solve a general economic problem and is not aimed directly at the control of navigation on a particular international waterway.²⁴

Navigational Freedom in Eastern Europe

So far we have been looking at the changes brought about in the navigational freedom concept in western Europe, where the idea originated. If we glance for a moment at eastern Europe it becomes even more apparent that this concept has no relevance to what occurs on international rivers there. As noted above, navigational freedom was a product of the *laissez faire*, free trade system of the nineteenth century. It was a natural outgrowth of that system and was integrally wedded to it. The principle simply has no relevance in a totally government-planned society. This does not mean that the words "navigational freedom" are no longer used in eastern Europe, or in the war of words between East and West. For example, at the Belgrade Conference of 1948, establishing the current Danube regime, the western delegates pressed vigorously for a convention articulating the navigational

of the phenomenon of competition. While [the court's decision] was fully in accord with the tenets of liberal economic theory, it was sadly out of touch with the realities of economic life."

²³ For example, in a 1948 Swiss case it was held that a Swiss law requiring accident insurance for the crew of vessels operating on the Rhine did not violate the navigational freedom provisions of the Mannheim Convention. *Basler Rheinschiffahrt-Aktiengesellschaft v. Bundesamt Für Sozialversicherung*, Switzerland, Federal Tribunal, 1948 Int'l L. Rep. 69.

²⁴ See Restraint at *Lobith* case, note 21 *supra*.

freedom concept, presumably realizing that it could not possibly become a reality in the six economically-planned downstream riparian countries. The Communist majority, presumably with the same realization, somewhat surprisingly agreed to such a convention, evidently believing it would improve its international image to do so. Article I provides:

“Navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all states, on a footing of equality in regard to port and navigation charges and conditions of merchant shipping. The foregoing shall not apply to traffic between ports of the same state.”

In this respect we may note that a few West German and Austrian vessels do today navigate the whole length of the Danube, and a few vessels from other non-Communist nations operate on the maritime Danube.²⁵ It is possible that British, French, or United States vessels might be allowed to pass along the river now. But such physical freedom of movement is not the same “freedom of navigation” intended in the various treaties, conventions and writings on the subject in western Europe over the past 150 years. Those documents and writings envisaged a *laissez faire* economic system in which not only navigation took place, but loading facilities would be available upon the payment of a standard fee, and cargoes could be obtained through the proffer of the right price and service. Under the Communist governments of eastern Europe the locus of decision-making regarding access to loading facilities and cargoes is now changed. It is not held by the owner of the private facility or business, interested primarily in making a private profit, but rather is held by government and other officials who operate under the guidance of Communist political and economic theory, and whose objectives and methods are, needless to say, quite different.

Transport

In addition to changes in the over-all economic and political setting in which navigation occurs today, there are other differences that affect the navigational freedom picture. Especially important are those that have occurred in the transport industry.

²⁵ See COMMISSION DU DANUBE, BULLETIN STATISTIQUE DE LA COMMISSION DU DANUBE (1959, 1960). For a report on current shipping and navigational control on the Danube, see Johnson, *supra* note 8, at 236.

During the past fifty years profound changes in the efficiency and organization of both national and international transport have occurred. The transport industry as a whole has expanded rapidly, has become highly complicated and interdependent, and has become increasingly important to today's highly industrialized societies.

International rivers of nineteenth century Europe held a larger position in the over-all transport picture than they do today. Roads were adequate only for limited transport; in many areas they were poor in the rainy winter months. Railroads were still in a developmental stage. It is true that the need for transport of any kind was less than now, but that need was necessarily satisfied to a greater extent by river travel. In the past fifty years we have seen a vast expansion of rail and road transport, the birth and development of air transport, and now rapid expansion of an international pipeline system. River transport still plays an important part in the carriage of heavy, bulk items, such as iron ore, coal, oil, and grain. But its relative importance has diminished. Even more significant, it is now merely one part of a highly complicated and interdependent transport pattern. With these changes it has become increasingly difficult to accord international rivers a special legal regime.

A greater degree of governmental regulation and control has come about in transport than has been true with most other modern industries. Thus the general pattern in Europe today is one of either outright state ownership, or else close regulation of both rail and inland waterway transport.²⁶ This has affected navigation on international rivers in two ways. First, it has given national governments a broader array of tools to influence and control international river transport. Many "international" cargo shipments either start or end their trips on intrastate carriers. In other cases intrastate carriers are the principal competitors of the international waterway carriers (*e.g.*, railroads paralleling the Rhine). By raising or lowering cargo rates of these connecting or competitive carriers, or by subsidizing or controlling their operation in other ways a national government can exert a compelling influence on the international carrier.²⁷ Second, the existence,

²⁶ See DIEBOLD, *THE SHUMAN PLAN* 178 (1959).

²⁷ See MANCE, *INTERNATIONAL RIVER AND CANAL TRANSPORT* 38 (1944), for a discussion of how international traffic on the Rhine has been adversely affected by national policies showing favoritism toward railroads.

over a period of years, of government ownership, regulation and control of intrastate transport systems has conditioned business and public opinion to an acceptance of similar controls over international transport, the kind of regulation now being brought about by the European Communities.

Another area of change having an impact on navigational freedom concerns the fact that navigation no longer holds such a dominant place in the use of Europe's, or the world's, great rivers.²⁸ It is not unusual today to find a single river in demand for navigation, municipal water supply, sewage and industrial waste disposal, power generation, irrigation, fish propagation, and recreation. Most of these uses have either originated or assumed greater importance within the past half century. It is therefore not surprising that the more casual, *laissez faire* approach of many states toward the control of their rivers in the nineteenth century has given way to an increasingly apparent "management" approach in contemporary times. This trend toward closer management has been encouraged because governments at one level or another, rather than private enterprise, have historically carried much of the responsibility for sewage disposal, domestic water supply, wildlife conservation, and public recreational facilities.

In this connection, it is appropriate to note the distinction between international rivers and the open seas. The freedom of the seas concept arose largely because of the exceptional difficulties of asserting control over the seas for more than a few miles offshore, and from the fact that the difficulty and cost of asserting more extensive claims was not warranted by the somewhat less vital interests to be protected thereby. (These interests are now increasing rapidly in number and importance.) On the other hand, it is relatively easy for a nation to control rivers that run through or along its borders, and states historically have done so. And there are now many vital, national interests that states have in such rivers, which tend to encourage close regulation, and which do not exist, or are only beginning to exist, in the case of the high seas.

Another geographical distinction should be made, *i.e.*, between those parts of international rivers that are usable for ocean-going vessels and those that are usable only for river craft. The argument for extending the freedom of the seas notion to the "ocean-going" part of the river is a good deal easier to make than that for the

²⁸ See BISHOP, *INTERNATIONAL LAW* 390 (2d ed. 1962).

“river craft” sector.²⁹ Ocean-going vessels have a freedom of movement that is not shared by river craft. When competition becomes too keen in one area they can usually be moved to another part of the world. River craft, on the other hand, are usually captives of a single river, or river system, and may even be limited by their draft, or engine capacity, to a portion of a river. Seldom can they operate from one river to another or onto the ocean. This geographical restriction reduces their competitive opportunities and puts added pressure on the state whose flag they fly to protect them through discriminatory regulations, subsidies and the like. If, as is usually the case, this state is a riparian, the understandable result is a tendency to restrict the freedom of foreign vessels.

Another factor that differentiates nineteenth century navigational control problems from those of our time is the extensive canalization now being carried out in Europe. The Moselle canalization will be completed in a few years, connecting the French steel industry directly with the Rhine. Work on the Rhine-Main-Danube canal is well along. There are definite plans to complete the Danube-Oder canals. Numerous other, less spectacular canals have been completed or are under construction.

Such canalization increases the difficulty of guaranteeing navigational freedom on international rivers. Canals are traditionally subject to national control—in spite of the fact that they may be physically linked to a “free” international waterway. National governments thus have an additional lever for controlling international waterways. For example, the national government can, on its canals, impose regulations favoring its own shipping in such a way as effectively to bar or harass foreign shipping. Such action would tend to inhibit the “freedom” of such foreign vessels even on the international waterway.

At the Barcelona Conference of 1921 this problem was recognized, and an attempt was made to put canals and the international rivers with which they connect on the same legal footing, *i.e.*, both

²⁹ See, *e.g.*, CHAMBERLAIN, *op. cit. supra* note 14, at 281-82. “The problem of freedom of navigation to all flags of international rivers may be divided into two clearly marked parts, freedom for seagoing ships to sail up to the river ports where they transfer to and from river boats, and strictly fluvial navigation. So far as the first is concerned, the river should, for this purpose, be treated as an arm of the sea, for the second, the fluvial community should have full power of disposition. The distinction between rivers and the open sea should be kept in view. The open sea is a roadway between practically all countries, which all are interested in keeping open because their trade passes over it. A river is a pathway of trade only to the states bordering it and can be of interest only to them and the countries with which they traffic.”

subject to rules of navigational freedom. The attempt did not succeed, and canals, along with internal rivers, have continued to be subject to exclusive national control.

*New Developments: The European Coal and Steel Community
and the European Economic Community*

So long as Europe consisted of sovereign, independent states, it was unlikely that a unified system of regulatory controls could be established for international river transport. The same forces which tended to foster state sovereignty worked to retard the development of such international controls. However, with the development of the common markets the sovereignty theme in Europe has been replaced by that of unity. As an incidental consequence of this change, the Rhine is gradually losing its character as an international river and taking on the aspect of an internal body of water within the newly emerging European federal state. Precisely what this will mean for "navigational freedom" cannot now be ascertained, but there is some evidence available. In general, this evidence points to a system of greater regulation. As indicated below, the increased regulation will apply to the whole of the transport industry, but especially to rail and inland waterway transport, and will cover international as well as intrastate movements.

An examination of the various publications of the European Economic Community indicates that the transport question is being attacked as part of the over-all problem of coordinating and encouraging Europe's economic growth. Needless to say, transport can make or break industrial development. It is essential to the Community's continued success that the transport industry be made as efficient as possible. To meet this objective the Community is planning a comprehensive regulatory program. It is true that this may mean increased competition among the industries dependent on transport, but for the transport industry itself there will likely be less competition, less freedom, and more regulation. Of course, in the rail and inland water industry this will mean merely a change in emphasis from national regulation to one of supranational regulation, a change from working with uncoordinated and diverse national policies to working with a single (hopefully) coordinated and harmonious international policy.

Before the birth of the European Coal and Steel Community

(ECSC) in 1952 there were three major unfavorable aspects in the European coal and steel economy that were attributed to transport:

“[T]he practice by which some countries forced foreign producers to pay more for the carriage of goods than home producers and consumers—‘discrimination’;

“[T]he growth over a period of many years of divergent transport policies in each country;

“[T]he fact that crossing a frontier automatically raised the price of freight above the rates already charged within a country [load breaking].”³⁰

The High Authority of the ECSC attacked all three of these problems on the ground that their elimination would facilitate the free flow of goods and thus encourage competition in the various industries of the Community. Within the first few years of the treaty it was able to eliminate more than thirty cases of “discrimination,” and this aspect of the work has now been completed. The problem of “load breaking” has similarly been solved. But the problem of harmonization of divergent transport policies has not been solved, and is proving difficult. In addition there have been recurrent crises on the Rhine, brought on by the cyclical effect of unregulated competition.

Various solutions to these problems have been tried. In the early 1950's it was suggested that the Rhine system be brought under regulatory control somewhat like that used internally in the European states. This idea was not well received and was shelved.³¹ It is doubtful, in any event, whether the ECSC had sufficient power under the treaty to carry it out, inasmuch as it can act only with regard to coal and steel. The transport problem as such is not within its jurisdiction, except as it relates to these items, yet any regulation of transport with regard to coal and steel would necessarily affect transport of other commodities.

Other attempts were made to alleviate the more serious problems. With regard to cargo haulage rates, several unsuccessful efforts were made to require international rates to conform to national rates. Failing these, in July 1957, the Community members signed the “Rhine Agreement,”³² providing that domestic

³⁰ P.E.P., EUROPEAN ORGANIZATIONS 256 (1959). See also 7 EUROPEAN YB. 47 (1961).

³¹ See DIEBOLD, *op. cit. supra* note 26, at 179.

³² Agreement on Rhine River Navigation, concluded between the member governments in July 1957, effective May 1, 1958. Article 2 provides: “With a view to eliminating the, at times, very considerable disparities in transport rates, the member states

rates should be adjusted to international rates, which were to be left free for determination between shipping companies and their customers. This unlikely plan has apparently been disregarded by member states.³³

With the advent of the European Economic Community a broader approach was taken. The Commission of the EEC determined that under articles 3, 74, and 75 of the Rome Treaty it was required to establish a common policy in the transport field. Toward the accomplishment of this objective it published a major memorandum in May 1961 outlining such a policy.³⁴ This memorandum outlines various "special aspects" of the existing transport systems which pose special problems, such as "(a) the intervention of the public authorities in infrastructure matters, (b) certain peculiarities in the structure of supply and demand in the transport sector, (c) the obligations incumbent on a public service, and (d) the enforced reduction of charges."³⁵ The memorandum then comments on possible Community action to alleviate problems raised by these "special aspects":

"The chief means to this end are the equitable distribution of infrastructure costs among the budgets concerned, improved administration and operational organization, the placing of certain limits on transport capacity and the imposition of some restriction on freedom to fix transport rates. To these should be added an easing of the obligations as a public service, action to offset those obligations which remain and fair compensation for loss of revenue due to reduction in the rates charged."³⁶

With regard to tariff rates for the haulage of cargoes the memorandum suggests the establishment of a system of price brackets, with checks in the form of publication of rates. Carriers will then be required to operate within these price brackets, leaving them a "certain liberty . . . chosen in such a way as to avoid excessive

applying their administrative regulations to Rhine traffic rates on the national level undertake to keep these regulated internal rates constantly in line with the level of the representative rates freely instituted by the shipping companies." See P.E.P., *op. cit. supra* note 30, at 259.

³³ See E.C.S.C. HIGH AUTHORITY, EIGHTH AND NINTH GENERAL REPORTS ON THE ACTIVITIES OF THE COMMUNITY (covering the period from February 1, 1959 to January 31, 1961).

³⁴ E.E.C. COMMISSION, FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY, MAY 16, 1960 TO APRIL 30, 1961, 139-52 (1961).

³⁵ *Id.* at 140.

³⁶ *Ibid.*

competition or monopoly."⁸⁷ For inland waterway transport in particular, the memorandum suggests that measures must be taken to lessen certain difficulties, such as the excessive number of small enterprises, and inadequate training for the work.

It is not difficult to see that the direction the Community proposes to take with regard to transport is toward more regulation, and toward the limiting of competition. As applied to international river navigation, this would seem to portend a further modification of the "navigational freedom" principle.

Conclusion

What, then, is the future of the venerated principle of freedom of navigation? Certainly its continued repetition as a kind of platitude or talisman will spread joy only among cliché buffs, but will accomplish little toward solving the real problems of commerce and navigation on the world's international rivers. To this author it would seem that the principle, or at least its nineteenth century version, probably ought to be stored away as the interesting historical notion that it is. It is festooned with too many meanings, and carries with it a too "dated" political and economic background to be useful now. Rather, it would seem that a fresh approach to the control of international rivers should be developed, one that takes into account the contemporary and still changing interests of the countries that use and benefit from the use of these rivers. An effort should be made to locate and accurately to describe these interests, determining their present value to society as well as anticipating their future worth. A number of questions ought to be asked, and answered, such as: What are the actual uses, *e.g.*, navigation, fish propagation, sewage disposal, power generation, irrigation, and recreation, that are now being made of the world's international rivers? What are the relative economic, social, and political values of these uses to contemporary society? What will be or should be their worth in the future? By whom, and for whose benefit—riparians, nonriparians, or both—are these rivers to be controlled? These are only suggestive of the questions that should be thought out and answered before a new effort at generalization is attempted. In particular, if the free navigation idea is to be further used, we should know more accurately what its advocates mean by it, and what its acceptance

⁸⁷ *Id.* at 147.

and application would mean in contemporary society. Then, and only then, will we be able to assess its utility within our own value structure.

To this author it seems likely that further study of the problem will not only confirm the irrelevance of the navigational freedom notion, but will also indicate the impracticability of creating any substitute generalization to take its place. The day is past when navigation plays such a dominant role, vis-à-vis other uses, on the world's international rivers. The particular concatenation of demands on each river is now so unique as to suggest an individual treatment for each one, giving due regard to the many and diverse community needs that must be served by it.