

## THE DECLINE OF SHIPPING CONFERENCES – LEGISLATIVE REFORMS IN CANADA, USA, EEC AND AUSTRALIA\*

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### I. Introduction

Shipping conferences that dominated ocean liner transport for most of the twentieth century were exempt from the antitrust laws of most countries. The 1990s witnessed a decline in shipping conferences and a mounting criticism against the exemption. But little was accomplished until 2008. In this paper we begin by examining the background to shipping conference legislation in Canada, USA, EEC and Australia. In section III we briefly examine the rationale for shipping conferences and the trends. In section IV we examine the recent legislative developments in Canada, USA, EEC and Australia and developments thereafter. We end with a few concluding remarks.

### II. Background to Conference Legislation

*a) Canada:* Canada did not have any specific legislation governing shipping conferences until 1971. In February 1959, a complaint was filed against the exclusive patronage system of the Eastern Canada-United Kingdom Shipping Conference to the Director of Investigation and Research and led to an inquiry under the *Combines Investigation Act*. The matter was brought before the Restrictive Trade Practices Commission (i.e., R.T.P.C.). Based on the rationale and recommendations of the 1965 R.T.P.C. report, the *Shipping Conferences Exemption Act* (i.e. *Act*) was passed in 1970.

Despite the R.T.P.C.'s strong criticism against patronage contracts, the *Act* continued to allow it. Further, the *Act* did not give any regulatory role to the Canadian Transport Commission. Its sole responsibility was to ensure that agreements were properly filed with it. Furthermore, there were no specific provisions designating responsibility for the enforcement of the *Act*. The main penalty for prohibited practices of shipping conferences was that agreements lost their exemption from the *Combines Investigation Act*. Other than the exemptions provided in the *Act*, shipping conferences continued to be subject to the *Combines Investigation Act*. This led to the *Shipping Conferences Exemption Act, 1979*. However, it did not introduce any effective pro-competitive measures. The provision to strengthen the position of the shippers through a shipper group, designated to represent shipper interest, was not very

effective due to the vagueness of the provision on the meaning of 'information sufficient for the satisfactory conduct of the meeting'. The *1979 Act* further increased the power of the conferences by extending the scope of the exemption between one or more conferences and between conference and non-conference carriers. This led to the *Shipping Conferences Exemption Act, 1987*.

**b) EEC :** In the early 1900s, Western Europe adopted the United Kingdom's "laissez-faire" approach to conferences. Since then till 1986 conferences were excluded de facto or de jure from the application of competition laws as the European governments. Shipowners wanted protection from the antitrust laws of the US and developing countries wanted protection from the discriminatory practices of conferences. This resulted in the adoption of the Code of Conduct for Liner Conferences. The Code was incompatible with the competition provisions of the *EC Treaty*. As a compromise, the "Brussels package" was adopted in 1979 by the EC Council of Ministers. It recognized the stabilizing influence of conferences while implicitly establishing the principle of block exemption. This led to a regulation (Council *Regulation No. 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty of Rome to Maritime Transport*) exempting liner conferences from Articles 85 and 86 of the *Treaty of Rome*. It went into force on July 1, 1987 together with a number of supplementary regulations on maritime transport.

**c) USA:** Before the passage of the 1916 legislation on shipping, the US Government brought legal suits under the *Sherman Act* against a number of international steamship combines. The House Committee on Merchant Marine and Fisheries under the chairmanship of J. W. Alexander investigated the problem of shipping combinations and published its findings in 1914. Based on these recommendations, Congress decided in 1916 that with federal regulation, the shipping industry could provide public benefits not otherwise available though the conferences had abused its monopolistic power which could be prevented (by prohibiting anti-competitive or discriminatory practices, disclosure to a federal agency and agency approval).

The US *Shipping Act, 1916* was largely based on the recommendations of the Alexander report. It recognized certain benefits and shortcomings of the conference system and therefore provided for limited acceptance of the conference system with active government supervision. In 1960, two congressional committees investigated the industry and its regulations and

noted the dissatisfaction with the operation of the system. Congress, however, remained persuaded that the conference system was necessary to avoid rate wars and monopoly. Consequently, the *Shipping Act, 1916* was amended. A number of developments led to the *US Shipping Act of 1984*: dissatisfaction with the regulatory process, uncertainties about the outcome of regulatory decisions, the container revolution and development of intermodal services; and, general dissatisfaction with the existing legislation.

**d) Australia:** Australia has a long history of Commonwealth regulation providing shipping conferences with conditional exemption from competition legislation. This continued when the 1965 *Trade Practices Act* (TPA) was introduced. Part XA was introduced in 1966 and provided exemptions from all of the competition rules in Part IV of the Act for all registered conference agreements in return for undertakings to enter into negotiations and provide information to the designated shipper body. Conference agreements could be disallowed if conferences or their members failed to comply with an undertaking or to appoint a local agent, or if they failed to have due regard for the need for services to be efficient, economical and adequate.

Over the last twenty-five years, there have been four major reviews of competition regulation in Australia: the 1977 Grigor Report; the 1984 Industry Task Force; the 1993 Brazil Review; and the 1999 Byron Report. The first resulted in no amendments to Part X of *Australia's Trade Practices Act*. The second resulted in amendments: providing for greater regulatory oversight of carriers, improving the bargaining power of shippers, limiting the exemption to sections 45 (anticompetitive agreements) and 47 (exclusive dealing), making agreements subject to section 46 (misuse of market power), introducing a 'me too' provision and requiring conferences to negotiate minimum service levels. The third resulted only in accepting one recommendation i.e. retention of Part X. The fourth also resulted in a few amendments.

### **III. Rationale for the Exemption and Developments in the 1990s**

**a) Rationale:** Over the history of conferences, two basic rationales - the economic and the political - have been put forward to provide a justification for the exemption of ocean liner shipping from competition. The economic rationale developed under various theoretical models has been increasingly questioned and its justification for continuing the exemption for ocean liner shipping from competition has been questioned. This rationale is based on the argument that conferences are needed to provide stability of rates and services

in an otherwise unstable industry which works to the benefit of users as well as carriers. This rationalization has been advanced under two models: 1) The monopoly-cartel; and, 2) The theory of the core.

The rationale for the monopoly-cartel theory is based on the presence of cream-skimming and fly-by-night entry by competitors. This leads to excessive entry and unrestrained competition, resulting in instability and destructive competition. This forces carriers to collude and erect barriers which prevent entry. The above rationale and result has been subject to careful scrutiny and the literature generally concludes that in order for instability or destructive competition to occur the industry must exhibit, three major characteristics (sunk costs, vulnerability to entry and extended periods of excessive capacity). Whether the above characteristics hold have been the subject of extensive debate. In general, it is argued that liner markets do not exhibit the characteristics of markets that are subject to destructive competition.

In view of the above, other economic models have been used to provide an alternative justification for the destructive competition argument which has received attention recently. One such model is the "economic theory of the core", this theory implies that in certain kinds of markets, there is no sustainable competitive equilibrium. It has been argued in a paper in 1989 that liner shipping may be an example of such an "empty core".

It has been pointed out that the theory of the core is also of questionable relevance as a justification for shipping conferences. The principal paper on which this view of conferences is based has been criticized on technical grounds. More generally, the evidence indicates that in most trade routes, there are a large number of carriers operating at different levels of capacity. This is a condition that is unlikely to prevail if there is an empty core. The existence of the empty core is most probable if an individual firm's capacity in the industry is large relative to the total demand, and if firms are homogeneous in their cost structures. This does not appear to be the situation in the liner industry.

It may also be noted that conferences have not, in practice, provided stability of rates and services. Indeed, in recent times, conference rates have tended to be volatile. In 1990, conference rates were affected by significant increases in surcharges as well as base rates. Evidence of instability of services was provided in a number of submissions to the Industry Advisory Group Relating to the Review of the *Shipping Conferences Exemption Act, 1987 (SCEA)*,

which drew attention to the recent withdrawals of conference services from the Atlantic ports despite *SCEA*.

The political rationale is based on the argument that conferences are required by considerations of international comity. Conferences operate on all of Canada's major trading routes with Europe, the United Kingdom, Japan, South-East Asia and South America. Their role has been sanctioned by specific legislation in many jurisdictions. In this context, a desire to ensure compatibility of Canadian maritime policy with our major trading partners appears to have been a consideration in adopting the present exemption for conferences from competition law under *SCEA*.

The argument that conferences should be accepted by Canada for reasons of international comity, while still important to consider, also seems less compelling than in the past. In 1991, the U.S. Assistant Attorney for Antitrust, James F. Rill, has categorically rejected the view that acceptance of conferences is required by the traditional concept of comity in international law. In his remarks before the U.S. Advisory Commission on Conferences, Mr. Rill stated "It takes a broad stretch of ingenuity to transform the comity doctrine to a justification for an outmoded and wasteful regulatory regime." Mr. Rill's viewpoint is supported by U.S. jurisprudence indicating that the comity doctrine does not require nations to maintain policies which are fundamentally prejudicial to their national interests.

***b) Developments in the 1990s:*** Fundamental changes have occurred in liner shipping. The most noticeable are: 1. Technological changes - containerization, multimodal transportation and new mega-sized carriers; 2. New forms of organizations - superconferences, consortia and joint ventures, global carriers, alliances and shippers' alliances; and 3. New forms of services - multimodal service and global service. The most significant of these changes is technological change. These developments have become so noticeable that some authors refer to them as 'the new paradigm'.

Three other important developments are: 1. A decline in shipping conferences vs. non-shipping conferences or independent carriers; 2. A change in philosophy towards shipping conference; and 3. A belief that abolishing the antitrust exemption would result in benefits to shippers and ultimately to consumers.

#### **IV. Recent Legislative Developments and Developments Thereafter**

In light of the above, legislative amendments were made in each of the above

jurisdictions. These will be described hereafter followed by developments thereafter and developments elsewhere.

***a) Recent Legislative Developments***

**Canada - The Amendments in SCEA (Bill C-14):** The amendments to the *Shipping Conferences Exemption Act* received Royal assent on November 1, 2001 and came into force on January 30, 2002. The amendments in SCEA can be categorized into those relating to: competition; efficiency; and administration.

*Competition:* The basic amendments relating to competition are: a reduction of notice period required for independent action on tariffs to five days from the present fifteen days and provision for adopting independent action on the same day; and a specific provision for mandatory individual service contracts. Mandatory individual service contracts were to be achieved by indicating that the terms and conditions established by a Conference will not have the effect of preventing a member of a conference from entering into a service contract and there will be no need for the member to give notice to the Conference of the service contract or to divulge its substance.

*Efficiency:* The basic amendments pertaining to efficiency are measures to provide for: filing documents electronically; deleting the requirement to file tariffs and individual service contracts; and making available tariffs electronically to the public at a reasonable price.

*Administration:* The basic amendment regarding administration is an increase in the fine for non-compliance to \$10,000 for each offence. Other amendments are designed to accommodate the above changes and to provide for reorganization of certain sections.

**US - Amendments to the US Shipping Act**

The reforms to the Ocean Shipping Reform Act of 1998 (OSRA) went into effect on May 1, 1999. These reforms can be classified into those related to: competition; efficiency; and administration.

*Competition:* First, the purpose clause of the Act has been expanded to promote the growth and development of United States exports through competitive and efficient ocean transportation and placing a greater reliance on the marketplace. Second, the notice period required before a member of a conference can take independent action has been reduced to five days from the previous ten day requirement. Third, ocean common carrier agreements can no longer regulate or prohibit the use of service contracts though they can discuss

and agree on any matter related to service contracts. An ocean common carrier agreement: cannot restrict a member or members from engaging in negotiations with one or more shippers; cannot require disclosure of the terms and conditions of a service contract, other than those required; and cannot adopt mandatory rules to negotiate and enter into service contracts. However, an agreement may provide authority to adopt voluntary guidelines (that must be confidentially filed with the FMC) regarding service contracts if it explicitly states that these guidelines need not be followed. Except for certain commodities, the essential terms of each service contract shall continue to be filed, however, only those terms related to origin and destination of port ranges, the commodities involved, the minimum volume or portion, and the duration shall be published. Fourth, the requirement that a service contract be made available to a similarly situated shipper has been eliminated. Fifth, no conference or group of two or more carriers may offer service pursuant to a service contract that is a unjustly discriminatory practice relating to rates or charges or give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any locality, port, or persons due to those persons' status as shippers' association or ocean transportation intermediaries. Sixth, a shipper can combine with another shipper to obtain a service contract. Seventh, an intermodal agreement by two or more ocean carriers and a non-ocean carrier are permitted if it is not in violation of the antitrust laws and is consistent with the purposes of OSRA.

*Efficiency:* The reforms relating to efficiency include: tariff filing elimination with the FMC; electronic publication of tariffs; electronic availability of tariffs to the public at a reasonable price; and service contracts now based on percentage.

*Administration:* First, section 3 on definition was amended: to delete the definition on fighting ships and non-vessel-operating common carrier; to add a new definition on ocean transportation intermediary; and to modify the meaning of: controlled carriers, deferred rebate, forest products, loyalty contracts, marine terminal operators, service contracts and shipper. Second, the section on penalties was also modified. Section 13(a) also specified that the amount of any penalty constitutes a lien upon the carrier's vessel; section 13(b)(4) also indicated that the FMC can request revocation of clearance for vessels for failure to comply with a subpoena; and the limitation on penalties indicated that neither the Commission or any court shall order the payment of any differences in the amount set forth in any tariff or service contracts for transportation

services agreed between specified parties. Third, ocean transportation intermediaries and NVOCCs must be licenced and the latter's bond has been increased. Finally, numerous other administrative amendments were also made for example, appropriations authorized for the Commission, quorum to exercise its powers and date for prescription of regulations.

#### **ECC - Amendments to the EC shipping laws**

A review of the exemption was undertaken in 2000 when the Lisbon European Council called on the Commission "*to speed up liberalisation in areas such as gas, electricity, postal services and transport.*" A number of other factors also provided increased momentum for the review. In May 2000, the OECD workshop on Reform in Maritime Transport met in Paris to consider their discussion paper that recommended the removal of immunity from the application of antitrust laws to common rate fixing by conferences together with discussion and capacity stabilization agreements. On November 6, 2000, the OECD published an interim report and on April 16, 2002, it published its final report. The OECD report concluded "that exemptions for conference price-fixing no longer serve their stated purpose (if they ever did) and are no longer relevant." The report recommended that OECD countries "seriously consider removing antitrust exemptions for price-fixing and rate discussions."

This led to a Review of Council Regulation (EEC) No. 4056/86 and a number of studies and papers. In light of the above, in a historic move, on December 14, 2005, the European Commission called for an abolition of the liner conference system that covered shipping services since the 1870's. The European Commission called on member governments to repeal the block exemption. The EC said "Repealing the exemption will benefit EU exporters by lowering transport prices whilst maintaining reliable services. This will enhance the competitiveness of the EU industry. ... Liner conferences do not deliver the benefits for which block exemption was established and the commission's impact assessment shows that lower transport prices are likely to result from the block exemption's repeal." The Commissioner said "The European shipping industry is strong and has everything to gain from a competitive market. Customers are clamouring for business in the industry to be conducted as it is in all other sectors." The Commission indicated that the end of the exemption should take effect two years after the EU ministers have approved the measure. This will provide time for carriers to adapt to a competitive market and governments to review their relations with non-EU



countries where shipping conferences are still legal.

On 25<sup>th</sup> September 2006, the matter was finally put to rest. The Competitiveness Council agreed to repeal Regulation 4056/86 ending the possibility for liner carriers to meet in conferences, fix prices and regulate capacities as of October 2008. It also amended Regulation 1 / 2003 – the general regulation setting out the procedural rules needed to implement Articles 81 and 82 of the EC Treaty – extending its scope to include cabotage and tramp shipping. The abolition of the exemption for liner conferences will affect EU and non-EU carriers operating on routes both to and from Europe. The European Commission welcomed the unanimous adoption of its proposal by the Competitiveness Council. The Commissioner who handled this proposal said “I am delighted the Council has adopted this proposal less than a year after we presented it. The European shipping industry will benefit from the more competitive market that will result from the repeal of the block exemption and the EU economy as a whole stands to benefit from lower transport prices and more competitive exports.” To ensure that the new regime fosters competitive markets, the Commission will issue Guidelines on the application of the competition rules to maritime transport before the end of the transitional period.

#### **Australia - Review of Part X of Australia's Trade Practices Act**

In June 2004, the Parliamentary Secretary to the Treasurer referred Part X of the TPA to the Productivity Commission for inquiry and report. The Commission's task in reviewing Part X was to consider: first, the justification for industry-specific exemption (i.e. whether Part X should be retained); second, the alternatives if Part X were abolished; and third, the changes that could be made to improve the effectiveness of Part X, if retained.

On July 19, 2004, the Australian Competition and Consumer Commission questioned the benefits of the shipping conferences exemption. Following a public investigation into the Asia-Australia Discussion Agreement, the ACCC Chairman stated that “this highlights both the pervasiveness of these anti-competitive agreements and the permissiveness of the Part X regime.” However, the Commission did not recommend that the agreement be disallowed as it could not separate the broader market effects from the impact of the anti-competitive agreement.

On September 15, 2004, the ACCC in its submission to the Productivity Commission suggested that the specialised treatment of the international liner

cargo shipping industry be revoked. It stated that “ what is not so clear is whether the collusive liner agreements provide benefits which outweigh those detriments.” In essence, it proposed the net public benefit of particular agreements between shipping lines be established prior to them being exempted from Australia’s competition law.

The Productivity Commission released its Inquiry Report on *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping* in October 2005. On the first issue, the Commission was of the opinion that Part X reflects a judgment that most agreements are beneficial (that is, that they should generate a net public benefit) and that it would be too difficult or costly to identify and exclude those that are not. This, however, was a presumption. On reviewing the filed agreements the Commission ‘considers that no compelling case has been made that all agreements currently registered under Part X operate to provide a net public benefit’. Accordingly, it was of the view that Part X as currently structured, no longer meets its primary purpose and that evaluation of agreements is needed to ensure that registration is provided only to agreements that are likely to provide a net public benefit. This could be achieved by an alternative mechanism for authorization or modifying Part X.

On the second issue, the commission’s preferred option is for Part X to be repealed and the liner cargo shipping industry to be subject to the general provisions of the TPA. Authorization could be undertaken under Part VII of the TPA as applies to industries. Under Part VII, agreements would be assessed individually on the basis of their net public benefit. It could be achieved with a 4 year transitional period and is unlikely to result in practical inconsistencies with the regulations as currently applied in US and the EU.

Regarding the third issue, the Commission’s strongly preferred option is to repeal Part X. However, if Part X were to be retained the current arrangements could be improved by either: (i) selectively registering only agreements that do not contain provisions to discuss or set prices and/or limit capacity offered on a trade route, and by revoking registration for those that do; or (ii) excluding from registration, and by revoking the registration of, ‘discussion agreements’, together with providing for the protection of confidential individual service contracts between carriers and shippers.

It is apparent from the above that the Commission would prefer the repeal of the current exemption and that alternative mechanisms be used to provide immunity for efficiency enhancing agreements or agreements that could be shown to

provide a net public benefit.

On August 4, 2006, the government provided its response to the Commission's recommendations. It decided to retain Part X but to amend it promote further competitive reform. The amendments to Part X will: clarify its objectives; remove discussion agreements from its scope; protect individual confidential contracts between carriers and shippers; and introduce a range of penalties for breaches of its procedural provisions.

***b) Developments in Canada, USA and EEC hereafter***

**Canada** - Since the amendments to SCEA in 2001, no major developments have occurred in Canada. Only one major report, by the Canadian Transportation Act Review Panel (*Vision and Balance*) made a recommendation with regard to international liner shipping. It stated that in principle it favoured eliminating the exemptions from competition law and recommended that the government make this intention clear and actively pursue a multilateral agreement among international partners to do so.

To date there are no reports what the government is doing other than that Transport Canada is monitoring the impact of the SCEA reforms together with developments occurring on the international front. Nevertheless, shippers, represented by the Global Shippers Forum in North America, Europe and Asia have called for further reduction in carriers' ability to collectively discuss rates and services. It has called for an end to carriers' antitrust immunity in the United States, and urged the governments of China and India to apply their antitrust laws to liner shipping. The forum is composed of the Asian Shippers' Council, European Shippers' Council, Japan Shippers' Council, the Canadian Industrial Transportation Association, and the U.S. National Industrial Transportation League.

**US** – Since the passage of OSRA in 1998 there have been very few developments in the US other than the initial reaction. Three noteworthy reports or developments were: the Federal Maritime Commission (FMC) Report, the Maritime Administrative Bar Association Survey and H.R. 1253. First, the FMC Report on the Impact of OSRA stated that after two years of operation, OSRA is generally achieving its objective of promoting a more market driven, efficient liner shipping industry. To eliminate the ambiguities in OSRA, the FMC suggested revisions to some provisions. Second, the MABAS published its review of OSRA in late 2001. It stated "More than two-and-one-half years later, all indications are that OSRA has changed commercial practices

in the liner shipping in a number of important respects. ... the act appears to be working consistent with its policy directive, which calls for an ocean liner industry that places a greater emphasis on competitive and market-driven practices.” Third, Bill H.R. 1253 (*Free Market Antitrust Immunity Reform (FAIR) Act of 2001*) was introduced in the House of Representatives on March 27, 2001 by James Sensenbrenner. This bill would repeal antitrust immunity for ocean carriers but retain such immunity for marine terminal operators. It was supported by several organizations but it resulted in no action by Congress. One unfortunate consequence of OSRA was the inability of non-vessel operating common carriers (NVOCC) to offer confidential contracts to their customers and the requirement for them to publish, file and adhere to mandatory tariffs. In 2005, the FMC revised the regulations and permitted NVOCCs to enter into confidential service agreements. In June 2010, the FMC began considering the matter of NVOCC tariff. Another interesting development that we note is that the FMC reports that discussion agreements have replaced conference agreements as the venue for carrier discussion. Further, the MABAS raised concerns regarding discussion agreements.

**ECC** – In the EEC, the removal of the exemption in 2008 was not total, it only applied to price agreements of shipping conferences but non-rate agreements (eg. consortia) continued to enjoy the exemption. Consortia agreements were covered under Regulation No. 870/95 which went into effect on April 21, 1995. The key elements of this regulation are: 1. A consortium formed from members within a conference will be exempt from EU competition laws if its market share is less than 30%. 2. A consortium of non-conference carriers can have a market share of up to 35%. 3. A consortium with a market share of between 30% or 35% and 50% must notify the Commission and will be granted exemption if no objection is issued within six months. Members of a consortium must have the right to withdraw without penalty on six months notice, after an initial period of 18 months. In the case of a highly integrated consortium, the initial period is 30 months. This regulation was amended in 2000 (823/2000) and 2005 (611/2005).

Since the 2005 consortia exemption was to expire in April 2010, the Commission began reviewing the exemption in 2007. On September 2009, the Commission decided to extend the block exemption (Regulation No 906/2009) to consortia (with a few amendments) for another five years. The basic amendments were: 1. Reduction in market share threshold from 35% to 30%.

2. Extension of the exemption to all cargo lines shipping services not just container. 3. The method of calculating market share was changed for lines applying for consortia exemption - it now includes vessel in and out of a consortium and all vessels in other consortia operating in the same relevant market. 4. Exit and lock-in periods for withdrawals were also extended.

It has been suggested that the amendments were made by the Commission to facilitate transition to the standard competitive regime applied to all economic sectors implying that the exemption to consortia will not be renewed when it expires in 2015. The European Shippers Council (ESC) indicated it supports the extension of the consortia exemption to 2015, so long as carrier consortia keep to activities that don't reduce competition.

#### **c) Developments Elsewhere**

Interesting developments on shipping conferences are occurring elsewhere. APEC member countries commissioned studies on 'non-rate' making agreements of shipping conferences which were published in 2008 and November 2009. It will enable them to address **non-competitive** aspects on non-ratemaking agreements among shipping companies.

The first study indicates that there is a core area upon which the vast majority of identified non-ratemaking agreements between carriers are focussed, they cover the sharing of vessel operations. These vessel sharing agreements are categorised into four types: Alliance; Vessel sharing; Vessel space charters; and Vessel space swaps. In them clauses - duration, termination and withdrawal, voting, new entrants, and sub-chartering - were found that could have an impact on competition.

The second study finds that "non-ratemaking agreements have the potential to provide important operating efficiencies. They can lead to increased efficiency and improved quality of services to customers by taking advantage of genuine economies of scale and coordinating sailing schedules." These benefits may be shared with users. However, "there are elements in non-rate making agreements that could in principle be anti-competitive elements, such as the ability to influence the behaviour of agreement members and restrict competition from current or potential competitors; market concentration and market share; and the exchange of information on confidential contracts. If this potential is realized, it may have a negative effect on the interest of the shippers." Shippers called for a monitoring of the system to prevent abuse.

The third study makes policy recommendations and proposes five general

guidelines for the following reasons. 1) *Supporting non-ratemaking agreements in regulation*- because it is generally agreed by the *European Union Competition Directorate* and the *European Shippers Council* that non-rate agreements (consortia, vessel sharing agreements, strategic alliances, etc.) that do not include price fixing are efficiency enhancing and that users can obtain a share of the benefits. If the competition laws do not grant an explicit exemption but call for specific review of each, the process is slow, wasteful and costly. The report therefore proposes a formal exemption either where the competition law prohibits efficiency-enhancing agreements or gives rise to uncertainty. 2) *Separating rate-making and non-ratemaking agreements* - because it will allow economies who wish to adopt different policies to do so readily and will reduce the risk of unintentionally reducing the scope of the latter. It can also be easily achieved. 3) *Not using market share testing* - because the benefits of imposing market share limits are dubious and there are difficulties of defining the relevant market which create uncertainties whether the law is being met. 4) *Negotiating freely the duration of non-ratemaking agreement* - because it encourages investing, reduces the extensive reorganization required and is best accomplished by commercial parties rather than set by a regulatory body arbitrarily. 5) *Collecting and exchanging main information* - because good policy requires good information. As the industry is evolving rapidly, detecting undesirable trends and taking prompt and effective action is required. These guidelines have their advantages and disadvantages. After completing this paper, two noteworthy developments have occurred in January 2012. First, the New Zealand Productivity Commission released its draft report on International freight services. It called for removal of the exemption on ratemaking and capacity-limiting agreements while retaining exemption for non-rate making agreements. However, agreements must be filed and allow for confidential individual service contracts. Second, the FMC released its report on the impact of the repeal of the liner conference exemption in the EU. It found no significant changes in rate levels in the EU and US liner trades or negative impact on US shippers vis-à-vis EU shippers.

#### **Concluding Remarks**

It is become increasing difficult to continue to justify an antitrust exemption to shipping conferences based on the comity doctrine. Such an exemption no longer makes sense, especially at a time when countries all over the world are turning to competition as the best hope for economic prosperity.

The EEC has led the way by removing the exemption. Other countries in the

past have taken a more conservative approach by trying to introduce competitive provisions while retaining the antitrust exemption. It is time to revise their philosophy towards price fixing agreements.

But like in many areas, some problems appear to be replaced by others. Price fixing agreements are now being replaced by discussion agreements. And since the core of these non-rate making discussion agreements involve efficiency, the question is how do we deal with these agreements when they may have an impact of competition. The EEC has decided to exempt these shipping conference agreements until 2015 at which time the competitive regime that applies to all sectors will also apply to shipping.

As the time for revising the shipping conference exemption is approaching in many countries, the lessons learned from the EEC deserve attention. It is worthwhile recalling the findings of a World Bank Study which indicated that enormous gains would accrue to the US through trade liberalization and breakup of private carrier agreements. With all the evidence pointing in one direction now, perhaps changes will be more than in the past.

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