THE EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION

by

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INTRODUCTION*

This paper examines the evolution of ocean shipping conference legislation in the United States of America, Australia, Canada, the European Union and New Zealand.[1] The first section is a brief introduction. The second section examines the rationales for ocean shipping conference and ocean shipping consortia legislation. Then, sections three to six describes: the background behind the legislation; the important features in each of the amendments since the laws were passed in each country emphasizing key aspects; the important events that played a major role in the evolution of this legislation, the ongoing developments after the last amendments were made to liner regulation in each of the above countries; and a summary. These sections provide a historical description of the laws on the shipping conference legislation in each of the four jurisdictions. The final section is the conclusion. There are five Appendices on: Theories behind the rationales; Evolution of Legislation; Evolution of Consortia; Evolution of Ship Size; and The Block Exemption in Shipping.

Laws on ocean shipping conferences[2] in the world did not exist for nearly fifty years after the first conference was formed in 1875 on a shipping service for the tea trade between Calcutta and United Kingdom, the Calcutta and United Kingdom Conference. The idea for a shipping conference has been credited to an English entrepreneur. Though it is worthwhile noting that an attempt to form an agreement by ship brokers to fix rates in the North Atlantic existed as early as 1869 but the plan did not materialize. Deferred rebates were pioneered in 1877 by the Calcutta conference to encourage shipper's loyalty, since the rebate was conditional upon the merchant sending all goods only via conference ships in the qualifying period. [3]

This worked sufficiently well and it was adopted my many later conferences.[4] Within the conferences there were also often confidential pooling agreements which usually took the form of "joint purses" where all receipts were divided between the participants on some pre-arranged basis.[5] Four years after the first conference was formed, the Far Eastern Freight Conference Agreement was formed between a group of steamship owners and shipbrokers serving China and Japan and European ports to overcome excess capacity of steamers in that trade. Capacity was controlled by limiting each member to an agreed number of sailings during the year. Described as a cartel, this conference too adopted the deferred rebate system. Capacity was controlled by limiting each member to an agreed number of sailings during the year. As can be expected, a few years later in 1885, this conference faced a legal challenge in UK, it went

* I thank Sanjay Castelino and Kim A. D'Souza for reading parts of this paper.

[1] The views in this paper are those of the author and not of the Canadian Transportation Research Forum or the Competition Bureau. They are based on the author's articles over the last twenty-five years.

[2] Shipping conferences often called ocean shipping conferences were later called liner conferences. The United Nations Convention on a Code of Conduct for Liner Conferences, 1974, defines liner conferences as: "A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services".

[3] The Vital Spark, The British Coastal Trade 1700-1930, John Armstrong, Chapter 5 - Conferences in British Nineteenth-Century Coastal Shipping, www.academic.oup.com

[4] The Organisation for Economic Cooperation and Development (OECD), reports that as of 2002, there were around 150 shipping conferences operating in the international freight trade markets.

[5] Id.

to High Court in 1887 then to the Court of Appeal and ultimately to the House of Lords. Though the conference won at every level, the activities of shipping conferences began to be challenged which led to an investigation in 1906 and the first report on shipping conferences, the 1909 *Report of the Royal Commission on Shipping Rings*. The majority report declared that shipping rings afford steadier freight rates and more regular service. They found that the ties to shippers were justified and that the deferred rebate system had to be tolerated in the interest of a strong conference system. It recommended the formation of a Shippers' Association, recognized by the Board of Trade. The minority report declared that shipping rings are unnecessary in the interests of British and colonial trade, and recommended the Board of Trade issue regulations against them.

SECTION I–RATIONALE FOR EXEMPTING OCEAN LINER SHIPPING FROM COMPETITION LAWS

To justify the exemption of ocean liner shipping from competition laws two types of rationale have been advanced: *the economic*; and *the political*. In this section, the *economic rationale* for ocean liner shipping conferences and shipping alliances will be first presented, and then the *political rationale*. Finally, is presented an evaluation of these rationales.

Economic Rationale for Shipping Conferences

Over the history of conferences, the *economic rationale* has been developed under various theoretical models. 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.[1] This rationalization has been advanced under two basic theoretical models: 1) The monopoly-cartel model; and, 2) The empty core model.

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.[2] 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. One, sunk costs - i.e., costs which cannot be recouped - must represent a large portion of total costs. Two, the industry which is profitable in the short run must be vulnerable to entry of competitors even when it is inefficient from a social point of view. And three, there are extended periods of excess capacity - i.e., production is at less than one's lowest cost - when demand falls.[3] In such circumstances, it is possible that firms may be forced to reduce prices to levels that are too low to cover their total costs.

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[1] The RTPC stated: "The public interest would not be served by excessive rate competition and instability in the liner trades," See *Shipping Conference Arrangements and Practices*, R.T.P.C., Department of Justice, Ottawa, 1965, p. 100. See Sletmo, G. K., and Williams, E. W., *Liner Conferences in the Container Age*, Macmillan Publishing Co. Inc., N.Y., 1981.

[2] In the earlier stages of conference development this led to the formation of closed conferences and the erection of other barriers for example denial of use of infrastructure owned or leased by conference carriers. The exemption of conferences from competition enables the trade to form conferences which can self-regulate the industry ensuring stability and provision of rationalized high quality service. The monopoly-cartel theory emphasizes certain structural characteristics such as a single supplier or a few suppliers who jointly act as a single supplier and barriers to entry. These structural characteristics lead to certain types of performance such as higher prices, reduced output and supranormal profits. Where there is collusion among suppliers, part of the supranormal profits often is wasted in excessive service competition forcing up costs.

[3] *Report of the Federal Trade Commission - An Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act, 1990.*

Do liner markets exhibit characteristics that are subject to destructive competition? Are sunk costs a large proportion of total costs in that ships cannot be used in an alternative route since they built to meet the special requirements of users and are investments in port facilities such that they cannot be sold? Are there no barriers to entry so that industry is vulnerable to entry by competitors?

Other economic models have also been used to provide an alternative justification for the destructive competition argument. 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.[4] It has been argued that liner shipping may be an example of such an "empty core" industry.[5] Are there a large number of carriers operating at different levels of capacity? Is an individual firm's capacity large relative to total demand?

Economic Rationale for Shipping Alliances

With the decline of shipping conference and conference agreements attention has shifted to shipping alliances and consortia agreements.[6] The focus of the debate is now on whether there should be block exemptions[7] for consortia agreements by shipping alliances from the antitrust laws or whether these agreements deserve no special treatment. The economic rationale used here is the network theory to explain the formation of alliances and mergers. The network theory states that in network industries, efficiencies arise on the supply side from joint provision of service by members of the network and an increase in the network; and externalities arise on the demand side as the value to existing users increase and from more individuals joining the network. Some studies have described the above rationale under economies of scale[8] and economies of scope.

The economies of scale rationale merely states that cost declines as output increases and is depicted by a downward sloping cost curve. There is hardly any doubt that the formation of vessel sharing agreements and consortia agreements were first encouraged in the liner shipping industry because of declines in cost of transporting a container as the size of the container vessel increased.[9] The antitrust exemption thus facilitated

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[4] "Cooperation, Competition, and Efficiency," by Telser, Lester G., *Journal of Law and Economics*, Volume 28, May 1985, pp. 271-295.

[5] "Collusion in Ocean Shipping: A Test of Monopoly and Empty Core Models," Sjostrom, W., *JPE*, 1989, v. 97, No. 5, pp. 1161-62.

[6] One study indicates that their analysis of existing literature groups indicates that the incentives for forming alliances fall into five generic categories (financial, marketing, and customer support, operational, strategic, and managerial incentives) and 13 sub-categories. Strategic alliances in container shipping: A review of the literature and future research agenda, Mohammad Ghorbani, Michele Acciaro, Sandra Transchel & Pierre Cariou, Maritime Economics & Logistics, volume 24, pp. 439–465 (2022), www.linkspringer.com

[7] A block exemption provides the guarantee that cooperation in these alliances is allowed if the alliance has certain characteristics. This is different from individual exemptions that require filing by the relevant companies and approval from the relevant authorities.

[8] Collaborating within SAs allows for combining cargo on the same route enabling economies of scale for carriers, as operating costs per unit (TEU) decline when larger container vessels are deployed. The benefits are related to bunker costs, crew costs, maintenance, lubricants, etc., as total costs increase less than proportionally to the size of the vessel. As a result, the cost of transporting one TEU is reduced in larger vessels as long as high capacity utilization rates are maintained at least on the head haul.

[9] See: This view on price evolution is shared by industry analysts; Alphaliner for example stated that "Real container freight rates, after accounting for changes in the price of bunker, have fallen by more than 50% in the last 20 years. While average nominal freight rates… have fallen by over 20% since the beginning of 1998, inflation-adjusted freight rates have shown an even larger reduction, as bunker prices have increased more than five-fold since 1998….the savings from operational and organisational efficiencies in the last two decades have mostly been passed on to shippers in the form of lower freight rates - both in nominal and in real terms." See for example Alphaliner, Vol. 2018/23 (30.05.2018 to 05.06.20), p. 1. *Report on the*

the move to ever larger ships which began in the 1970s when the first cellular container ship with 1000 TEUs was built to the MGX-24 container ships of 25,000 TEUs in 2019.

The economies of scope rationale merely states the average total cost of a company's production decreases when there is an increasing variety of goods produced. Economies of scope give a cost advantage to a company when it makes a complementary range of products. In ocean shipping this occurs when members of an alliance can increase their market coverage and connecting services with cross-ocean and feeder routes. In addition to the above, other economic reasons for block exemption are: reduction in transactions costs and reduction in administrative burden on the industry.[10]

Few countries have adopted the use of block exemption in ocean shipping: EU, Hong Kong, New Zealand (since 2019 only for Vessel Sharing Agreements), Israel and Malaysia (and it is being considered by Australia). The EU is the best known of the above countries to have adopted the block exemption. In adopting the exemption it provided the following reasons: First, consortia agreements generally help to improve the productivity and quality of available liner shipping services through rationalization and economies of scale in the operation of vessels and utilization of port facilities. Second, they also help to promote technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity.[11] Third, users of the shipping services provided by consortia generally obtain a fair share of the benefits (i.e. frequency of service, improvement of scheduling, and better quality and personalized service through the use of more modern vessels and other equipment including port facilities) resulting from the improvements in productivity and service quality which they bring about.[12] Therefore, these agreements should benefit from a block exemption provided they do not give the companies concerned the possibility of eliminating competition in a substantial part of the trade in question.[13]

Political Rationale for Shipping Conferences and Shipping Alliances

The *political rationale* is based on the argument that conferences are required by considerations of international comity. The comity of nations is the courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as it may be without prejudice to its own rights and

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Possibility of a Group Exemption for Consortia Agreements in Liner Shipping, Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990, November 20, 2019, p. 29, www.europa.eu; According to the OECD, the official freight rates have halved over the last two decades, suggesting significant efficiency gains. The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 78, www.itf-oecd.org; and There appears to be cost savings of 30% per teu from moving to a 18,000 teu ship from a 13,100 teu ship. Why Size Matters: Container Ship Economies of Scale, September 3, 2013, www.marinelink.com

[10] According to the OECD "these compliance costs might actually be fairly limited in practice." In New Zealand, it was estimated to be NZ$1 to 4 million based on 30 agreements, in the EU it would be higher given there are more agreements. The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 76, www.itf-oecd.org

[11] See Preamble to Regulation 870/95, paragraph 4. *Report on the Possibility of a Group Exemption for Consortia Agreements in Liner Shipping*, Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990.

[12] See Preamble to Regulation 870/95, paragraph 5.

[13] See Preamble to Regulation 870/95, paragraph 6.

interests.[14] 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 maritime policy with our major trading partners appears to have been a consideration in the amendments in the *1984 US Shipping Act* and in adopting the present exemption for conferences from competition law under the Canadian *Shipping Conferences Exemption Act.*

Evaluation of the Rationales

Regarding the *economic rationale* for shipping conferences, whether the characteristics of a monopoly-cartel model or empty core model hold have been the subject of extensive discussion.

In the case of the monopoly-cartel model, it is argued that liner markets do not exhibit the characteristics of markets that are subject to destructive competition. First, sunk costs do not appear to be a large proportion of total costs, as ships are mobile and firms can move their assets from one shipping route to another.[15] It is recognized however that in some trades, ships have been developed to meet special requirements of users and are therefore less readily transferable than in other routes. Further, some carriers may also have significant investment in port facilities on particular trade routes some of which may be saleable. Second, regarding inefficient entry, the danger is rather limited as firm level economies of scale on individual trade routes are not extensive. This is suggested by the number of firms with varying capacities which exist on major trades in an FMC report. It indicates that concentration on major routes is typically in the low to moderate range. Third, the purported risks associated with uncertain demand can be addressed through long term contracts between carriers and shippers.[16]

In the case of the empty core model 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.[17] 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.

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[14] See Sletmo, G. K., and Williams, E. W., p. 269.

[15] "Statement of John L. Peterman, Director, Bureau of Economics, FTC," Before the Advisory Commission on Conferences in Ocean Shipping, Sept. 13, 1991, p. 5.

[16] See *FTC Report*, 1990, p. 20. Also see Davies, John, *Legislative Change On The North American Liner Trades: A Study Of Causes And Consequences*, TP 10639, Transport Canada, October 1990, p. 185.

[17] *The Department of Justice Analysis of the Impact of the Shipping Act of 1984*, U.S. DOJ, Antitrust Division, March 1990, pp. 31-32.

It should also be noted that conferences have not, in practice, provided stability of rates and services. Conference rates have tended to be volatile[18] and in recent time with Covid-19 rates have risen to levels never seen before. In 1990, conference rates were affected by significant increases in surcharges as well as base rates and with Covid-19 demurrage and detention charges have led to investigations in the US. 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*. More recently, the OECD reported that most ports depend on one or two alliances and the risk of losing the alliance calls provides these alliances with huge leverage over ports. They contribute to concentration of port networks and bigger cargo shifts from one port to another when alliances change port networks.

The evidence from the above two models, do not in general indicate that the characteristic of the shipping industry in the 1900s was such as to support the economic rationale for shipping conferences.

The *economic rationale* for shipping alliances for EU shipping has been examined in considerable depth by the OECD and it has come to the following conclusion regarding the reasons for the block exemption. First, "Although alliances were initially a key enabler of economies of scale, consolidation in the industry suggests that this is no longer a major factor. Thus, the size of any efficiency gains has become questionable while, at the same time, the exemptions have facilitated a business model –based on ever larger ships – that has yielded offsetting efficiency costs, by enabling overcapacity, reducing the number of destinations and limiting actual and potential service differentiation. Thus, while the official freight rates have halved over the last two decades, suggesting significant efficiency gains, other price increases, which include various surcharges by carriers, such as for demurrage and detention, have partly offset these gains. The deterioration of service quality, encompassed in lower frequencies, less direct port connections and lack of service differentiation, has yielded further costs."[19] Second, according to the OECD "these compliance costs might actually be fairly limited in practice."[20] In New Zealand, it was estimated to be NZ$1 to 4 million based on 30 agreements, in the EU it would be higher given there are more agreements. In the absence of a block exemption carriers would be required to do a self-assessment of their agreements to see if it violates the competition regulation. Repeal of the consortia block exemption does not necessarily create a legal vacuum. It is likely that the European Commission would consider providing temporary horizontal guidelines for cooperative agreements reducing legal uncertainty. It did so when it repealed the block exemption for liner conferences.

In view of the above, the report came to the conclusion that: 1. A shipping alliance does not have any unique characteristics that justify the exemption to consortia agreements. 2. The rationale for the block exemption does not exist any longer or the rationale has now become counterbalanced with offsetting effects. 3. The regulatory neutrality in antitrust enforcement would be restored without a block exemption. 4. The other

[18] Of the eighteen trades analyzed in the U.S., six trades were significantly more unstable in the post 1984 period. *Id*, p. 204.

[19] The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 76, www.itf-oecd.org

[20] Id.

actors in the maritime sector would be able to challenge more easily agreements with undesirable market effects. 5. The application of generic antitrust rules could result in lower risks of anti-competitive conduct and higher probabilities of customers getting a fair share of any cost savings arising from alliances.[21] The ITF-OECD Report recommended that the EU not extend the block exemption when it expires.

Regarding the *political rationale* the argument that conferences should be accepted 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."[22] 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.[23]

Conclusion

In sum, the rationale for antitrust exemption for conference and consortia agreements has been presented. The economic rationale for shipping conferences does not appear to be supported by the evidence. The economic rationale for consortia is stronger as indicated by the evidence. The two theories and other theories are examined in further detail in Appendix 1.

[21] The report states "One could wonder if there are still welfare benefits from maintaining block exemptions." The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 78, www.itf-oecd.org

[22] See "Statement of James F. Rill, Assistant Attorney General, Antitrust Division, United States Department of Justice," Before the Advisory Commission on Conferences in Ocean Shipping, September 13, 1991, p. 10.

[23] "No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." Laker Airways v. Sabena, 731 F 2d 909, 937 (D. C. Cir 1984).

SECTION III–EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION IN THE UNITED STATES OF AMERICA

A. Background to Conference Legislation in the United States of America

In the early 1900s, Congress became concerned about the practices of steamship lines. In 1912, the House Committee on Merchant Marine Fisheries was directed to conduct an investigation which was later broadened in that year. The Committee, Chairman, J.W. Alexander conducted hearings and issued a two volume report (Alexander Report) of its findings with recommendations. "The investigation revealed that steamship lines had entered into a wide variety of agreements controlling competition, either between the lines to the agreements or from lines outside the agreements. Competition between the lines was regulated by, inter alia: (1) agreeing on rates; (2) allocating ports; (3) restricting the number of sailings; (4) limiting the volume of freight carried; (5) pooling the monies received; (6) agreeing between conferences; and (7) penalizing carriers if they assisted a non-conference line or started a new service. In addition, most conferences were "closed" with new lines being admitted only by unanimous consent."[1] The Committee realized that "To terminate existing agreements would necessarily bring about one of two results: the lines would necessarily either engage in rate wars which would mean the elimination of the weak and the survival of the strong or, to avoid a costly struggle they would consolidate through common ownership. Neither result can be prevented by legislation and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement."[2] The Committee was thus faced with two alternative courses of action: prohibit all agreements, or eliminate their abuses. It chose the latter and recommended: "(a) lines be brought under the supervision of the Interstate Commerce Commission (i.e. "ICC"); (b) all agreements among steamship lines be filed with the ICC for approval; (c) the ICC have the authority to investigate unreasonable or unfair rates; (d) rebating made illegal and discrimination between ports and shippers be prohibited; (e) the ICC be empowered to investigate all complaints or discriminatory practices; (f) the use of "fighting ships" or deferred rebates be prohibited; and (g) adequate penalties be provided."[3] Two years later, a bill HR 15455 was introduced by Alexander, then amended by senate and later signed into law by President Woodrow Wilson on September 8, 1916 and called the *Shipping Act, 1916*.[4]

B. Conference Legislation in the United States of America

1. The US *Shipping Act, 1916*

The Act contained 44 sections. The noteworthy features of the Act were:

- Filing of certain agreements with the Shipping Board for approval (s. 15)
- Granting antitrust immunity for approved agreements (s. 15)
- Prohibiting certain acts by common carriers by water and other persons (s.14)
- Filing of tariffs and rates to be kept open
- Ordering just and reasonable maximum rates by water in interstate commerce (s.18)
- Investigating violations

[1] Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, p. 33.

[2] Id. p. 25.

[3] Id. p. 34.

[4] This is the short title of the *Act* see section 44 of the *Shipping Act, 1916*.

The Act established the US Shipping Board (five commissioners) whose responsibility included authority to construct, purchase, lease, charter, sell and operate certain vessels to be used as naval auxiliaries and as naval vessels together with the administration of the Act. Filed agreements could be disapproved, cancelled or modified if they: (1) contained discriminatory or unfair particular aspects; (2) operated to the detriment of US commerce; or (3) violated the Act. Prohibited acts by common carriers included: (1) paying deferred rebates; (2) using fighting ships; (3) retaliating against shippers; and (4) making unfairly discriminatory contracts with shippers or otherwise discriminating against shippers with respect to space, handling of cargo or adjustment of claims (s.14). Other prohibited acts by water carriers and other persons were: (1) giving undue or unreasonable preferences; (2) allowing persons to obtain transportation at less than the regular rates; or (3) inducing marine insurance companies from giving a competitor a favourable rate (s. 16). More prohibited acts by water common carriers in foreign commerce were: charging unreasonable rates; and requiring carriers to establish just and reasonable regulations for receiving and handling property (s. 17). Common water carriers in interstate commerce were required to establish just and reasonable rates, file them and keep them open, and tariffs and rates increases required ten days notice. Section 26 gave the Board the power to investigate actions by foreign governments that did not give equal privileges to US vessels and then make recommendations to the President to pursue equal privileges. The Board could also investigate violations of the Act on its own initiative (s. 22) and persons could file complaints. The general penalty for violation of the Act was a fine not greater than $5,000 (s. 32) and individual provisions carried their own penalty. These and the other sections are shown in Table 1.

Table 1. US Shipping Act of 1916

1-2. Definitions	24. Written Report of Every Investigation
3-4. US Shipping Board	25. Reverse, suspend or modify orders
5-8. Powers of the Board	26. Investigate discriminatory action of foreign governments against US vessels
9. Operations of certain vessels	27. Subpoena witnesses and records
10. Repossession of certain vessels	28. Privilege against self-incrimination and immunity
11. Establishments of corporations to construct	29. Enforcement of orders
12. Relative cost of construction and operation of vessels in US v. abroad	30-31. Procedure and Venue
13. Issuance of Panama Canal Bonds	32. Penalty for violation
14. Prohibited acts and investigation	33. Jurisdiction
15. Filing of Agreements, modifications, cancellation and antitrust approval	34. Constitutionality severability clause
16-17. Prohibits discriminatory actions and forbid rates other than the filed rates	35. Appropriation of initial expenses (Repealed)
18-19. Domestic rate regulations	36. Refusal of vessel clearance
20. Confidentiality	37-42. Restrictions during national emergency
21. Requirement to file	43. Termination of national emergency (repealed)
22. Filing of complaint and investigation	44. Short Title
23. Hearings before order	

Since the enactment of the Act, shipping conferences used a dual rate contract system whereby shippers who exclusively signed up with the conferences received the lower rate and those not party to these contracts paid the higher rate. In 1958, the Supreme Court of US found these contracts contrary to section 14.[5] Nevertheless, Congress passed interim legislation permitting the continuation of the dual rate system and undertook an investigation. Hearings were held by three Committees and ultimately a bill was passed

[5] *Federal Maritime Board vs Isbrandrsen, 356 US (481), 1958.*

that legalized the dual rate system and gave the FMC increased regulatory powers. Congress remained persuaded that the conference system was necessary to avoid rate wars and monopoly. This led to amendments resulting in the *US Shipping Act, 1961* (it contained seven sections).

2. The US *Shipping Act, 1961*

The Act contained 45 sections. The noteworthy features of the Act were:

- A dual rate system (s. 14)
- A new public interest standard (s. 15)
- A right to independent action for carriers not members of the same conference and open conferences (s.15)
- A requirement to file rates and adherence to filed rates (s.16)
- A rule making authority for the Commission (s. 43)

The dual rate system embodies nine specific provisions, including that: 1. A shipper could be released if the carrier could not provide adequate space; 2. The tariff rates on subject commodities could not be increased on less than 90 days notice; 3. The only goods covered were those for which the shipper had the legal right to select the carrier; 4. The contract shipper is not required to divert shipments of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; 5. The damages recoverable for breach by either party to actual damages are limited; 6. The contract shipper could terminate the contract without penalty on 90 days notice; 7. The spread between the ordinary rates and contract rates could not be more than 15 percent. 8. The contract excludes cargo of the contract shipper unless authorized by the Commission. 9. The contract contains such other provisions not inconsistent herewith as the Commission shall require or permit (s. 14b). Section 18(b) required ocean common carriers (in foreign commerce) to file tariffs with the FMC and stipulated that rates so filed could not be increased with less than 30 days' notice. Section 16 requires carriers to adhere to the filed tariffs (i.e., lower tariffs or different rates were prohibited). The Commission was given the power to disapprove any rate found to be unreasonably high or low detrimental to commerce of the US (s. 18(b)(5)). Section 15 added a fourth standard to the review criteria 'a public interest standard'. Further, it contained a right of independent action for carriers not members of the same conference or serving different trades. Furthermore, conferences had to be open without penalty for withdrawal on reasonable notice. The Commission could also disapprove agreements if it found inadequate policing under them or a failure to adopt reasonable procedures for promptly dealing with shippers' request or complaints (s. 15). The Commission was also given rule making authority to carry all the provisions of the 1916 Act (s. 43). These and other sections are shown in Table 2.

Table 2. US Shipping Act of 1961

1-2. Repealed	25. Reverse, suspend or modify orders
3-4. Repealed	26. Investigate discriminatory action of foreign governments against US vessels
5-8. Repealed	27. Subpoena witnesses and records
9. Operations of certain vessels	28. Repealed
10. Repealed	29. Enforcement of orders
11. Repealed	30-31. Procedure and Venue
12. Relative cost of construction and operation of vessels in US v. abroad	32. Penalty for violation
13. Issuance of Panama Canal Bonds	33. Jurisdiction

14. Prohibited acts and investigation. Dual contracts, conditions, approval and legislation	34. Constitutionality severability clause
15. Filing of Agreements, modifications, cancellation and antitrust approval adding public interest standard	35. Repealed
16-17. Prohibits discriminatory actions and forbids rates other than the filed rates. FMC may adjust discriminatory rates	36. Refusal of vessel clearance
18. Domestic rate regulations. Rates to be filed by carriers in foreign commerce; no prior approval for rate changes; prohibits other than filed rate and rates can be disapproved	37-42. Restrictions during national emergency
19. Domestic rate reduction below cost to drive out competitors and subsequent increase	45. Short Title
20. Confidential information not to be released	43. Making rules and regulations
21. Requirement to file	44. Licensing of Forwarders
22. Filing of complaint and investigation	3. Filing of rates for barges
23. Hearings before order	35. Exemption of Agreements
24. Written Report of Every Investigation	

Dissatisfaction with the regulatory process (i.e. uncertainties about: the outcome of regulatory decisions, extent of antitrust immunity, legality of innovative pricing schemes and delays in processing agreements), and fundamental changes in shipping (i.e. the container revolution, the development of intermodal services, the increasing size of ships, etc.) led to the *US Shipping Act of 1984*.

3. *The Ocean Shipping Act of 1978*

On October 18, 1978, the *Controller Carrier Act* (P.L. 95-483, 92 Stat 1607) was passed. It was added as section 18(c) of the 1916 Act. The major features of this Act were:

- Prohibition of rates of state-controlled carriers operating as 'cross-traders' below a just and reasonable level or classification, rules or regulations that have that effect
- List of factors the Commission must consider in determining justness and reasonableness
- Filing all rates, regulations which result in rate decreases 30 days before effective and justification within 20 days
- Authority for the Commission to require Show/Cause why rates/regulations should not be disapproved and authority to suspend them
- Presidential authority to stay permanently order of the Commission when required for national defence or foreign policy reasons.

There were also exemptions from the 1978 Act. The exemption applied to controlled carriers: of a state carrier with national or most-favoured-nation status or those subscribing: to an OECD Code on Liberalization; to an agreement approved under section 15 of the 1916 Act; to a government owned or controlled carrier; and to a trade served exclusively by controlled carriers. "The purpose of the 1978 Act was to strengthen the powers of the FMC to regulate the ratecutting practices of state-controlled carriers operating as "cross-traders" in the US oceanborne foreign trade. The intent was to: preserve legitimate competition among all common carriers engaged in the US foreign commerce; ensure the survival of the US merchant marine; provide a means to monitor, and limit if necessary, the future penetration of state-

owned carriers into the US trade; and maintain and promote our international trade."[6] These and other sections are shown in Table 3.

Table 3. Ocean Shipping Act of 1978

1. Title – Ocean Shipping Act of 1978	3. Section 18 of 1916 amended by adding c(1) to c(6) notice and hearing
2. Section 1 of 1916 amended to include 'controlled carrier'	4. Effective date

4. *Shipping Act Amendments of 1979*

On June 19, 1979, an amendment was made to the Shipping Act of 1916 known as the *Antirebating Act* (P.L. 96-25 (93 Stat 71). The major features of this Act were:

- A written certification by the chief executive officer of company policy to prohibit rebates
- The Commission is authorized to suspend upto 12 months tariffs of carriers

The authorization for failure to respond to subpoenas in investigations of suspended rebating has the effect of barring the offending carrier from the trade. Section 22 also provides for the Commission: to institute adjudicatory investigations into possible violations of section 16 and to issue show/cause order with fines upto $50,000.00; to notify Secretary of State where documents are in a foreign country and cannot be produced because of laws of that country; and to submit to the President who may disapprove the Commission suspension of tariffs for reasons of national defence or foreign policy of United States. In addition, civil penalties were increased to $25,000.0 in section 16. Civil penalties were also increased in section 18(b) other than (b)(3) to not more than $5,000.0 and for section (b)(3) by means or rebates or refunds to not more than $25.000.0 and to not more than $50,000.0 for continuation of rebates after suspension. Section 32 of the Act was amended whereby no penalties shall be imposed on any person for conspiracy after August 29, 1972 for rebate or refund or defrauding the Commission about rebate concealment and the Commission shall have the authority to compromise all civil penalties in the Act. These are shown in Table 4.

Table 4. Shipping Act Amendments of 1979

1. Title – Shipping Act Amendments of 1979	7. Section 27 – Deleting part of text
2. Section 16 of 1916 Amended – Increased civil penalties	8. Section 29 – Deleting part of text
3. Section 18(b) – Increased penalties	9. Section 30 – Deleting part of text and insertion
4. Section 21 – Adding 21(b) – Written certification and violation penalty	10. Section 32 – Amended
5. Section 22 – Adding (c)(1) to (c) 4 – Adjudicatory Investigation; Suspension of tariffs; Suspension order; submittal to President.	11. Effective Date
6. Section 23 – Deleting part of text	

[6] FMC 1989 Report, p. 599.

5. *US Shipping Act of 1984*

On March 20, 1984, President Ronald Regan signed the *United States Shipping Act of 1984* into law. The Act consisted of 23 sections and its administration was the responsibility of the Federal Maritime Commission. The major features of the Act were:

- Three principle goals of regulation – non discrimination, efficient transportation and development of US flag carrier
- Exemption for conferences, interconferences, and conference and independent carriers
- Exemptions for ocean marine terminal operators, and marine terminal operators and conferences
- Investigation by the FMC of any conduct or agreement in violation of the Act
- Filing of every agreement, service contracts and tariffs with the FMC. Essential terms of service contracts must be published and offered to all shipper's similarly situated.
- Agreements effected after 45 days (no specific approval needed). Independent action with 10 day notice period

The establishment of principle goals of regulation are covered in the Declaration of Policy in section 1701. The conference agreement exemption can cover seven types of acts: 1. discussing, fixing or regulating of transportation rates, through rates, and other conditions of service; 2. pooling and apportionment of traffic, revenues or loses; 3. allocating ports or regulating sailings; 4. limiting or regulating the volume or character of service (cargo or passenger); 5. engaging in exclusive, preferential or co-operative working arrangements among themselves, marine terminal operators or non-vessel operating common carriers; 6. controlling, regulating preventing competition in international transportation; and 7. regulating or prohibiting the use of service contracts.[7] The marine terminal operator/conference agreement must relate to ocean transportation in foreign commerce to the extent that it relates to: 1. discussing, fixing or regulating rates or conditions of service; and 2. engaging in exclusive, preferential or co-operative working arrangements.[8] It also expands the scope of antitrust exemption by 1) denying applicability of antitrust laws when there is reasonable basis or belief that the filed agreement is in accordance with an effective agreement or exempt from the filing requirements even if prohibited (s.7(a)(2)); 2) resorting to retroactive liability under the antitrust laws if immunity is denied or removed (s.7(c)(1)); and 3) preventing recovery of antitrust damages under the antitrust laws (Clayton Act) (s.7(c)(2)) – namely resort to treble damages.

There are, however, restrictions on the exemptions or prohibited acts. These relate to non-application of the exemption to other modes of transport (including domestic water transportation) and common carriers.[9] The prohibited acts are categorized into four groups: 1. General; 2. Common Carriers; 3. Concerted action; and 4. Common carriers, ocean freight forwarders and marine terminal operators.[10] The first includes: attempting to provide ocean carriage at rates less than those applicable; operating an

[7] Shipping Act of 1984, 46 App, USC. at 1701 (Supp. 1998) (International Ocean Commerce Transportation Act), s.1703(a).

[8] Id at s. 1703(b).

[9] Id at s. 1706(b).

[10] Id at s. 1709.

agreement that has not become effective/cancelled/disapproved/rejected; and operating an agreement that has not been filed.[11] The second includes: charging rates/rebates/concessions not shown or below that in the tariff/service contract; retaliating against a carrier (for use of another carrier or filing a complaint); engaging in unfair or discriminatory practices except for service contracts; employing fighting ships; offering or paying deferred rates; using a loyalty contract; using rates that are unjustly discriminatory between shippers or ports; giving/subjecting any person, locality or traffic to an undue or unreasonable preference/disadvantage; refusing to negotiate with a shipper's association; and disclosing information that have certain effects.[12] The third group includes: boycotting or unreasonably refusing to deal; restricting unreasonably use of intermodal services or technological innovations; engaging in predatory practices; negotiating with a non-ocean carrier or group; denying/limiting compensation to ocean freight forwarders; allocating shippers/soliciting cargo.[13] The fourth group includes: failing to establish, observe and enforce just and reasonable regulations; agreeing to boycotts or discriminating unreasonably in the provision of terminal services together with the last three factors mentioned in group 2.[14] The act does not apply to acquisitions.

Investigations are dealt with in section 11, it also covers complaints, investigations, reports and reparations and injunctions, and section 12 provides for the utilization of subpoenas and the discovery procedures. Section 13 addresses penalties and in addition it provides for additional penalties and Presidential review of orders. Further orders of the Commission relating to violation of the Act or regulation are dealt with under section 14.[15] Section 1704 of the Act deals with filing of agreements that become effective on the 45 day of filing (no specific approval was needed compared to the 1916 Act which required affirmative approval). The FMC may also seek injunctive relief if the conference agreement is likely to produce an unreasonable reduction in transportation services. Carriers must also file their service contracts confidentially (accepting certain commodities), provide the essential terms of the agreement to the public and make them available to similarly situated shippers. Section 1707 covers tariffs and should provide all ocean rates (exempted products excluded) including those for through transportation (inland division of through rates exempted). Tariffs filed must be kept open for public inspection and must be made available at a reasonable price. Tariffs can include volume discounts and rate increases become effective thirty day after filing and rate decreases become effective on the same day. Refund/waiver of rates/charges may be permitted by the FMC which prescribes the form and manner of filing rates. The Act contains numerous administrative provisions. Section 1716 allows the Commission to make rules and regulations together with interim rules and regulations. Further, rules for the operation of government carriers are provided under section 9 and freight forwarders are covered under section 19 which deal with licensing, revocation, and compensation. Finally, section 23 deals with bonding of non-vessel operating common carriers. The Act thus contained both anti-competitive (clarifying carrier's antitrust immunity and non-approval of agreements) and pro-competitive features (independent action and service contracts). The sections of the Act are shown in Table 5.

[11] Id at s. 1709(a).
[12] Id at s. 1709(b).
[13] Id at s. 1709(c).
[14] Id at s. 1709(d).
[15] Id at s. 1822.

Table 5. US Shipping Reform Act of 1984

1. Title	13. Penalties
2. Declaration of Policy	14. Commission orders
3. Definitions	15. Reports and certificates
4. Agreements within scope of Act	16. Exemptions
5. Agreements	17. Regulations
6. Action on Agreements	18. Agency Reports and advisory commission
7. Exemption from Antitrust Laws	19. Ocean freight forwarders
8. Tariffs	20. Repeals and conforming amendments
9. Controlled Carrier	21. Effective date
10.Prohibited Acts	22. Compliance and Budget Act
11. Complaints, investigations, reports and reparations	23. Bonding of non-vessel operating carriers
12. Subpoenas and discovery	

Developments on the shipping front (technological changes, new forms of organizations, new forms of agreements and new forms of services) and legislative issues (deregulation and antitrust immunity philosophy, concerns with the tariff filing and enforcement philosophy, constraints on service contracts, constraints on non vessel operating carriers and freight forwarders) led to reports such as: Congress Should Deregulate the Maritime Industry, Federal Maritime Commission 1989 Report, Federal Trade Commission 1989 Report, Department of Justice 1990 Report, 1992 Report of the Presidential Advisory Commission and several Bills (Carper Bill; Metzenbaum Bill; NITL Bill; Pressler, Lott and Breaux Bill; Senate Bill; and Lott, Breaux Bill[16]) which ultimately resulted in the *Ocean Shipping Reform Act of 1998.*

6. *Ocean Shipping Reform Act of 1998 (OSRA)*

The reforms to the Ocean Shipping Reform Act of 1998 (OSRA) went into effect on May 1, 1999. The noteworthy amendments in this Act were:

- the purpose clause of the Act has been expanded to promote the growth and development exports through competitive and efficient ocean transportation.
- the notice period required before a member of a conference can take independent action has been reduced to five days from ten.
- a number of restrictions are placed on ocean carrier agreements: no regulation or prohibition on the use of service contracts or restriction on members in negotiation with one or more shippers or disclosure of terms and conditions of a service contract or adoption of mandatory rules.
- the me-too requirement for a service contract for a similar situated shipper is dropped.
- a service pursuant to a service contract cannot be offered that is a unjustly discriminatory practice to rates, etc. due to those persons' status as shippers' association or ocean transportation intermediaries.
- a shipper can combine with another shipper to obtain a service contract.

[16] For further description see Monteiro, Joseph and Robertson, Gerald, "Shipping conference legislation in Canada, EEC, and the U.S.A: Background, emerging developments, trends and a few major issues", *Transportation Law Journal*, V. 26, Spring 1999, pp. 179-181.

- an intermodal agreement between ocean carriers and a non-ocean carrier is permitted if it does not violate antitrust laws and is consistent with OSRA's purpose.
- the filing of tariffs was eliminated
- the electronic publication of tariffs which are available at a reasonable price;
- a service contract is now based on percentage.

In addition to the above, 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. Section 13 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. Section 19 requires ocean transportation intermediaries and NVOCCs to be licenced and the latter's bond has been increased. Other administrative amendments were also made for example, appropriations authorized for the Commission, quorum to exercise its powers and date for prescription of regulations. These are shown in great detail in Table 6.

Table 6. Ocean Shipping Reform Act of 1998 (OSRA)

Declaration of policy. Subsection 2(4) has been added to the Declaration of Policy to promote the growth and development of US exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.
Definition. Section 3 has been amended: to delete the definition of fighting ship (ss.10) and non-vessel-operating common carrier (ss.17); to add a new definition on ocean transport intermediary which means an ocean freight forwarder or a non-vessel-operating common carrier both of which are defined (now s.3(17)); and to modify the meaning of controlled carrier (ss.8), deferred rebate (ss.9), forest product (ss.11), loyalty contract (ss.14), marine terminal operator (ss.15), service contract (ss.21), and shipper (ss.23).
Agreements within the scope of the Act. Subsection 4(7) which entitled the agreement to regulate or prohibit the use of service contracts has been replaced with a new section which allows them to discuss and agree on any matter related to service contracts.
Agreements. Subsection 5(b)(8) has been amended to reduce the 5 day notice period from the previous 10 day. Subsection 5(c) is a new addition. Ocean common carrier agreements: cannot prohibit or restrict a member or members from engaging in negotiations with one or more shippers; cannot require disclosure of a negotiation or the terms and conditions of a service contract, other than those required; and cannot adopt mandatory rules affecting the right of a member 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.
Exemption from antitrust laws. Section 7(b) now contains an additional subsection 7(b)(4) whereby the Act does not grant antitrust immunity to any loyalty contract
Tariffs. Section 8(1) (a): adds new assembled motor vehicles to the list of excluded products; eliminates tariff filing with the FMC; and provides for public inspection of automated tariffs. Tariffs shall include copies of any loyalty contract, omitting the shippers name (s.8(A)), tariffs shall also be made available electronically to any person for a reasonable charge (s.8(2)). The section on filing of service contracts (s.8c) has been simplified, however, the most significant change is that it eliminates the requirement that those essential terms shall be available to all similarly situated shippers. The publication requirements of service contracts has been reduced (s. 8 (3)) to some of the essential terms filed (the origin and destination port ranges, the commodity or commodities involved, the minimum volume or portion, and the duration). A new section (s.8(4)) requiring disclosure of certain terms to a labour organization with whom it is engaged in collective bargaining under certain specified conditions has been added. Subsection 8(e)(3) on refunds has been deleted. A new subsection 8(f) on marine terminal operator schedules has been added to this section whereby a marine terminal operator may make available to the public, a schedule of rates, regulations and practices, including limitations of liability for cargo loss or damage at terminals and such schedule shall be enforceable in an appropriate court. The old subsection 8(f) prescribing the form and manner in which tariffs shall be filed and published together with the rejection authority of the FMC for non-conforming tariffs has been deleted. In its place, a new subsection (s. 8g) pertaining to regulations has been added which empowers the FMC to prescribe requirements for automated tariff systems, prohibit their use if it fails to meet requirements and prescribe the form and manner in which terminal operator schedules are published.
Controlled carriers. Subsection 9(a) adds to this section the requirement that no rates or charges, etc. of controlled carriers in service contracts are below a level that is just and reasonable. The FMC is given the power to prohibit the publication or use of rates or charges etc. rather than

disapprove rates or charges of controlled carrier. Section 9d also requires the FMC to consider whether rates or charges, etc. requested by the FMC are unjust or unreasonable within 120 days. Further, the FMC may suspend rates on not less than 30 days instead of the previous 60 days. Three exceptions to section 9f have been deleted: subscribers to the OECD code on Current Invisible Operations, agreements effective under s.6, and rates or charges, etc. to the US government controlled carriers.
Prohibited acts. Section 10 deletes ss.1-3 on charges, rebates, concessions (extending or denying) not shown in tariffs or service contracts. It adds to the old ss. 4 the prohibition of providing service that is not in accordance with the rates or charges, etc. in a tariff published or service contract unless excepted or exempted or a tariff or service contract that has been suspended or prohibited. Subsections 10(b) 9-13 are deleted and new prohibitions added. First, no person may pursuant to a tariff give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage; second, no person may pursuant to a service contract give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port; third, no person may unreasonably refuse to deal or negotiate; fourth, no person may knowingly or willingly accept cargo from or transport cargo for an ocean transportation intermediary that does not satisfy certain conditions; and fifth, no person may knowingly or willingly enter into a service contract with an ocean transportation intermediary or its affiliates that does not satisfy certain conditions. Subsection 10c (4) now permits an intermodal agreement by two or more ocean carriers and a non-ocean carrier if it is not in violation of the antitrust laws and is consistent with the purposes of OSRA. Section 10c also adds two new subsections 10c (7-8) whereby 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. Two new subsections have been added to section 10d, first no marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person (s.10d (4)); and second, no transportation intermediaries may disclose any information to the detriment or prejudice of the parties contained in s. 10b (13) (see s.10d (5)).
Penalties. Section 13(a) also specifies that the amount of any penalty constitutes a lien upon the carrier's vessel. Subsection 13(b)(4) is new and indicates that the FMC can request revocation of clearance for vessels for failure to comply with a subpoena. The limitation on penalties adds to section 13(f)(1)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.
Reports and certificates. Section 15(b) on certification of anti-rebating has been deleted.
Ocean transport intermediaries. This section replaces the section on ocean freight forwarders. Ocean transportation intermediaries (OTIs) must be licenced, and the FMC may issue it to any person who is qualified by experience and character (s. 19(a)). Further, no person may act as an OTI unless that person furnishes a bond, proof of insurance or other surety determined by the FMC to insure financial responsibility (s. 19(b)1), it will be available for specified purposes. The FMC shall prescribe regulation concerning process of pursuing claims against OTIs (s. 19(b) 3). OTIs not domiciled in the US shall designate a resident agent in the US (s. 19(b) 4). Conferences or groups of 2 or more ocean common carriers must give members the right of independent action on compensation paid to an OTI on not more than five calendar days notice and cannot agree to compensation of less than 1.25% of the aggregate of all rates charges applicable under the tariff and which are assessed against the cargo (s. 19 e).
Other Amendments include changes to the short title, effective date, appropriations authorized for the Commission, quorum to exercise its powers, power to make rules and regulation and date for prescription of regulations.

For the next twenty years (1998-2017), there were very few legislative developments in the US other than the initial reaction. Four noteworthy reports or developments were: the Federal Maritime Commission (FMC) Report, the Maritime Administrative Bar Association Survey (MABAS), H.R. 1253 and the evolution of shipping alliances. 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.[17] 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.[18] In 2005,

[17] Federal Maritime Commission. (2001) *The Impact of the Ocean Shipping Reform Act of 1998,* p. 5.

[18] In June 2002, the issue of antitrust immunity was raised by the US House Judiciary Committee. This led to the introduction of HR 3138, the Free Market Antitrust Immunity Reform Act that would have ended the antitrust immunity for rate setting conferences. In response to HR 3138,

the FMC revised the regulations and permitted NVOCCs to offer confidential service agreements (that would have to be filed) to its shippers and then between NVOCCs and shipper groups but they would not be exempt from antitrust laws.[19] In June 2010, the FMC began considering the matter of NVOCC tariff and their reports noted that discussion agreements have replaced conference agreements as the venue for carrier discussion. Fourth, the growth of shipping alliance agreements and their market power began to attract attention.

7. *LoBiondo Coast Guard Authorization Act of 2018- Federal Maritime Commission Authorization Act of 2017*. In 2018 amendments to the US Shipping Act known as the Maritime Commission Authorization Act of 2017 were achieved through the Coast Guard Authorization Act of 2018.[20] It contains 14 sections under Title VII. The highlights of these amendments were:

- to protect providers of port services such as tugboat operators and marine terminal operators by prohibiting collective behaviour of ocean carriers (i.e. no joint carrier negotiations with the former)
- to prohibit anti-competitive behaviour by carriers (by prohibiting participation in both rate agreements and vessel sharing agreements if it has certain effects)
- to increase the enforcement authority of the FMC (through civil action and injunctive relief)
- to require filing of reports by carriers and MTOs if required by the FMC

In addition, the FMC may bring action in courts to stop a cooperative agreement from operating, if it determines that it is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, or substantially lessening of competition in the purchasing of certain covered services.[21] Other requirements relate to facilitate information gathering, oversight of ocean transportation intermediaries and transparency through reports to Congress. The role of the Department of Justice (DOJ) was not limited by the amendments. The amendments are shown in Table 7 and those of interest in greater detail in Table 7A.

Table 7 – Frank LoBiondo Coast Guard Authorization Act of 2018- Federal Maritime Commission Authorization Act of 2017

701. Short Title	706. Public Participation	711. Discussions
702. Authorization of appropriations	707. Ocean Transportation Intermediaries	712. Transparency
703. Reporting on Impact of Alliances on	708. Common Carriers	713. Study of Bankruptcy Preparation

the US Department of Justice made a submission calling for an abolition to antitrust immunity. It indicated why allowing price fixing and other anticompetitive practices imposed substantial costs on their economy through higher prices on a wide variety of goods shipper costs on their economy through higher prices on a wide variety of goods shipped by ocean transportation. It indicated that carriers' reason for the exemption to keep shipping costs lower was a seriously flawed public policy. It stated "Such an exemption no longer makes sense, especially at a time when countries all over the world are turning to competition, rather than antitrust exemptions and regulation, as the best hope for economic prosperity." See Statement of Charles A. James, Assistant Attorney General, Antitrust Division, before the Committee on the Judiciary, U.S. House of Representatives Concerning H.R. 1253, the Free Market Antitrust Immunity Reform Act of 2001, June 5, 2002.

[19] The Chairman of the FMC said that "...it [these confidential agreements] will ultimately result in more competition and a more efficient industry." On October 28, the FMC issued its final regulation lifting the ban on the use of NVOCC Service Arrangements by Shippers' associations with NVOCC members. See FMC approves NVO contract petition, JOC, December 14, 2004, www.joc.com

[20] See Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, Title VII, "Federal Maritime Commission Authorization Act of 2017." The Shipping Act is codified at 46 U.S.C. §§ 40101-41309. Also see New antitrust amendments to the U.S. Shipping Act, 11 March 2019, Anila Premti, Article No 31 [UNCTAD Transport and Trade Facilitation Newsletter N°81 - First Quarter 2019].

[21] Id. Anila Premti.

Competition		and Response
704. Definition of Certain Covered Services	709. Negotiations	714. Agreements Unaffected
705. Reports Filed with the Commission	710. Injunctive Relief Sought by the Commission	

Table 7A – Frank LoBiondo Coast Guard Authorization Act of 2018- Federal Maritime Commission Authorization Act of 2017

s. 701. It expands the scope of the Shipping Act by including certain U.S. port service providers (i.e. vessels engaged in berthing or bunkering, loading or unloading, buoy movements and towing) s. 40102(5).
s.709. It prohibits a conference or group of two or more common carriers from jointly negotiating agreements with tug or towing vessel service providers (to ensure that the latter may not be disadvantaged through collective action of the former) s. 41105(5)
s. 708. It prohibits carriers from participating simultaneously in a rate discussion agreement and an agreement to share vessels, in the same trade, if it produces an unreasonable reduction in transportation service or an unreasonable increase in transportation cost by a reduction in competition s. 41104(13).
s.710. It expands the remedies (through civil action and injunctive relief) that the FMC may seek to enforce anticompetitive behaviour by requiring an additional factor that must be considered: substantially lessening of competition in the purchasing of certain covered services together with a factor that may be considered: competition in other affected markets s. 41307(b)
s. 705. It empowers the FMC to require filing of reports by carriers and MTOs s. 40104(a)(1)
s.703. It expands the reporting requirements of the FMC to Congress (to include the impact of an alliance on competition for the purchase of certain covered services) s. 306(6); and adds a requirement on the Comptroller General of the U.S. to Congress (to include a study on the after effects of a bankruptcy of an ocean common carrier on the supply chain) s.713.
s. 706-708. Its other amendments relate to: information (to facilitate gathering) s. 40304(a); ocean transportation intermediaries (OTIs) (to increase oversight through licence, bond, insurance requirements, etc. as determined by the FMC) s. 40901(a)-2(a); transparency (to submit bi-annual reports to Congress) s. 712; and authority of the DOJ (which is preserved and not limited by the above amendments) s.41105A..

The unanticipated arrival of Covid-19 in December 2019 and its declaration that it was a world pandemic in January 2000 sent shock waves throughout the world. The slowdown at ports and rebounding in trade led to huge profits of ocean carriers bringing about a flurry of activity by governments to investigate the matter and revise the competition laws governing shipping as they felt it was contributing to inflation. This led the National Industrial Transportation League to call for modernization of the Shipping Act of 1984, particularly in regard to landside equipment quality and demurrage issues in May 2021. The Biden Administration set to resolve the matter issued an Executive Order on *Promoting Competition in the American Economy on July 9, 2021*. US President, Joe Biden, in his State of the Union Address on March 1, 2022 said "When corporations don't have to compete, their profits go up, your prices go up, and small businesses and family farmers and ranchers go under. We see it happening with ocean carriers moving goods in and out of America. During the pandemic, these foreign-owned companies raised prices by as much as 1,000% and made record profits. Tonight, I'm announcing a crackdown on these companies overcharging American businesses and consumers."[22] A reform bill was introduced and passed the House in December 2021.

8. *The Ocean Shipping Competition Reform Act of 2022*.
On June 16, 2022, Bill S.3580, the Ocean Shipping Competition Reform Act of 2022 became law.[23] The Bill consisted of 26 sections. The important new changes are:

- to prohibit retaliation by Common carrier, MTO or OTI against a shipper (by refusing cargo space or resorting to other discriminatory action)

[22] See Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery, March 1, 2022, www.whitehouse.gov; and FACT SHEET: Lowering Prices and Levelling the Playing Field in Ocean Shipping, February 28, 2022 , www.whitehouse.gov

[23] By a vote of 369-42, the U.S. House of Representatives passed the Ocean Shipping Reform Act (OSRA) of 2022, which is the Senate's version of a reform bill passed by the House in December 2021.

- to allow persons to submit to the FMC complaints regarding charges assessed by a common carrier.
- to provide for investigation, refund, penalties and consideration
- to ensure a competitive and efficient maritime transportation system (through setting a National Shipping Exchange Registry, providing for new rulemakings on prohibited practices, etc.)

In addition, there are new provisions for data collection, which will require the FMC to publish new reports on regulated ocean common carriers. The bill instructs the FMC to initiate new rulemakings on prohibited practices involving the assessment of efforts (e.g., chassis management best practices, potential discrimination against transportation of qualified hazardous materials, etc.).[24] Other amendments are on: investigations; awards of additional amounts; reparation orders; annual reports to Congress; technical amendments; dwell time amendments; FMC activities; temporary emergency authority; licensing testing; planning; worker identification; storage and transfer of containers; technological Reports; and appropriations. The amendments are shown in Table 8 and those of interest in greater detail in Table 8A.

Table 8 – The Ocean Shipping Competition Reform Act of 2022

1. Short Title	10. Charge Complaints	19. Best Practices for Chassis Pools
2. Authorization of appropriations	11. Investigations	20. Licensing Testing
3. Service Contracts	12. Award of Additional Amounts	21. Planning
4. Shipping Exchange Registry	13. Enforcement of Reparation Orders	22. Review of Discrimination of Potential Hazardous Materials
5. Prohibition on Retaliation	14. Annual Report to Congress	23. Transportation Worker Identification Credentials
6. Public Disclosure	15. Technical Amendments	24. Use of United States inland ports for storage and transfer of cargo containers
7. Common Carriers	16. Dwell Time Statistics	25. Report on Adoption of Technology at US Ports
8. Assessment of Penalties or Refunds	17. Federal Maritime Activities	26. Authorization of Appropriations
9. Data Collection	18. Temporary Emergency Authority	

Table 8A – The Ocean Shipping Competition Reform Act of 2022

1. Promote the growth and development of US exports through a competitive and efficient system for the carriage of goods by water. s. 2(2)
2. New provisions for a National Shipping Exchange Registry s. 4. Filing with the FMC s.4b. Exemption, Regulation and Exemption ss. 4(c)-(e)
3. Prohibition of Retaliation by Common carrier, MTO or OTI against a shipper by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or resort to any other unfair or unjustly discriminatory action s. 5(d) (1-2)
4. Public Disclosure s. 6. Common Carriers s. 7. Assessment of Penalties or reforms s.8
5. Data collection - FMC shall publish on its website a calendar quarterly report s. 9 (a). Confidential information excluded s. 9(b)
6. Charge complaints which allow persons to submit to the FMC complaints regarding charges assessed by a common carrier s.10(a). Provision for Investigation, refund, penalties and consideration ss. 10(b-e).

[24] President Biden Signs the Ocean Shipping Reform Act of 2022 into Law, June 16, 2022, www.venable.com

C. Developments that played an important role in the evolution of the liner legislation

In this section, the developments that played an important role in the evolution of the legislation described in Section III are described. It provides a better appreciation why certain amendments were made and a better understanding of the laws that were described.

1. Post 1916 Developments

Following the enactment of the 1916 Act, after World War II, carriers once again were faced with overcapacity and competition from non-conference carriers, conferences began making extensive use of "dual rate" contracts to bind shippers to conferences and stave off non-conference carrier competition. These dual-rate contracts, also referred to as "loyalty contracts," offered discounted rates to shippers who agreed to use only conference carriers; they differed from the outlawed deferred rebates only in that the shipper could obtain the discount at the time it paid for a shipment. The dual rate contracts were never challenged until the mid 1950s. The challenge resulting from the *Isbrandtsen Case* and the reports thereafter ultimately led to the 1961 amendments, these are briefly reviewed.

In 1956, Isbrandtsen Co. challenged the January 1956 Federal Maritime Board order approving a rate system proposed by a shipping conference of 17 common carriers by water (i.e. Japan-Atlantic and Gulf Freight Conference) serving the inbound trade from Japan, Korea, and Okinawa to ports on the Atlantic and Gulf Coasts of the United States.[25] Isbrandsten was an independent shipping carrier and attempted to increase its market share. The Conference responded by filing a proposed dual-rate system with the Federal Maritime Board on December 1952 which was approved. The Board hoped that "the rate war would lead to Isbrandtsen's joining the Conference." Isbrandsten did not and a rate war led to freight rates falling to 30 percent below the pre-rate war and fell below the level of handling costs. A petition was filed with the Court of Appeal which favoured Isbrandsten. The matter was then appealed to the US Supreme Court by the Board and in 1958 the Supreme Court affirmed the Court of Appeal's decision.[26] The court ruled in favour of Isbrandsten. The ruling meant that any dual rate system tied to an inter-carrier agreement designed to meet outside competition, regardless of the agreement's justification such as a reasonable means to counteract cutthroat competition would violate section 14 of the 1916 Act. This meant that the Federal Maritime Board could not approve such agreements. As a result, all existing systems in the shipping industry which employed a dual rate system were thrown into question, creating major problems. Congress undertook a full scale investigation of the steamship industry. Hearings were held by three Committees: 1. The Special subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries (Bonner Committee); 2. The Antitrust Subcommittee of the House Committee on the Judiciary (Celler Committee); and 3. The Merchant Marine and Fisheries Subcommittee of the Senate Committee and Commerce. The key features of the first reports and the Bill introduced thereafter are briefly described.

Bonner Report: The Bonner Committee with Herbert C. Bonner chairman conducted an extensive study of conferences and dual rate contracts. Regarding the conferences, it reported that the conferences promoted: [. . .] regularity and frequency of service, stability and uniformity of rates, economy in the cost of service,

[25] Section 14 of the Act also prohibits discriminating or unjust methods by carriers because a shipper has supported another carrier.

[26] *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958).

better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination.[27] Regarding dual rate contracts, it reported the dual rate system – a tying device – was considered necessary by most shippers necessary to preserve the integrity of conferences, even though some shippers were dissatisfied with it. "The Bonner Committee ultimately decided that effective conferences were necessary and that, within safeguards, the Board should be authorized and directed to approve exclusive patronage arrangements."[28] It rejected certain proposals for rate and other controls and approved only the minimum regulation necessary to protect various interests. The Committee introduced H.R. 4299 in February 1961.

Celler Report: The Celler Committee in its report observed that the national shipping policy embodied in the 1916 Act was sound and that Congress is faced with the same predicament as faced in the early 1900s - to eliminate the conference system or allow it in the public interest with appropriate checks and balances. It found that over the years, conferences dominated by foreign carriers, had grown stronger and flagrant abuses of its privileges were continuing.[29] It also noted that over the years that conferences were charging higher rates than would otherwise prevail. It believed that "[I]t is one thing for this country to authorize the establishment of a cartel with anticompetitive devices authorized by law, but it is quite another for this Government to permit such a cartel to become a total supermonopoly unrestrained either by Government oversight or by free economic forces. Only by maintaining some competition against these cartelized foreign-dominated steamship conferences can there be any hope that the fundamental economic interests of the United States be preserved."[30] Notwithstanding the above, it did not recommend withdrawal of antitrust immunity for shipping conferences providing three reasons.[31] It concluded "…it is absolutely essential, we believe, if the conference system is to do more good than harm, to devise methods for effectively controlling the operation of conferences and for prohibiting abuses which violate conference agreements, to deter violations of the law, to safeguard shippers from unreasonably high conferences rates, to protect nations and ports from unjustified discrimination, and to leave the ways free for independents to enter the trades."[32] It made two observations: First, there existed a direct relationship between the power of shipping conferences and their competitive abuses, and the society may suffer once a healthy competition between conference and non-conference carriers was missing. Second, that shipping conferences may be run by foreign carriers that have little motivation to protect US economic interests, and the Committee called for a greater regulation of the maritime industry.

Bonner Bill (HR 4299 – H.R. 6775)*:* The introduction of Bill H.R. 4299 by Bonner which became Bill H.R. 6775 led to comments by Chairman Emanuel Celler. He listed a number of concerns about the dual rate system and legalization of legal rate agreements by conference to be a drastic step and need for

[27] H.R.Doc. No. 805, 63d Cong., 2d Sess., 416.

[28] Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, 1989, See p. 496.

[29] For example, secret rate agreements, traffic and market division, secret rebates, partially closed conferences, and discriminatory treatment of shippers.

[30] Staff of the Antitrust Subcommittee on the Judiciary, 87th Congress, 2D Sess., Report on the Ocean Freight Industry, p. 395.

[31] The existing long historical international structures; the international system cannot be eliminated by withdrawal; and the severe hardship on American merchant marine and rate instability undesired by American shippers.

[32] The Ocean Freight Industry, Report No. 1419 of the Antitrust Subcommittee (No. 5) of the Committee on the Judiciary (pursuant to House Resolution 56). House of Representatives, 87th Cong., 2nd Sess., March 12, 1962, p. 386.

effective enforcement of the Shipping Acts.[33] The Bonner Committee agreed and sufficient safeguards were erected to protect the public interest. Both committees found that traditional antitrust principles should not be applied to the ocean shipping industry. H.R. 6775 was amended and passed by the House and referred to the Senate in June 1961. The Senate Commerce Committee passed the amended bill in September 1961. It was signed by the President and became PL 87-346 effective on January 2, 1962

The Bill contained seven sections: Section 1 relates to s. 14b – Foreign commerce, common carriers, dual rate contracts; and Notice and hearing.[34] Section 2 relates to s. 15 Filing of Agreements, etc.; and Discriminating agreements disapproval.[35] Section 3 relates to Existing agreements, modifications, etc.[36] Section 4 relates to s. 18 Filing of carrier rates, etc; Rate Changes; Tariff; Collection of Specified rates only; and Penalty.[37] Section 5 relates to s. 20 to protect the use of confidential information making its release unlawful.[38] Section 6 relates to s. 16 Filing of Protests.[39] Section 7 relates to s. 43 Rules and Regulations.[40]

Given the above, Congress concluded that the cooperative activity of these shipping conferences was to some extent in line with the public interest, despite traditional hostility to these anti-competitive arrangements. It legalized the dual rate system, added a new 'public interest' to conference agreements, and set up a new agency the Federal Maritime Commission with the sole responsibility of regulating the maritime industry with increased regulatory powers.

[33] So it emphasized the need for the Federal Maritime Commission to effectively use its powers to prevent and punish conference abuses of ratemaking authority. The Commission was also admonished to police closely the new rate filing provisions to ensure adherence to the tariffs filed with the agency, and that the lines make their tariffs available to the public when requested to do so. Id., p. 387.

[34] It permits the use of dual rate contracts by common carriers or conferences unless the Commission found, after notice and hearing that the contract will be detrimental to the commerce of the United states or unjustly discriminatory or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Such contracts had to satisfy nine conditions.

[35] Section 15 requires filing of all agreements. The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancel thereof, if it finds it to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act. It thereby added a fourth standard to the review criteria 'a public interest standard'. Further, no agreement could be approved unless: 1. it contained a right of independent action for carriers not members of the same conference or serving different trades; and 2. it was open and without penalty for withdrawal on reasonable notice. The Commission could also disapprove agreements if it found inadequate policing under them or a failure to adopt reasonable procedures for promptly dealing with shippers' request or complaints. The penalty was not more than $1000 per day.

[36] This section indicates that existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, cancelled, or modified by the Commission.

[37] Section 18(b) requires ocean common carriers (in foreign commerce) to file tariffs with the FMC and stipulates that rates so filed could not be increased with less than 30 days' notice. It requires carriers to adhere to: the filed tariffs (i.e., lower tariffs or different rates were prohibited); and the form and manner tariffs shall be filed and published, together with provision for the disapproval of rates too high or too low that are detrimental to the commerce of United States. The penalty was not more than $1000 per day.

[38] This section is amended to protect the use of confidential information making its release unlawful.

[39] It indicates that the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission if the rate, rule, or regulation unjustly discriminates against. The conference shall show why such rate, rule or regulation should not be set aside.

[40] It gives rule making authority to the Commission to carry all the provisions of the 1916 Act.

2. Post 1961 Developments

In the 1960s and 1970s, a number of developments occurred which led to the Shipping Act of 1984, a few were related to the developments in the industry (i.e. containerization[41] and increase in trade), domestic and international policy (i.e. decline of US merchant marine,[42] deregulation philosophy and international practice) and a few were related to the interpretation of the 1916 Act. Scholars on the subject have categorized the latter into the following: A. Narrowing antitrust exemption as a result of the 'public interest test' in the 1961 amendments and the US Supreme Court decisions; B. Applying and expanding US laws extraterritorially due to antitrust laws; and C. Passing of foreign laws. These developments will be briefly reviewed hereafter.

A. Narrowing of antitrust exemption: In the mid 1960s, problems arose about the interpretation of the Act as to which agreements among ocean carriers would be exempt from the antitrust laws due to the 1961 amendment which added a 'contrary to the public interest' standard. This issue was clarified[43] in *FMC v. Svenska Amerika Linien* when this case was referred to the US Supreme Court. In this 1960 case, the American Society of Travel Agents petitioned the FMC to institute proceedings to investigate the relations between travel agents and the Trans Atlantic Passenger Conference (Agreement No. 120) and the Atlantic Passenger Steamship Conference (Agreement No. 7846). The case involved two provisions in an inter-carrier agreement: one provision prohibited travel agents from selling passage on competing, non-conference lines (the tying rule); and the other provision required unanimous action by conference members before the maximum rate of commissions payable to travel agents may be changed (the unanimity rule). The FMC disapproved both provisions and ordered them eliminated from the conference agreement and the matter was appealed. The Court of Appeals set aside the FMC order twice. The matter was then appealed to the US Supreme Court. In 1968, the Supreme Court reversed the judgement of the Court of Appeals and approved the FMC decision.[44] The decision also noted that all the criteria in s. 15 had to be considered for approval of a conference agreement and 'that once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is *contrary to the*

[41] "The first containerized shipping services were established in the United States in the late 1950s and early 1960s. There were no specific container size standards, with the most prevalent form being the 35-foot container. By 1968, a standard was reached, defining 20 foot and 40-foot containers as the norm. This allowed the construction of single-purpose ships and specialized terminal facilities. Still, the uncertainty and capital-intensiveness of containerization implied a particular diffusion pattern focused on the United States. It was not until 1970 that a global system of container ports and shipping services started to emerge and that ports started reporting traffic in TEU (Twenty-foot Equivalent Unit), a standard that was set just two years earlier." Early container shipping activity was highly clustered and involved economies with a strong relationship with the United States. See The Dawn of Containerization: 1970.

[42] "A variety of political and economic factors had again put American shipbuilding and shipping companies into decline, so much so that MARAD's 1969 Annual Report stated the industry was "drifting to the brink of disaster." To help revive U.S. merchant shipbuilding, Congress passed the Merchant Marine Act of 1970, which, for the first time, extended subsidies to bulk carriers. Although it was the most significant maritime legislation in over three decades, the act did not reinvigorate the U.S. maritime industry and only 200 of 300 planned ships were built over the next 10 years. The need to modernize and modify the NDRF also became apparent during the 1970s. In 1976, a Ready Reserve Fleet (RRF) component was established as a subset of the NDRF made up of vessels that can be activated on short notice to provide rapid deployment of military equipment during an emergency." MARAD

[43] In an earlier case *Carnation Co. v. Pacific Westbound Conference,* the Supreme Court indicated that 'the 1916 Act provided the shipping industry with only limited exemption' and in the 1968 case *Volkswagenwerk Aktiengesellschaft v. the Federal Maritime Commission* indicated that the FMC had the duty to scrutinize the agreement that it did not invade the prohibition of the antitrust law. The Carnation case arose because of a conflict between a dairy shipper and two steamship conferences. Carnation challenged the clandestine rate-fixing agreement of the conferences and the denial of its rate requests. The Federal district court and Court of Appeals turned down Carnation's request. The matter was then appealed to the US Supreme Court whose decision favoured Carnation indicating that the agreement of the conferences was in violation of section 15 of the Shipping and could not be approved.

[44] Having "found that the Commission's findings and order are supported by substantial evidence, and since there are no other meritorious contentions raised by the respondents." *FMC v. Svenska Amerika Linien,* 390 U.S. 238 (1968).

public interest' in the absence of contrary evidence. The FMC did this and the Conference did not convince the FMC that evidence existed not to use this test. The use of the Svenska standard was of particular concern to carriers as it could be interpreted to permit the FMC to subject conference agreements to analysis comparable to that applied under the antitrust laws. Carriers and conferences complained that the Svenska standard was too vague and placed an undue burden on them. It also shifted the burden of proof to the conferences.[45]

B. Applying and expanding US laws extraterritorially due to antitrust laws: First, while governments claim jurisdiction over foreign conduct affecting matters within its borders, United States courts began to regularly exercise this right in a manner that failed to consider the interrelationship of anticompetitive conduct, public policy and the national interests of other countries.[46] Second, was the question of whether the remedy was to be sought under the antitrust law or shipping law as larger damages are awarded under the antitrust law compared to those of the shipping law. Initially, the Supreme Court indicated that the remedy in shipping cases is that affected by the shipping law but in *Carnation Co. v. Pacific Westbound Conference* the Court indicated that remedy outside the shipping law could be sought if the conference activities were not debatably legal. In this case the plaintiff shipper alleged that the secret price-fixing activity was beyond the agreement approved by the FMC. While price fixing activities that are granted an exemption under the Shipping Act are lawful those not granted an exemption are not lawful. So in this case, the courts had ample jurisdiction to levy triple damages under the antitrust law without the plaintiff having to take the case to the FMC to see if it first violated the Shipping Act. Third, in North Atlantic Shipping cases, United States began using United States discovery procedures abroad. The United States Department of Justice issued Civil Investigatory Demands on the British shipping companies in the North Atlantic investigation. This was considered in Great Britain to be an infringement of United Kingdom's jurisdiction. It created a furor especially as the court imposed the largest fines at that time in any single antitrust case.[47]

C. Passing of foreign laws: The North Atlantic Shipping cases in part led to the UK Parliament passing the *Protection of Trading Interests Act* together with other countries. Canada passed the *Uranium Information Security Regulations* in 1976, Australia passed the *Foreign Antitrust Judgements (Restriction of Enforcement) Act 1979* in 1979, New Zealand passed the *Evidence Amendment Act (No. 2)* in 1980 and France passed the *Law Concerning the Communication of Documents or Information of an Economic, Commercial, Industrial, Financial, or Technical Nature to Aliens Whether Natural or Artificial Persons* in 1980. These blocking statues of foreign countries restricted the extent to which the United States litigants could obtain evidence in the United States. In short, "These developments in United States case law … illustrate how the persistent export of US antitrust philosophy provoked foreign governments into passing

[45] "Since *Svenska*, the FMC and the federal courts have continued to insist that anticompetitive agreements be carefully tailored to meet legitimate Shipping Act goals. The Commission is required to conduct an adequate investigation of all agreements containing anticompetitive provisions. The FMC must scrutinize closely all agreements involving activities that are pe se illegal as well as agreements having any antitrust *implications*. Proponents of anticompetitive agreements must "meet the *heavy burden* of showing hat, on balance, the agreement is in the public interest." Regulatory Reform in the Ocean Shipping Industry: An Extraordinary U.S. Commitment to Cartels, George E. Garvey, Geo. Wash. J. Int'l L. & Econ, Volume 18, 1984, P. 16.

[46] See *The Shipping Act of 1984: Bringing the United States in harmony with International Shipping*, Martha L Cecil, Penn State International Law Review, Volume 3, Number 2 Dickson Journal of International Law, 1985, pp. 206-7. www.elilibrary.law.psu.edu

[47] Eventually it led to reports such as *British Threaten Retaliation Over Shipping Judgements*, July-Dec. Antitrust & Trade Reg. Rep (BNA) No. 922, at A-31 (July 12, 1979) and later dismissal of FMC cases.

retaliatory legislation that, in turn, induced Congress to rethink United States international shipping policy."[48]

The above events led to erosion of antitrust immunity, as one writer states "Carnation was the first case to decisively strip away the defense of exemption from the antitrust laws. Later, Svenska placed the burden of proof of a conference acting within the provisions of the 1916 Act on the conferences themselves if their agreements or actions were challenged. Finally, Sabre[49] completed the erosion by holding that even though an agreement may have been approved by the FMC, the finding of a violation would strip the conference of their approved immunity. It is this erosion of antitrust immunity which established the need for strong legislation reaffirming the antitrust environment initially established in 1916."[50] This was the situation that prevailed when Congress sat down to review the amended Shipping Act of 1916. The above developments and those in the 1960 and early 1970 resulted in several years of study on shipping. During this period however certain rate-cutting and rebating practices arose, and these immediate problems had to be dealt with first.

3. Post 1965 Developments

An increase in Soviet shipping began to attract attention by the late 1970s. Its presence in American shipping increased to 3.4 percent in 1977 from .3 percent in 1971 and MARAD projections indicated it would reach 6 percent by 1986. There was also a concomitant decrease in the size of US merchant fleet and concern of rate practices of 'state-controlled' carriers. "The Ocean Shipping Act of 1978 was the Congressional response to the growing usurpation of maritime trade from U.S. shippers by the Soviet Union's merchant fleet. Specifically, Congress desired to give the Federal Maritime Commission new power to regulate and check the rate-cutting practices of state-controlled carriers operating as "cross-traders'" in U.S. ocean commerce."[51] This led to H.R. 9998 in 1977 introduced by Representative Murphy (an identical bill S. 2783 was undertaken by the Senate Committee on Commerce, Science and Transportation[52]). A series of hearings began on the bill during which input was received from the relevant federal agencies, domestic shipping groups and international shipping interests. The FMC and Maritime Administration were supporters of the bill. The bill was opposed to by the National Industrial Traffic League (it wanted minimum regulation), Great Lakes Commission and the Illinois Department of Business and Economic Development (it was concerned as Eastern-bloc carriers provided a substantial service to the Great Lakes region). The Carter Administration favoured the bill with six amendments and the bill became law in October 1978.

[48] See Martha L. Cecil, p. 206.

[49] In *Sabre Shipping Corporation v. American President Lines*, the FMC claimed that the conference rates had a predatory effect on the independent carrier, Sabre, and were predatory because they were unreasonably low so as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5) of the Shipping Act. Sabre then sued for treble damages under the antitrust laws.

[50] Harold A. Sherrts, ESSAY The Shipping Act of 1984: A Return to Antitrust Immunity Transportation Law Journal, Vol. 14 [1985], Issue 1, Art., p. 168.

[51] The Ocean Shipping Act of 1978: New Direction in Maritime Legislation, Steven M. Talson, Maryland Journal of International Law, Volume 5, Issue 2/6, 1980, p. 268.

[52] The Senate committee was attuned to the Soviet political and military objectives in monopolizing ocean shipping routes and projecting influence. It was in general accord with the House Committee and its bill was unanimously voted out. See Steven M. Talson.

Notwithstanding the 1978 Act, illegal rebating and rate cutting continued which the 1979 amendments attempted to put an end to. The hearings on rebating practices[53] stated "One of the most pressing problems facing the U.S.-flag fleets is that of rebating. Although the Shipping Act, 1916 prohibits [it] …., the Commission is now investigating 27 ocean carriers – 9 U.S.-flag and 18 foreign-flag – and 215 shippers or consignees known or believed to have paid, or received rebates in our liner trades. … That it is a harmful practice in the U.S.-liner trades is best described in a statement by Manuel Diaz, president of Adherence group, Inc., with 30-years experience in ocean shipping. 'It results is unreasonable preference and advantage or prejudice and disadvantage to shippers, ports and other concerned interests. It never benefits the consumer and ultimately, must result in predatory competition leading to unbridled rate wars which will ultimately make it impossible for privately owned companies to continue to operate much less to replace their fleets. In a nutshell, the result of illegal rebating, whatever its degree, is the enrichment of a few at the expense of the public interest and commerce between nations.'" Initial attempts to prevent rate cutting was embodied in bill H.R. 7940 (94th Congress). The bill died and bill H.R. 14564 was introduced to apply to state-controlled carriers. The bill also failed. Hearing were then held by the Subcommittee on Merchant Marine on Illegal Rebating in the U.S. Ocean Commerce (95th Congress, 1st Session, 1977). In response to the problems posed by these agreements, the Shipping Act Amendments of 1979 (H.R. 3055) were enacted.[54]

Having dealt with the rate-cutting and rebating concerns, Congress turned its attention to consider various legislative proposals to address the problems that had arisen under the 1916 Act. The record established the need for maritime reform. "It was believed that reform was necessary to reduce the time required for carrier agreements to become effective and to clarify carrier exposure to antitrust exposure."[55] Several bills were introduced both by the House of Representative[56] and Senate[57] accompanied by reports.[58] These are briefly summarized.

Murphy Bill (HR11422 – HR 4769 - HR6899): On March 9, 1978, the Murphy Bill, H. R. 11422, the International Shipping Act (95th Congress) was introduced. It amends the Shipping Act, 1916, to authorize the use of deferred rebate contract systems and to authorize the operation of closed shipping conferences and shippers councils under specified conditions. A follow up bill was introduced on July 12, 1979, H. R. 4769, the Omnibus Maritime Regulatory Reform, Revitalization, and Reorganization Act of 1979 (96th Congress). It consisted of five parts: Findings and Purposes; Regulation of International Ocean Shipping; Amendments to the Merchant Marine Act, 1936; Amendments to the Internal Revenue Code of 1954; and Reorganization of Maritime Policymaking Functions. This was followed by the introduction of Bill H.R. 6899, Revitalization and Reorganization Act of 1980, on March, 24, 1980. It consisted of the first three parts of the previous bill and a miscellaneous part. The bill: authorized closed conferences, granted antitrust exemption to shippers' councils and eliminated consideration for the anti-competitive

[53] Hearings on H.R. 9518, A Bill to amend the Shipping Act, 1916, to provide for a three-year period, to reach a permanent solution of the rebating practices in the United States foreign trade, Serial No. 95-24, 1978, pp. 1-2.

[54] The legislative history is set forth in [1979] U.S. CODE CONG. & AD. NEWS 1392.

[55] See FMC Report on Section 18, p. 500.

[56] H. R. 11422 – H. R. 4769 – H. R. 6899 associated with the name of John M. Murphy; and H. R. 4374 – H. R. 1878 associated with the name of Mario Biaggi. The bills were introduced during Congress sessions 96 to 98 and were given new numbers as they were either not voted or amended and introduced in the next session.

[57] S. 1593 – S. 504 - S47 associated with the name Slade Gorton. Mention should also be made of S. 2585 - S. 125 (Daniel K. Inouye).

[58] Senate 'Report on The Shipping Act of 1982', House 'Report on International Ocean Commerce Transportation 1982', Judiciary 'The Shipping Act of 1983' Report 98-53, Conference Report 98-600 to accompany S. 47, Shipping Act of 1984, Committee of Conference, House of Representatives, 98th Congress, 2nd Session, February 23, 1984.

effect of an agreement thereby providing limited antitrust immunity but substituted a different set of criteria[59] to deal with the problems with the public interest that the industry complained about.

Gorton Bill (S. 1593 – S. 504 - S47)*:* On August 3, 1981, the Gorton Bill, Bill S. 1593 - Shipping Act of 1982 (97th Congress) was introduced to revise regulation of international liner shipping operating in the U.S. foreign commerce. The bill: authorized closed conferences; granted antitrust exemption to shippers' councils; required the FMC to issue a decision on agreements within 180 days with automatic approval if not filed; shifted the burden of proof to the opponent of the agreement; and provided for a full exemption from antitrust laws. The bill was amended to satisfy U.S. flag carriers and major shippers by clarifying sections concerning independent action, loyalty and service contracts. The bill however did not reach full senate for its consideration. So on February 17, 1983, Bill 47 - Shipping Act of 1983 (98th Congress) (an identical bill to S. 504) modeled after S. 1593 was introduced. It proposed major changes: eliminate FMC's ability to scrutinize rate levels (except controlled carriers) while retaining FMC's role as repository of tariffs and enforcer. It included provisions which addressed antitrust concerns which had not been incorporated into its predecessor. The bill was considered necessary to streamline role of the FMC, to reaffirm carrier participation and to improve strained international relations. Interested parties (members of the administration, FMC, small and large shippers and carriers) provided testimony on Bill 47 on a panorama of shipping conference problems (i.e. impact of the bill on: competition, shippers, ports, and rate levels together with adequacy of the FMC, penalties, etc.). There was considerable debate among Senators as to the need for TFE (Senators D. K. Inouye, Ted Stevens and S. Gorton supporting it and Senator Thurmond Senator Thurmond not supporting it) and finally the TFE requirement was retained. S. 47 also excluded agreements of terminal operators to pool or apportion earnings, losses, or traffic which was recommended by the Senate Committee. The Senate passed S. 47 in March 1983.

Biaggi Bill (HR4374 – HR1878)*:* On August 4, 1981, the Biaggi Bill, H. R. 4374, the Shipping Act of 1982 (97th Congress) was introduced. The bill authorized: closed conferences; granted antitrust exemption to shippers' councils; required the FMC to issue a decision on agreements within 30 days of filing and a final order 180 days thereafter but there was no automatic approval in the case of delays; shifted the burden of proof to the opponent of the agreement; and included consideration for the anti-competitive effect of an agreement thereby providing limited antitrust immunity. The House passed the bill but not the Senate. So on March 3, 1983 an identical Bill H. R. 1878, the Shipping Act of 1983 (98th Congress) was introduced with amendments and referred to House Committee on the Judiciary. It proposed elimination of TFE by the FMC. Discussions between the House Committee and Judiciary Committee resulted in a compromise proposal reconciling the two versions of the Bill. The compromise version of H. R. 1878 restored the House provision for TFE of tariffs. The compromise also restored the FMC's authority to suspend tariffs for violation of the Shipping Act including the failure to adhere to valid tariffs. The compromise version of the Bill also provided for the establishment of a Commission on the Deregulation of International Ocean Shipping. The matter of carte blanche antitrust immunity to the activities and agreements of conferences led to the usual challenge. The consensus of those testifying indicated that 'the burden of proof' of carrier activities and conference agreements do not violate the antitrust laws should rest with the conference not those challenging it. The conference carriers testified that 'the burden of

[59] The agreement be consistent with the mandated policy objectives of promoting U.S. foreign commerce, assuring competitive rates in the international market, and realigning U.S. policy with those of foreign nations.

proof' should rest with those challenging it. The final draft of H.R 1878 was modified to reflect the views of the conference carriers (and consistent with the S. 47). The bill also specifically limited the scope of marine terminal agreement exemption to those involving ocean transportation in the US foreign commerce to avoid any extension of antitrust immunity inland. The full House passed the Bill on October 17, 1983.

Conference Report 98-600: This Report[60] dealt with 1. Applicability of the Shipping Act of 1984 to agreements: by or among ocean common carriers (eg. fixing of rates; pooling; allocating ports; limiting traffic; engaging in arrangements with carriers MTO and NVOCCs, regulating competition in ocean transportation; regulating or prohibiting service contracts), and; by MTOs in ocean transportation and MTOs and ocean common carriers (fixing of rates; and engaging in cooperative arrangements). 2. Filing: It requires filing of agreements with the FMC in prescribed form and manner necessary to evaluate them, together with the contents and describes criteria by which the FMC shall suspend, cancel, or modify such agreements. Requires filing of tariffs which should be kept open for public inspection. Authorizes the use of time/volume rates and service contracts with individual shippers. 3. Exemptions: It does not apply to maritime labor agreements and exempts certain agreements, contracts, and activities from antitrust laws. 4. Prohibitions: It prohibits a controlled carrier or carrier that is controlled by a government from maintaining tariffs that are below a level that is just and reasonable and describes standards against which such rates shall be disapproved. It provides for Presidential review of any order of suspension or final order of disapproval of rates of a controlled carrier and grants the President the authority to require the Commission to stay such order for national defense or foreign policy reasons. It prohibits operation by non-licensed ocean freight forwarder or non vessel operating common together with specified acts by ocean common carriers or conferences including rebates, rate discrimination, and retaliation against shippers. 5. Powers of the Commission: It sets forth the powers of the Commission and civil penalties for violations of this Act and authorizes the Commission to exempt any specified activity or class of agreements between ocean carriers or other persons subject to this Act.

Ultimately agreement was reached by the Senate on 22 February 1984 and the House on 6 March 1984 and the bill[61] was signed into law on 20 March 1984 (PL 98 237). The provisions included in the law to specifically address some of the problems noted previously are contained in: Section 2 on the Declaration of Policy,[62] Section 13 on Penalties[63] and Section 7 which recognizes the need for harmony with

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[60] Conference Report 98-600 to accompany S. 47, Shipping Act of 1984, Committee of Conference, House of Representatives, 98th Congress, 2nd Session, February 23, 1984.

[61] "The expected legislation is the Shipping Act of 1983, S. 47, 98th Cong., 1st Sess., 129 CONG. REC. S 1828 (daily ed. Mar. 1, 1983). The House version of S. 47 is embodied in H.R. 1878, 98th Cong., 1st Sess., 129 CONG. REC. H8202 (daily ed. Oct. 17, 1983) [herei nafter cited as S. 47 (House Version)]. The Senate passed S. 47 on March 1,1983. 129 CONG. REC. S 1828 (1983). The House passed H.R. 1878 on October 17, 1983. 129 CONG. REC. H8216 (1983). The House later vacated its passage of H.R. 1878, passing in its place a version of S. 47 which had been amended by the House to contain certain language of H.R. 1878. 129 CONG. RFc. H8223 (1983). The two versions of S. 47 then went to conference. For purposes of this article, "S. 47" refers to the version passed by the Senate on March 1, 1983, whereas the version passed by the House will be referred to as "S. 47 (House Version)." See footnote 2 in George E. Garvey, *Regulatory Reform in the Ocean Shipping Industry: An Extraordinary U.S. Commitment to Cartels*, The Catholic School of America, Columbus School of Law, 1984, p. 1.

[62] "SEC. 2. DECLARATION OF POLICY.

The purposes of this Act are—

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; and

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs."

international shipping policies; and Section 6 on Action on Agreements[64] and Section 7 on Exemption from Antitrust laws[65] which clarifies antitrust exemption in the shipping law by introducing new tests and expanding the exemption in the shipping law.

4. Post 1984 Developments

A few years after the passage of the 1984 Act, several reports (Federal Maritime Commission 1989 Report, Federal Trade Commission 1989 Report, Department of Transportation Report 1989, Department of Justice 1990 Report, and Presidential Advisory Commission 1992 Report) appeared on its effectiveness to fulfil the Section 18 requirement of Act which requires an analysis and effects of the Act on the ocean shipping industry after five years.[66] Thereafter, several Bills (Carper Bill; Metzenbaum Bill; NITL Bill; House Bill; Senate Bill; and Lott, Breaux Bill[67]) attempted to introduce changes to the Act which ultimately resulted in the *Ocean Shipping Reform Act of 1998.* The above reports and bills are briefly summarized.

FMC Report: Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission contains information on, and an analysis of, the impact of the U.S. Shipping Act of 1984 on the international ocean

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63 "13. PENALTIES.

(6) Before an order under this subsection becomes effective, it shall be immediately submitted to the President who may, within 10 days after receiving it, disapprove the order if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States."

64 "SEC. 6. ACTION ON AGREEMENTS.

6. (c) REVIEW AND EFFECTIVE DATE.—Unless rejected by the Commission under subsection (b), agreements, other than assessment agreements, shall become effective—

(1) on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later; or …"

6. (g) SUBSTANTIALLY ANTICOMPETITIVE AGREEMENTS.—If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h)." With regard to this section the Conference Committee Report states that the "language of this section must be interpreted in light of the historic international acceptance of carrier agreements." (p. 289) This was intended to indicate that the new standard was a departure from the 1916 Act in recognition of international shipping practices."

65 "SEC. 7. EXEMPTION FROM ANTITRUST LAWS.

(a) (2) any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 16 of this Act from any filing requirement of this Act;

(c) LIMITATIONS.—(1) Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) shall not remove or alter the antitrust immunity for the period before the determination

(2) No person may recover damages under section 4 of the Clayton Act (15 U.S.C. 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by this Act." The Judiciary Committee recognized that this brings US shipping law in line with international policy and the sensitivities of foreign governments.

66 The report by Al Gore, *Congress Should Deregulate the Maritime Industry* has been excluded. It also excludes two symposiums co-sponsored by The Federal Maritime Commission on the 1984 Act, the first with Old Dominion University in Norfolk, Virginia, and the second with the University of Southern California in Long Beach, California. The latter resulted in the publication of the Shipping Act of 1984: a debate of the issues. Proceedings of a conference held at Long Beach, California on February 18-19, 1988. The 345 page publication included: Findings on the Impact of the Shipping Act of 1984 Four Years after Enactment; Tariffs and Independent Action; Service Contracts; Antitrust Issues for Carriers and Shippers; Antitrust Issues for Ports and Non-Port Terminal Operators; State of the Liner Shipping Industry Four Years After Passage of the Shipping Act of 1984; The Position of Shippers, Forwarders and Ports After Four Years of Experience with the Act; The Future of Liner Shipping and Regulation; A Reading of the Tea leaves. A list of conference registrants, biographical information on conference participants, and a background paper on the Act are included.

67 For further description see Monteiro, Joseph and Robertson, Gerald, "Shipping conference legislation in Canada, EEC, and the U.S.A: Background, emerging developments, trends and a few major issues", *Transportation Law Journal*, V. 26, Spring 1999, pp. 179-181.

shipping industry.[68] It also includes reports on the tariff system and port antitrust immunity, as mandated by the 1984 Act, as well as special reports on service contracts, independent action, and provisions of the 1984 Act that may require technical adjustments or clarifications. An Executive Summary presents an overview of the Report's findings and conclusions. The report concluded that the Act has had a minimal effect: on the level and stability of ocean liner freight rates; on the concentration of port calls; and on independent participation in U.S. trades. It indicated that the objectives were met to reduce the time and uncertainty of obtaining Federal Maritime Commission approval of an agreement as well as to reduce the costs of the legal filing process. It is also stated: that rate-making should be left entirely to the private sector; that the need exists for antitrust immunity for ports and marine terminals; and that and there is a continuing need for the statutory requirement that tariffs be filed with and enforced by the commission.

FTC Report: The FTC Report consists of eleven sections.[69] The conclusion states "Our view of the available evidence suggests that the pro-competitive aspects of the 1984 Act, such as mandatory independent action and service contracts, may have provided real benefits to shippers by reducing shipping rates and providing better service."[70] "…we believe the evidence justifies our greater optimism regarding the potential benefits of competitive forces."[71] "In general consumers benefit from the removal of impediments to competition. Several such impediments remain in the ocean shipping industry, including tariff filing requirements, anti-trust immunity for ports and marine terminal operators, and restrictions on conference members from negotiating service contracts directly with shippers. Our analysis questions whether these characteristics of the industry provide net social benefits. Thus, we recommend that Congress and the Advisory Commission seriously consider whether the continuation of these impediments are in the best interests of society as a whole."[72]

Department of Transportation Report: The Department of Transportation report provides an analysis of a five-year study on the impact of the Shipping Act of 1984. It concluded that the Act has had a minimal effect: on the level and stability of ocean liner freight rates; on the concentration of port calls; and on independent participation in U.S. trades. Objectives were met that intended to reduce the time and uncertainty of obtaining Federal Maritime Commission approval of an agreement as well as to reduce the costs of the legal filing process. It is also stated: that rate-making should be left entirely to the private sector; that the need exists for antitrust immunity for ports and marine terminals; and that and there is a continuing need for the statutory requirement that tariffs be filed with and enforced by the commission.[73]

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[68] Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, pp. 1-697 contains 29 chapters in four parts. Part one is on: the impact of the U.S. Shipping Act of 1984; Part two is on the advisability of adopting a system of tariffs based on volume and mass of shipment; Part three is on the need for antitrust immunity for ports and marine terminals; and Part four is on the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission.

[69] I. Introduction; II. Industry Background; III. Legislative Background; IV. Rationales for Regulation; V. An Evaluation of the Three Rationales for Regulation; VI. The Potential Costs of Regulation; VII. Effects of the 1984 Shipping Act; VIII. Common Tariffs for Products of Equivalent Volume and Mass; IX. Tariff Filing Requirement; X. Antitrust Immunity for Ports and Marine Terminals; and XI. Conclusion. See Report of the Federal Trade Commission – An Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act, November 1989, pp. 1-80.

[70] Report of the Federal Trade Commission – An Analysis of the Maritime Industry and the Effects of the 1984 Shipping Act, 1989, p. 11.

[71] Id.

[72] Id. pp.11-12.

[73] Comments of Department of Transportation on the Effects of the Shipping Act of 1984, Transportation Department, Washington, D.C., 1989

DOJ Report: The Department of Justice provided its analysis of the Impact of the Shipping Act.[74] It examined the issue of antitrust immunity for the shipping industry. On this issue it called for the abolition of antitrust immunity for shipping conferences. It reviewed the rationale for it and examined the underpinning theories.[75] The DOJ felt that there was no reason for marine terminal operators (MTOs) to have antitrust immunity to collectively establish rates and terms of service suggesting that terminal operators differed from other persons engaged in international shipping. It examined the arguments for tariff filing and enforcement and concluded there was no need for it in the US.

Presidential Advisory Commission 1992 Report:
The Report of the Advisory Commission to the President and Congress examined a number of issues in the shipping industries.[76] The main issues were: 1. Antitrust immunity to Conferences; 2. Tariff filing and Enforcement; 3. Principles of Common carriage; 4. Service contracts; 5. Relations of Conferences with shippers and transportation intermediaries.[77] In the absence of any consensus, the Report did not provide any conclusions or recommendations.

Carper Bill: On August 12, 1992, Thomas R. Carper introduced in Congress Bill H. R. 5841 entitled the "Shipping Act of 1992".[78] This Bill attempted to limit antitrust immunity for carriers. The Bill contained a few new features. First, shippers would be able to sign confidential rate contracts with individual shipping lines rather than having to sign them with the conference. Second, the Bill introduced an alternative to minimum quantity of cargo, namely 'percentage' of cargo in its definition of service contracts. Third, anti-trust immunity would be limited to a conference, excluding independents, discussion agreements, etc. A conference with a market share exceeding 60% of liner capacity on a trade lane would have to obtain certification from the Justice Department that it would not likely increase transportation costs or reduce services. Fourth, shippers and carriers would be allowed to enter long-term contracts with individual shipping lines without conference or FMC interference. Carriers voiced strong opposition to the Bill and the Bill died.

Metzenbaum Bill: On October 29, 1993, a bill that would repeal antitrust exemption for ocean carriers was introduced by Senator Metzenbaum[79] with support from senators, C. Grassley and O. Hatch. The Bill, entitled an "Act To Restore Fair Competition in the Ocean Shipping Industry", indicated that conferences

[74] The Department of Justice Report Analysis of the Impact of the Shipping Act of 1984, US DOJ, Antitrust Division, March 1990.

[75] Regarding the theory of the Core that was tested by William Sjostrom who suggested that an empty core may be the reason for need for a cartel to bring about stability in rates as there is no competitive equilibrium. The Antitrust Division of the U.S. Department of Justice questioned the findings of Sjostrom. They point out that the existence of a large number of carriers operating at differing levels of capacity suggest a non-empty core in most U.S. liner trades as indicated in the conditions noted above for the existence of a core.

[76] Report of the Advisory Commission on Conferences in Ocean Shipping, Washington, D.C., April 10, 1992.

[77] For a discussion of the each of these issues see Monteiro, Joseph and Robertson, Gerald, "Shipping conference legislation in Canada, EEC, and the U.S.A: Background, emerging developments, trends and a few major issues", *Transportation Law Journal*, V. 26, Spring 1999, pp. 177-8.

[78] "Bill seeks to limit antitrust immunity for carriers, permit secret rate pacts," The Journal of Commerce, N.Y., Friday, August 14, 1992, p. 1B.

[79] "Bill Would End Antitrust Immunity Granted to Ocean Shipping Conferences," Antitrust & Trade Regulation Report, Vol. 65, No. 1638, Nov. 4, 1993, pp. 580-581.

can determine the fate of certain ports. This power, according to the Senator, conferences should not have. The Bill would terminate, effective January 1, 1994, the immunity provided by section 7 of the *Shipping Act of 1984*. The exemption, according to Senator Metzenbaum, raises cost to exporters, drives up cost of imports and increases transportation costs which consumers are forced to pay. Further, the increase in costs will put US exports at a competitive disadvantage. Given the fragile state of the US economy, cartels which generate such effects should not be tolerated. Further, the Senator indicated that the conferences have colluded to shut selected US ports, citing Philadelphia as an example and the conferences were also neutralizing low cost non-conference rates through stabilization or discussion agreements. Furthermore, in mid 1993, two major US ocean shipping lines sought foreign registry. Consequently, US firms have little presence abroad and the US should not be protecting foreign dominated cartels according to the Senator. This Bill was also sponsored by Senators Hatch, Grassley and Specter. Senator Hatch pointed to the conclusion of other groups, such as the Alliance for Competitive Transportation Act and the Study by the Department of Agriculture. These groups demanded changes and showed that the cartel premium on certain agricultural products were quite significant (18%), respectively. There was also the final version of the Gore report (which did not contain the initial deregulation proposals - including elimination of anti-trust exemptions - but contained a proposal for setting up a Commission). The ensuing political developments, somewhat thwarted atleast for the moment the thrust of the Metzenbaum effort.

NITL and Sea-Land Service Bill: In January 1995, the National Industrial Transportation League introduced a Bill entitled *Shipping Deregulation Act of 1995*.[80] The bill proposed that the Department of Justice would take over the Federal Maritime Commission's role of regulating shipping and the Department of Transportation would be responsible for policing carriers. The NITL bill attempted to remedy some of the deficiencies of the Carper Bill but did not go anywhere.

House Transportation Committee Bill: In March 1995, Chairman of the House Transportation Committee, Representative Bud Shuster introduced a bill known as the *Ocean Shipping Reform Act*.[81] The bill provided for elimination of the FMC; mandatory independent action on service contracts; elimination of tariff and contract filings; and provided for the negotiation of confidential contract between shipper and carriers. On May 1, 1995, the House Transportation Committee passed the Bill. The initial success was however short lived. A dual attempt to push the bill forward (as a stand-alone Bill and as a Bill tacked to the Budget conciliation measure through Congress) ended in failure. The Senate blocked the stand-alone Bill. It appears that certain provisions of the House Bill were unacceptable and that further hearings into the matter were needed so as to satisfy other vested interests such as port authorities, labour, etc. Some commentators believe that the true reason was because there were forces behind the Senate that would see the Bill capsized. In 1966, an attempt to salvage the bill was made by House

[80] NIT League Proposes End of FMC Ship Act, Journal of Commerce, January 20, 1995, at pp. 1A-2A.

[81] Congress in 1995 appointed a Subcommittee chaired by Howard Coble to look into antitrust exemption provided under the US Shipping Act 1984 and the possibility of eliminating the FMC.

Representative James C. Oberstar by making contract terms publically available and placing the FMC's function under the independent Surface Transportation Board instead of the Transportation Department. However, given the problem of reconciling views and lack of time in the 1996 session, attempts to reform shipping legislation were not successful.

Senate Bill: In 1996, Senators Larry Prestler, Trent Lott and John Breaux introduced a bill (known as the Senate Bill) which considered matters such as filing of individual contracts, retention of their confidentiality and endorsing closing conferences. It can be considered more a deregulation bill as it favoured shippers. In March 1997, several refinements were introduced to the Bill. It now provides for individual confidential contracts, protection of U.S, flag ships from foreign predatory pricing, merger of the FMC and the DOT, elimination of tariff filing, tariff enforcement by the Intermodal Transportation Board and the reduction of the notice period on independent action to five days from ten days. After a one-day hearing in April 1997 and the mark-up in May 1997, efforts to find common grounds of interest were not successful. In mid July 1977, the Bill died as International Longshore and Warehouse Union would not support the Bill and political support was not forthcoming.

Trent Lott and John Breaux Bill: In late 1997, a compromise bill (between the House and Senate) was introduced by Senators Trent Lott and John Breaux entitled the *Ocean Shipping Reform Act*. Three major revisions were introduced with regard: to service contracts; to standalone FMC retention; and to permitting the International Longshore and Warehouse Union to obtain more information it needed to ensure that collective bargaining contracts will be enforced. The bill would now permit these service contracts between the conference and shippers and confidential multiple carrier and shipper contracts on segmented service besides the confidential contracts between a shipping line and shipper. On April 21, 1998, the Senate passed the Bill by a vote of 71 to 26. The key features of the Bill are: the FMC is retained as an independent agency; the filing of tariffs at the FMC is eliminated and is replaced by electronic publishing; conferences are prohibited from restricting independent action of individual carriers and the notice period required for independent action has been reduced to five days from ten days; confidential contracting between individual lines and shippers are allowed; information on dock movement of cargo in conference contracts will be made available to longshore unions; shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them; and freight forwarders must continue to publish tariffs. The Bill did not extend confidential contract rights to non-vessel operating common carriers. The Bill was then sent to the House of Representatives, approved by it on August 4, 1998 with one minor change and returned once again to the Senate for approval. Following approval, the Bill was signed by U.S. President Bill Clinton on October 14, 1998. It took effect on May 1, 1999.[82]

[82] House Passes Ship Reform Legislation, William Roberts and Tim Sansbury, Journal of Commerce, August 5, 1998, p. 1A.

5. Post 1998 Developments

Two years after the operation of OSRA 1998, the FMC published a Report in 2001 on the impact of OSRA. It stated that OSRA is generally achieving its objective of promoting a more market driven, efficient liner shipping industry. Regarding, the most important specific reform (i.e., individual service contracts) carriers indicate that 80% or more of their cargo currently moves under SCs rather than conference tariffs. It also noted that service contracts with smaller minimum volume commitments and relatively shorter contract durations of a year of less are more prevalent. The Report also noted that discussion agreements have replaced conference agreements[83] as the venue for carrier discussion. Further, the FMC Chairman stated that "it does not appear that discussion agreements, and voluntary guidelines in particular, are defeating the reforms put into place by OSRA.[84] The reforms have led to a decline in a number of NVOCCs as they now have to be licensed and are subject to a higher bonding level. To eliminate ambiguities in OSRA, the FMC suggested revisions to provisions relating to: compensating freight forwarders (i.e., setting it in accordance to a tariff rate or subjecting it to independent action in SCs), changing the notice period of tariff increases (i.e., not requiring a thirty day notice period), adjusting civil penalties for inflation, changing the definition of ocean common carrier by clarifying its scope to foreign agreements and service contacts, clarifying the predominance of service contracts or bills of lading, increasing the FMC power to address unjust and unreasonable rates in SCs, clarifying when rates are not just and reasonable, extending the definition of controlled carrier to include NVOCCs, and applying retrospective penalties to unjust and unreasonable rates. Finally, two commissioners were concerned about carrier antitrust immunity allowed under the law.

In late 2001, the Maritime Administrative Bar Association Survey published its review of OSRA. 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." On the most important reform, it indicated that service contracts between shippers and ocean carriers skyrocketed. This indicated that shippers have found individual carriers to be more flexible and responsive to their business needs. Confidentiality of SCs have helped establish a more positive and less adversarial business environment for crafting liner shipping arrangements. The review indicated that one unfortunate consequence of OSRA is the inability of NVOCCs to offer confidential contracts to their customers. It suggested that deregulation will occur in a series of steps as in other transportation modes and further benefits could be achieved by the removal of the prohibition on contracting by NVOCCs. Regarding discussion agreements and the adoption of voluntary guidelines, the concerns of adherence to the guidelines and the rising number of surcharges raise question as to whether the conduct of carrier members of such agreements is truly voluntary or

[83] Commissioner Antony Merck indicated that when the market is tight there is adherence to the guidelines and when it is not commercial men operate in their own interests. He expressed concern about the way discussion agreement members 'universally and uniformly apply surcharges'. See Edmonson, R.G. (2001) FMC releases final OSRA report. Journal of Commerce, September 27.

[84] Commissioner Delmond J.H. Won stated "When natural competitors are allowed to sit together at the table, then true competition cannot exist." Commissioner Joseph E. Brennan added that "the commission has a responsibility to watch this very carefully." See Edmonson, R. G.

merely a disguise for a means to enhance revenue. Further, discussion agreements are viewed as more powerful than conference agreements not only because of the substantial market share of the trade under its control but also because it encompasses non-conference carriers. The review maintained that tariffs are an important pricing benchmark, nevertheless tariff publication and tariff enforcement will ultimately be eliminated.

On March 27, 2001, Bill H.R. 1253 (To Amend the Shipping Act of 1984 to restore the application of antitrust laws to certain agreements and conduct to which such Act apples) was introduced in the House of Representatives by James Sensenbrenner. The short title of the Act is *Free Market Antitrust Immunity Reform (FAIR) Act of 2001*. This bill would repeal antitrust immunity for ocean carriers but retain such immunity for marine terminal operators. Further, statutory exemptions for intercarrier agreements would be phased after one year. Assistant Attorney General, Charles A. James, Chief of Justice Department's Antitrust Division testified before the Judiciary House of Representatives on June 5, 2002 why the antitrust exemption lacks sufficient rationales to warrant departure from normal competition policy or the application of antitrust laws. He indicated why allowing price fixing and other anticompetitive practices has resulted in substantial costs on our economy through higher prices on a wide variety of goods shipped by ocean transportation. He indicated that carriers' reason that they should be granted exemption to collude to keep shipping costs lower is a seriously flawed public policy. Besides the Department of Justice, other organizations such as Freight Forwarders, Pacific Coast Council of Customs Brokers, and some unions supported the bill. Nevertheless, it is believed that any action by Congress is unlikely in 2002.

The NVOCC filed petitions with the FMC in 2003. They want the FMC to losen restrictions placed on them by OSRA. The issues to be resolved are: 1) Does OSRA authorize the commission to make the changes NVOCCs want, or whether Congress must revisit the law; 2) Should NVOCCs be able to sign service contracts with shippers or be exempted from tariff-filing?; and 3) If so, should the FMC act through commission orders, or institute rule-making proceedings? United Parcel Service the largest of the petitioners contend that the FMC petition is the first step in asking Congress to revise OSRA.[85]

In May 2021, the National Industrial Transportation League (NITL), called on Congress to modernize the Shipping Act of 1984, particularly in regard to landside equipment quality and demurrage issues. Following months of congestion at seaports in the United States and unprecedented disruption to the ocean shipping U.S. companies are unable to timely access marine containers and chassis and secure sufficient vessel bookings. "These unprecedented challenges have exposed gaps in the law governing ocean carrier services that warrant immediate action." It drafted a legislative proposal whose main recommendations were: "1. Establish rules prohibiting common carriers and marine terminal operators from adopting and applying unjust and unreasonable demurrage and detention rules and practices by codifying the industry guidance issued by the Federal Maritime Commission (FMC) in the spring of 2020,

[85] Edmonson, R. G. (2003) FMC gets an earful, JOC Week, October 20-26, pp. 15-16.

and shifting the burden of proof for complaints onto the service providers to show that their practices are reasonable and comply with the rules. 2. Clarify the obligations of common carriers with respect to equipment and vessel space allocations and contract performance by requiring them to adhere to minimum service standards that meet the public interest. Ocean carriers would also be required to develop contingency service plans during periods of port congestion to mitigate supply chain disruptions. 3. Modify the prohibited acts to address unfair business practices related to the instrumentalities required to perform the transportation services, including access to, allocation of, and interchange of equipment, and any unreasonable allocations of vessel space by ocean common carriers considering foreseeable import and export demand. 4. Expand the FMC's authority to act upon complaints filed against anticompetitive agreements between ocean carriers that operate with antitrust immunity, such as alliances, and allowing third-party intervenors to participate in court proceedings initiated by the FMC against such agreements."[86]

The period from 2003 to 2021 led to dramatic fall in conference agreements, an increase in the size of ships, a growth of consortia agreements and a growth in alliances, a growing matter of concern as their market power increased.[87]

D. Legislative developments after the last amendments

In this section, the legislative developments after the last amendments were made in the United States are described.

On March 1, 2022, a bill was introduced in the House, the *Ocean Shipping Antitrust Enforcement Act (H.R. 6864)* that would repeal antitrust exemptions (to alliances, marine terminal operators, etc.). There appears to be strong opposition to this bill. One source states "Ports, labor unions, container lines, and US-flag interests are moving fast to halt efforts by the Biden administration and Congress to strip antitrust immunity from container lines, warning that the end of shipping alliances would create a seismic — and unintended — shift in how carriers serve US ports and shippers."[88] However, there are many supporters to this Bill, US President stated "When corporations don't have to compete, their profits go up, your prices go up, and small businesses and family farmers and ranchers go under. We see it happening with ocean carriers moving goods in and out of America. During the pandemic, these foreign-owned companies raised prices by as much as 1,000% and made record profits. Tonight, I'm announcing a crackdown on these companies overcharging American businesses and consumers."[89] In situations like this, discretion may be the better part of valour, especially after the third fact Finding Investigation Report

[86] See, NITL Pushes Shipping Act Reform, May 21, 2021, www.mhlnews.com

[87] Castelino Sanjay, Grace Castelino, and Monteiro, Joseph, Alliances, mergers, competition issues and recent developments in ocean shipping, Canadian Transportation Research Forum Proceedings of the 2023 Annual Conference, Toronto, Ontario, 2023, pp. 487-498.

[88] Efforts growing to halt US moves targeting ocean carrier antitrust immunity, by Peter Tirschwell and Mark Szakonyi, Mar ch15, 2022, www.joc.com

[89] See Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery, March 1, 2022, www.whitehouse.gov; and FACT SHEET: Lowering Prices and Leveling the Playing Field in Ocean Shipping, February 28, 2022 , www.whitehouse.gov

by FMC Commissioner Rebecca Dye on May 31, 2022 indicated that "…we have, to date, observed no indication that the high market prices for liner services are the result of collusive or illegal conduct on the part of major ocean carriers in our markets."[90] Evidence in 2023 indicates that container prices have fallen to near pre-pandemic levels. This does not mean that ocean carriers are lily white in their dealing with shippers during the pandemic as seen when Hapag-Lloyd on June 14, 2022 reached a $2 million settlement agreement with the Commission's Bureau of Enforcement regarding unreasonable assessment of detention and demurrage charges.[91]

On March 28, 2023, a follow-up to the bill was introduced by Rep. Johnson in Congress, the bill would: establish reciprocal trade (boosting US exports by prioritizing them into foreign markets and protecting them against container rate increases and demurrage and detention charges) as part of FMC's mission in enforcing the Shipping Act; clarify the agency's role in service contracts by ocean common carriers; and block the FMC from requiring ocean carriers from reporting information already reported to other federal agencies. Hearings were held in April and May 2023. These and other maritime supply-chain issues will get more congressional attention.[92]

E. Summary

In 1916, United States of America passed its first shipping law, the *US Shipping Act, 1916* granting ocean carrier liners immunity from the antitrust laws. In 1961, amendments were made to the Act when the 'dual rate system' was challenged and the Supreme Court indicated that such a system violated another provision in the Act. This meant that the FMC could not approve such agreements. As a result, all existing systems in the shipping industry which employed a dual rate system were thrown into question, creating major problems. Congress undertook a full scale investigation of the steamship industry legalizing the dual rate system, adding a new 'public interest' test to conference agreements and setting up a new agency the Federal Maritime Commission with the sole responsibility of regulating the maritime industry with increased regulatory powers. After 1961, two practices in the industry that were having an impact on U.S. shipping drew increasing attention: rates of state-controlled carrier; and rebating. To deal with these problems the *1978 Shipping Act* and the *1979 Antirebating Act* were passed. In addition, industry and legal developments such as: a narrowing of antitrust exemption as a result of the 'public interest test' and the US Supreme Court decisions; an expansion of US shipping law extraterritorially; and a passing of foreign laws led to an erosion of antitrust immunity and the *Shipping Act of 1984*. The Act now contained a declaration of policy and an extension of the scope of the exemption thereby recognizing international policy, together with the requirement to file tariffs and service contracts with essential terms. Filings went into effect after 45 days (there was no specific need for approval). After five years, a review

[90] Fact Finding Report 29, May 31, 2022, p. 45.

[91] Statement on FMC's approval of the $2 million settlement agreement with Hapag-Lloyd, June 14, 2022, www.ajot.com

[92] New bill in US House seeks repeal of carriers' antitrust immunity, March 2, 2023, www.joc.com; and The Backbone of Global Trade Faces Antitrust Questions in US Congress, March 28, 2023 , www.bloomberg.com

of the Act (as required by the Act) led to reports and bills to reform the Act which led to *Ocean Shipping Reform Act 1998*. The Act contained provisions to improve competition; and efficiency. Examples of the first are: a reduction in notice period; the use of service contract cannot be regulated or prohibited by the conference; the me-too provision was eliminated; a shipper can combine with a shipper to obtain a service contract; a service contract with restrictions or unjustly discriminatory, unreasonably prejudicial or disadvantageous was prohibited; and intermodal rates were permitted. Examples of the second are: tariff filling was eliminated; tariff was to be electronically published and made available at a reasonable price; and service contracts was to be based on percent. Thereafter, industry developments resulting from the growth of consortia agreements and shipping alliances led to the amendments in 2018 through the *LoBiondo Coast Guard Authorization Act of 2018* to protect marine terminal and tug boat operators from the abuse of market power by ocean carriers. The arrival of Covid-19 led to unprecedented events and delays in shipping, leading to a dramatic rise in price of containers and an unbelievable increase in profits for container lines. To protect shippers, *The Ocean Shipping Competition Reform Act of 2022* was passed. On March 1, 2022, a bill was introduced in the House, the *Ocean Shipping Antitrust Enforcement Act* that would repeal antitrust exemptions and a follow-up to the bill was introduced on March 28, 2023. Hearings on the bill were held in April and May 2023.

SECTION IV–EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION IN AUSTRALIA

A. Background to Conference Legislation in Australia

In Australia contracts and combinations in restraint of trade and detrimental to the public interest and prohibited monopolization were prohibited under the *Australian Industries Preservation Act 1906*. Shipping conference agreements like other agreements were considered under the provisions of this Act. There was no specific exemption in favour of ocean shipping. In April 1930, this Act was amended providing a specific exemption from that Act for ocean shipping. This exemption continued when the Trade Practices Act (TPA) was introduced in 1965.

Until 1966, Australia did not have any specific legislation governing ocean shipping conferences. Specific legislation was then introduced providing exemptions from all of the competition rules in Part IV of the TPA 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 or if they hindered the entry of an Australian flag carrier. An amendment to the TPA in 1972 provided for designation by the Minister of a single shipper body to negotiate with shipowners in all outwards liner trades.

B. Conference Legislation in Australia

1. *Australian Industries Preservation Act 1906-1910*

In April 1930, one section was added to the *Australian Industries Preservation Act 1906-1910.* The key feature of this amended was:

- Exemption of certain agreement for carriage of goods.

The amendment provides an exemption for an agreement between shippers, ship-owners or their representatives for the carriage of goods of the shippers at agreed rates where the shippers agree to ship exclusively by the ship-owners or to the refusal to extend the advantages of the agreement to shippers who do not offer to enter into it be deemed to be an offence. The agreement required the approval of the Australian Oversea Transport Association.[1] The section also specifies the Australian Oversea Transport Association.[2] The exemption was only for the Australia-United Kingdom/Continent Conference. This is shown in greater detail in Table 1.

[1] See *Australian Industries Preservation Act 1906-1910,* "7C.—(1.) An agreement in relation to the carriage of goods to other countries, made and entered into between shippers of the one part and ship-owners or their representatives of the other part, and approved by the Australian Oversea Transport Association, whereby, in consideration of periodical sailings to be provided by the ship-owners, and the carriage of goods of the shippers at agreed rates, the shippers agree to ship exclusively by the ship-owners, shall not, by reason of such provisions, be deemed to be made or entered into in contravention of this Part of this Act, nor shall the making or carrying out of such an agreement, or the refusal to extend the advantages of the agreement to shippers who do not offer to enter into it, be deemed to be an offence against this Part of this Act.

[2] See *Australian Industries Preservation Act 1906-1910,* 7 C "(2.) In this section, the 'Australian Oversea Transport Association' means the Association formed under that name in Sydney on or about the twenty-sixth day of June, One thousand nine hundred and twenty-nine, and includes the Council of that Association".

Table 1 - *Australian Industries Preservation Act 1906-1910*

1. An agreement in relation to the carriage of goods to other countries, made and entered into between shippers … and ship-owners or their representatives …, and approved by the Australian Oversea Transport Association, whereby, … the carriage of goods of the shippers at agreed rates, the shippers agree to ship exclusively by the ship-owners, shall the making or carrying out of such an agreement, or the refusal to extend the advantages of the agreement to shippers who do not offer to enter into it, be deemed to be an offence against this Part of this Act. 2. Australian Oversea Transport Association' means the Association formed under that name in Sydney and includes the Council of that Association

2. *Trade Practices Act 1966 Part X_A—Overseas Cargo Shipping*

In 1966, the TPA was amended, by adding Part X_A on Overseas Cargo Shipping. Part X_A consisted of six divisions and 35 sections. Sections 90B and 90C together exempted outwards cargo shipping conference agreements from all competition laws in Part IV of the Act (i.e. s. 35 Agreements between competitors containing certain restrictions and s. 36. Examinable practices - Obtaining discrimination in prices or terms of dealing in connection with a merger; Forcing another person's product; Inducing refusal to deal; and Monopolization). The exemption specified in 90C permits:

- the fixing or regulation of freight rates
- the giving to shippers, or the withholding from shippers, of special rates or other special privileges or advantages
- the pooling or apportioning of earnings, losses or traffic
- the allocation of ports or the restriction or other regulation of the number and character of sailings between ports
- the restriction or other regulation of the volume or character of goods to be carried.

The Act requires conference agreements to be filed together with particulars. Failure to provide particulars can result in an offence resulting in a fine not exceeding two thousand dollars.[3] The Minister may request undertakings from parties to the conference agreement, may disapprove them and may reinstate them. The undertakings include negotiations with a designated shipper body together with any such information that the parties request.[4] In addition, the Minister may request undertakings from individual shipowners and may refer certain matters to the Tribunal after consultation with parties to the conference agreement or shipowners. The Act also provides for civil remedies of fifty thousand dollars to a shipper, shipowner or other person that suffers loss or damage for contraventions of sections on: 1.

[3] See 90 H "(3.) The penalty for an offence against this section is a fine not exceeding Two thousand dollars."

[4] See "90M.—(1.) The Minister may serve on each of the parties to a conference agreement who carry on outwards cargo shipping to which the agreement relates a notice in accordance with this section.

"(2.) A notice to a party under the last preceding sub-section shall request the party to give to the Minister, by a date specified in the notice, an undertaking in writing executed by the party that, whenever the party is reasonably requested by the relevant shipper body, by notice in writing, to take part in negotiations with that shipper body with regard to arrangements for, and the terms and conditions that are to be applicable to, outwards cargo shipping to which the conference agreement relates—

(*a*) the party will take part in such negotiations and will have due regard to matters and considerations raised, and representations made, by the relevant shipper body in the course of the negotiations;

…

(*c*) if the relevant shipper body requests the party to make available for the purposes of the negotiations any information that is reasonably necessary for those purposes and itself makes available for those purposes any such information that the parties or any of them request to be made available, the party will make available the information requested by the shipper body.

effect of disapproval of conference agreement[5] - (i.e. enforcing the disapproved agreement as it relates to outbound shipping, entering into other conference agreement to which the disapproved agreement relates or doing anything to enforce the disapproved agreement) or 2. prohibitions applicable to ship owners[6] - (i.e. engaging in: a. restrictions for use of other shipowners or freight rates that are patronage; b. rebates that are deferred; c. anti-competitive acts such as preventing entry, engaging in freight-cutting or using fighting vessels; d. other acts such or retaliating or threatening retaliation by refusal to carry goods for a shipper or resorting to disadvantageous or discriminating measures). Conference agreements could be disapproved or disallowed by the Governor-General 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 or if they hindered the entry of an Australian flag carrier.[7] The provisions are summarized in and shown in the Table 2 hereafter.

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[5] See Trade Practices Act 1966 Part XA—Overseas Cargo Shipping. Effect of disapproval.

"90P.—(1.) Where an agreement is disapproved under this Division, the agreement becomes, upon the date on which the order of disapproval takes effect, unenforceable as regards observance of the agreement, so far as it relates to outwards cargo shipping, on and after that date, but a transaction entered into, whether before or after the order takes effect, in pursuance of the agreement is not illegal or unenforceable by reason only of the making of the order.

"(2.) A party to a disapproved agreement shall not—

(*a*) do any act or thing in pursuance of, or enforce or purport to enforce, the agreement (including the agreement as varied by any later agreement) so far as it relates to outwards cargo shipping;

(*b*) enter into any other conference agreement (whether with the same parties or with other parties) that relates, in whole or in part, to the carriage of goods from Australia to a place outside Australia that is a place to the carriage of goods to which the disapproved agreement related; or

(*c*) do any act or thing in pursuance of, or enforce or purport to enforce, an agreement referred to in the last preceding paragraph.

Penalty: Fifty thousand dollars.

[6] See Trade Practices Act 1966 Part XA—Overseas Cargo Shipping. Prohibitions applicable to declared shipowner.

"90V. A declared shipowner shall not, in respect of outwards cargo shipping to a port specified in the order by virtue of which he is a declared shipowner—

(*a*) enter into a contract, or follow a practice, under which a shipper—

(i) is subject to restrictions with respect to, or is subject to any detriment by reason of or in the event of, his giving patronage to another shipowner; or

(ii) obtains or may obtain advantageous freight rates on condition that, or by reason that, he gives all or a part of his patronage to the shipowner, or to two or more particular shipowners;

(*b*) pay or allow, or make an agreement to pay or allow, to a shipper a deferred rebate, that is to say a rebate of portion of any freight money upon fulfilment by the shipper of a condition with respect to confining patronage to the shipowner, or to two or more particular shipowners;

(*c*) with the object of substantially damaging the business of another shipowner or preventing another shipowner from entering into competition with him, engage in freight-cutting, or use a vessel (whether alone or in conjunction with any other shipowner) to forestall the first-mentioned shipowner in the obtaining of cargoes; or

(*d*) retaliate, or threaten to retaliate, against a shipper for giving patronage to another shipowner by refusing, or threatening to refuse, to carry goods of the shipper, or to carry goods of the shipper otherwise than on terms disadvantageous to the shipper, or by resorting to other discriminatory measures.

Penalty: Fifty thousand dollars."

[7] See "90N.—(1.) The Governor-General may, by order, disapprove a conference agreement, whether or not particulars of the agreement have been furnished to the Clerk, on a ground specified in the order, being one of the following grounds:—

(*a*) that a party to the agreement has, without reasonable excuse, failed to comply with section 90D of this Act;

(*b*) that there has been a failure to comply with a request for the giving of an undertaking made by the Minister under the last preceding section in relation to the agreement;

(*c*) that the Governor-General is satisfied, after consideration of a report to the Minister by the Tribunal, that—

(i) there has been a failure to comply with an undertaking given under the last preceding section in relation to the agreement;

(ii) the agreement, or the manner in which it is being interpreted or applied by the parties, or the conduct of, or the provision of facilities by, the parties in relation to outwards cargo shipping to which the agreement relates does not have due regard to the need for services by way of overseas cargo shipping to be efficient, economical and adequate; or

(iii) the agreement, or the manner in which it is being interpreted or applied by the parties, or the conduct of the parties in relation to matters to which the agreement relates, is preventing a person from, or hindering a person in, engaging

Table 2 - TRADE PRACTICES ACT 1966 PART X_A—OVERSEAS CARGO SHIPPING

Preliminary – ss. 90_A-90_D. Definitions. Part to be exclusive. Agreements to which Part Apply. Shipowners may be required to be represented by agent and give address for services
Filing of Conference Agreements – ss. 91_E-90_L. Clerk of Shipping Agreements. Agreements subject to filing. Particular to be furnished of certain agreements, variations and determinations. Failure to furnish certain particulars to be an offence. Clerk to file particulars. Filed documents to be evidence. Secrecy.
Powers in relation to Conference Agreements – ss. 90_M-90_S. Minister may request undertakings. Disapproval of Agreements. Effect of disapproval. Reinstatement of disapproved agreements or approval of substituted agreements. Injunctions. Publication of commencement of orders.
Powers in relation to Individual Shipowners – ss. 90_T-90_W. Minister may request undertakings. Declaration of shipowners. Prohibitions applicable to declared shipowners. Injunctions.
General – ss. 90_X-90_{ZF}. Minister may refer certain matters to Tribunal. Ministers to consult with shipowners before making reference. Representations. Undertakings of Tribunal. Publication of reports of Tribunal. Institution of prosecutions. Aiding and abetting. Protection of certain persons. Constitution of Court.
Civil Remedies in relation to Overseas Cargo Shipping – ss. $90Z_G$-$90Z_I$. Action for damages. Deferment of action on application on Minister. Findings in contempt proceedings to be evidence. Prosecutions. Commissioner to furnish Annual Report

3. *Trade Practices Act* 1971/1972.

In 1971, the TPA was amended and the sections pertaining to Overseas Cargo Shipping (PART XII) were numbered ss.104-137 but no changes were made from the 1966 Act.

Table 3 - TRADE PRACTICES ACT 1971 PART XII—OVERSEAS CARGO SHIPPING

Preliminary – ss. 104-108. Definitions. Parts to be exclusive of certain sections. Parts to be exclusive of Part X. Agreements to which Part Apply. Shipowners may be required to be represented by agent and give address for service
Filing of Conference Agreements – ss. 109-115. Clerk of Shipping Agreements. Agreements subject to filing. Particular to be furnished of certain agreements, variations and determinations. Failure to furnish certain particulars to be an offence. Clerk to file particulars. Filed documents to be evidence. Secrecy.
Powers in relation to Conference Agreements – ss. 116-121. Minister may request undertakings. Disapproval of Agreements. Effect of disapproval. Reinstatement of disapproved agreements or approval of substituted agreements. Injunctions. Publication of commencement of orders.
Powers in relation to Individual Shipowners – ss. 122-125. Minister may request undertakings. Declaration of shipowners. Prohibitions applicable to declared shipowners. Injunctions.
General – ss. 126-134. Minister may refer certain matters to Tribunal. Ministers to consult with shipowners before making reference. Representations. Undertakings of Tribunal. Publication of reports of Tribunal. Institution of prosecutions. Aiding and abetting. Protection of certain persons. Constitution of Court.
Civil Remedies in relation to Overseas Cargo Shipping – ss. 135-137. Action for damages. Deferment of action on application on Minister. Findings in contempt proceedings to be evidence.

In 1971 the Act was amended and renamed the Restrictive Trade Practices Act 1972. A noteworthy amendment was made with regard to Part XII on Overseas Cargo Shipping. It:

- provided for designation by the Minister of a single shipper body to negotiate with shipowners in all outwards liner trades.

The amendments are shown in the Table 4 hereafter.

Table 4 – RESTRICTIVE TRADE PRACTICES ACT 1972 PART XII—OVERSEAS CARGO SHIPPING

1. Short Title and Citation
2 Commencement
3. Definitions – s. 104 of the Act is amended
4. Clerk of Shipping Agreement – s. 109 amended
5. Minister may request undertakings – s. 116 of the Act Amended
6. Minister may request undertakings. 6. Section 122 of the Principal Act is amended …. 6.(b) 'the designated shipper body' means the shipper body designated by the Minister in the notice requesting the undertaking.".

efficiently, to an extent that is reasonable, in overseas cargo shipping in relation to which he is an Australian flag shipping operator.

"(2.) For the purposes of sub-paragraph (ii) of paragraph (*c*) of the last preceding sub-section, consideration shall be given to the need to ensure the continuing provision of services by way of overseas cargo shipping and, in that connexion, the conditions under which, on a long term view, shipowners may reasonably be expected to provide such services.

"90D.—(1.) The Minister may, by notice in writing to a shipowner served as prescribed, request the shipowner to comply with the provisions of this section, and, where such a request has been made, the provisions of sub-sections (2.) to (7.) of this section apply.

"(2.) If the shipowner is a corporation or is not resident in Australia, the shipowner shall, at all times after the expiration of fourteen days from the date of service of the notice, be represented for the purposes of this Part by a person (not being a corporation) resident in Australia and appointed by the shipowner as the agent of the shipowner for the purposes of this Part.

4. *Trade Practices Act* 1974.
In 1974, the Act was amended. Part X (renamed from Part XII) relating to Overseas Cargo Shipping did not change and consisted of six divisions and 35 sections (renumbered ss.111 to ss.146 from ss. 104 to ss. 107 in the 1971 Act). The major feature of this amendment was:

- The exemption was extended to a wider range of anti-competitive practices in Part IV.

The five specifically mentioned types of activities regarding all outward cargo shipping were now contained in sections 112 and 113 and exempt from Part IV. These are shown in Table 5.

Table 5 - TRADE PRACTICES ACT 1974 PART X—OVERSEAS CARGO SHIPPING

Preliminary – ss. 111-114. Interpretation. Part IV not to Apply. Agreements to which Part Apply. Shipowners may be required to be represented by agent and give address for service
Filing of Conference Agreements – ss. 115-121. Clerk of Shipping Agreements. Agreements subject to filing. Particular to be furnished of certain agreements, variations and determinations. Failure to furnish certain particulars to be an offence. Clerk to file particulars. Filed documents to be evidence. Secrecy.
Powers in relation to Conference Agreements – ss. 122-127. Minister may request undertakings. Disapproval of Agreements. Effect of disapproval. Reinstatement of disapproved agreements or approval of substituted agreements. Injunctions. Publication of commencement of orders.
Powers in relation to Individual Shipowners – ss. 128-131. Minister may request undertakings. Declaration of shipowners. Prohibitions applicable to declared shipowners. Injunctions.
General – ss. 132-143. Minister may refer certain matters to Tribunal. Ministers to consult with shipowners before making reference. Representations. Undertakings of Tribunal. Failure to comply with undertakings of Tribunal to be contempt of Tribunal. Punishment of contempt. Protection of certain persons. Publication of reports of Tribunal. Institution of prosecutions. Aiding and abetting. Protection of certain persons. Constitution of Court.
Civil Remedies in relation to Overseas Cargo Shipping – ss. 144-146. Action for damages. Deferment of action on application on Minister. Findings in contempt proceedings to be evidence.

Notwithstanding the fact that the Part covering overseas cargo shipping did not change, the 1974 Act was the first effective Australian competition statute[8] and its significance and importance to overseas cargo shipping lies in that it covered a **wider range** of anti-competitive practices in Part IV. This meant that the exemption granted to conferences became more **extensive**. The anti-competitive practices now covered were: Contracts, arrangements or understandings in restraint of trade or commerce (s.45); Monopolization (s.46); Exclusive dealing (s.47); Resale price maintenance (s.48); Price discrimination (s.49); and Mergers (s.50). The extension was noted by the Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974.[9] In the 1971 Act the anti-competitive practices were covered in ss.36-37 (i.e. s. 35 Agreements between competitors containing certain restrictions and s. 36. Acquisitions-discrimination in prices or terms of dealing in connection with the acquisition; Forcing another person's product; Inducing refusal to deal; and s. 37.Monopolization). Further, it makes it clear that an agreement is not a 'Conference agreement' by reason only on any provision as between

[8] Some key points of interest include: 1. The Commission was the *Trade Practices Commission* and the Tribunal the *Trade Practices Tribunal; 2.* In section 45 prohibits contracts, arrangements or understandings in 'restraint of trade or commerce' (s 45(2)) where they had a 'significant; effect on competition' (s 45(4)) [rather than the current 'substantial lessening of competition' test]; 3. Price fixing provisions were prohibited per se (s 45(4)) unless their impact on competition was 'slight' (s 45(3)); 4. There was no specific prohibition on exclusionary provisions (boycotts); 5. Section 46 referred to 'monopolization' rather than misuse of market power and, instead of 'market power', the phrase 'in a position substantially to control a market' is adopted. 6. Section 47 applies to a more restricted range of conduct; 7. Price discrimination is prohibited; 8. The merger provision (section 50) does not contain a set of criteria to be considered when determining if conduct substantially lessens competition. 9. Penalty for a corporation was originally $250,000 per offence. 10. Authorisation was not possible for price fixing and for other authorisation applications proof of 'substantial benefit' was required. 11. A broader range of clearance/notification options were available (including for mergers).
Section 3 of the Act repealed the Restrictive Trade Practices Act 1971 and the Restrictive Trade Practices Act 1972.

[9] Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report, 15 September 1999, p. 42.

shipowners and shippers with respect to the terms and conditions applicable to contracts for outwards cargo shipping.

In 1977, a review of the Act led to the *Grigor Report* which made thirty-six recommendations but did not result in any amendments to Part X of the TPA.[10] Seven years later a task force was established to review overseas liner shipping. *The Industry Task Force* released its report in 1984. The report recommended a separate Shipping Act granting continued allowance of cooperative agreements between carriers but with stronger pro-competitive safeguards on agreements, prohibition of predatory and discriminatory practices and establishment of a Shipping Industry Tribunal to consider conference agreements and complaints made about them. This report provided the basis for amendments to Part X in 1989. It resulted in the following 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 (i.e. prohibiting price discrimination) and requiring conferences to negotiate minimum service levels.[11]

5. *Trade Practices Amendment Act* 1989.

In 1989, the Act was amended. Part X relating to International Liner Cargo Shipping consisted of fifteen divisions with 106 sections numbered 10.01 to 10.93. The Act is a totally new approach as it applies to shipping conferences. It repeals the old Part X of the Trade Practices Act and replaces it with a new Part X.[12] The noteworthy features of this amendment were:

- Objects of the legislation.[13]
- Conference agreements can cover: fixing or other regulation of freight rates; pooling or apportionment of earnings, losses or traffic; restriction or other regulation of the quality or kind of cargo; or other restriction for the effective operation of the agreement and of overall benefit to Australian exporters'.[14]
- Exemption is provided from section 45 (i.e. fix, control or maintain prices; effect a collective boycott - referred to in the Act as "an exclusionary provision"; or bring about a result which has or is likely to have, the effect of substantially lessening competition).[15]

[10] The report made thirty-six recommendations on: conferences and interests of shippers and shipowners (1); control of conference agreements and practices (18); non-conference services (4); financing and long term development of the Australian Shippers' Council (5); and ministerial power and departmental functions (8). It contained a number of pro-competitive measures such as tightening the exemptions in sections 45, 46 and 47, filing and inspection of agreements (other than confidential aspects), independent action, inquiry where entry into a closed conference is denied, negotiations with shipper bodies other than the designated shipper body and clarification of whether the exemption applied to inbound conferences.[10] It also observed a number of weaknesses in the legislative backing for shippers in their negotiations with Conferences. Id.

[11] Id.

[12] For an in depth analysis of the Act see 'A summary of the provisions of the Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989 Warren Pengilley'

[13] Ensure continued access to outwards liner cargo shipping services (adequate frequency and reliability at competitive freight rates); promote conditions that encourage stable access to export markets; and ensure Australian flag shipping is not unreasonably hindered from any outwards liner cargo shipping trade. See s.10.01, Trade Practices (International Liner Cargo Shipping) Amendment Act 1989.

[14] See s.10.08, Trade Practices (International Liner Cargo Shipping) Amendment Act 1989.

[15] See s. 10.17, Trade Practices (International Liner Cargo Shipping) Amendment Act 1989.

- Exemption is provided from section 47 (i.e. exclusive dealing – supply or discount of goods/services for dealing with a competitive supplier or resupply of goods to a particular person - that has the effect of substantially affecting competition, and full line forcing).[16]
- Registration is required for outwards conference agreement (final or provisional) for exemption of s. 45 and s.47

In addition to the above, the Act contains several other provisions. To counterbalance cartel or ocean carrier market power and improve its bargaining power, it provides for a "designated peak shipper body" and a "designated secondary shipper body".[17] Section 45 also does not apply to a loyalty contract, ocean carrier, shipper or designated secondary shipper body.[18] Section 46 (misuse of market power) now became applicable to inward and outward conferences.[19] In addition, price discrimination by conferences between similarly placed exporters is prohibited if it has the effect of substantially lessening competition.[20] There are minimum standards for outward conference agreements.[21] Sections 45 and 47 with the exception of third line forcing do not apply to conduct engaged in by a person so far as the service relates to the provision of an inward liner cargo service.[22] The exemption extends to the fixing of door-to-door freight rates and the terms and conditions for all inward bills of lading for inwards liner cargo shipping service and terms and conditions.[23] Obligations also exist for ocean carriers in relation to registered conference agreements (i.e. i. to take part in negotiations with the designated shipper body, to provide information - terms and conditions of service, freight rates, frequency of sailings and ports of call - necessary for the negotiations to that body and authorized officer; and ii. to notify the Registrar).[24] The Act provides the Minister with powers in relation to registered conference agreements, in relation to non-conference ocean carriers with substantial market power and in relation to unfair pricing practices.[25] Registers by the Registrar and Trade Practices Commission shall be kept[26] and confidentiality shall be kept for parts of if confidentiality claims are accepted.[27] The legislation finally contains miscellaneous provisions such as review of decisions of the Registrar by the Administrative Appeals Tribunal and the parties that can participate in such reviews.[28] The divisions in the Act are shown in Table 6.

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[16] See s. 10.18, Id.

[17] See (10.03(1) and 10.03(2)), Trade Practices (International Liner Cargo Shipping) Amendment Act 1989.

[18] See s. 10.19, Id.

[19] See s. 10.04, Id.

[20] See s. 10.05, Id. There are defences for an ocean carrier in this section: 'cost justification'; 'capacity/time'; and 'good faith' to deal with a competitor, see 10.05. (2).

[21] See ss. 10.06 to 10.08, Id. These are: a question arising under the agreement; the right to withdraw from the agreement; and the minimum level of outward liner cargo services to be provided.

[22] See ss.10.23. (1) and (2).

[23] See ss.10.22. (2)

[24] See ss. 10.41. (1), (3) and 10.43, Id.

[25] Subject to certain conditions: i. the Minister may direct the Registrar to cancel the registration of a registered conference agreement either wholly or insofar as it relates to particular conduct. a particular provision or a particular party; ii. the Minister may refer to the Tribunal for inquiry and report the question whether an ocean carrier has a substantial degree of market power in the provision of outwards liner cargo shipping services on a trade route otherwise than because the ocean carrier is a party to a conference agreement; and iii. the Minister may, by writing served on an ocean carrier, order the ocean carrier not to engage in a pricing practice. See ss. 10.44, ss. 10.54 and 10.61, Id.

[26] See ss. 10.11, 10.13, 10.34, Id.

[27] See ss. 10.34, 10.37 and 10.88, Id.

[28] See ss. 10.84 and ss. 10.93, Id.

Table 6 – TRADE PRACTICES (INTERNATIONAL LINER CARGO SHIPPING) AMENDMENT ACT 1989 PART X — INTERNATIONAL LINER CARGO SHIPPING

Division 1 – Preliminary
Division 2—Additional restrictive trade practice provisions applying to ocean carriers
Division 3—Minimum standards for conference agreements
Division 4—Registers and files and public inspection of them
Division 5—Exemptions from certain restrictive trade practice prohibitions: Subdivision A—Exemptions relating to conference agreements; Subdivision B—Exemptions relating to loyalty agreements; Subdivision C—Exemption relating to inwards liner cargo shipping services; Subdivision D—Other exemptions
Division 6—Registration of conference agreements: Subdivision A—Provisional registration; Subdivision B—Final registration; Subdivision C—Confidentiality requests; Subdivision D—Miscellaneous
Division 7—Obligations of ocean carriers in relation to registered conference agreements
Division 8—Powers of Minister in relation to registered conference agreements
Division 9—Obligations of non-conference ocean carriers with substantial market power
Division 10—Powers of Minister in relation to non-conference ocean carriers with substantial market power
Division 11—Unfair pricing practices
Division 12—Registration of ocean carrier agents
Division 13—General provisions relating to registers and conference agreement files
Division 14—Administration
Division 15—Miscellaneous

A few years later, a task force was established to review overseas liner shipping which lead to the 1993 *Brazil Review*[29] but only one recommendation was accepted i.e. retention of Part X[30] so no amendments were made to Part X. Five years later in 1999, the Treasurer referred Part X for Review to the Productivity Commission which led to *Byron Report* which made nine major recommendations and findings. These were: Part X should be retained and re-examined in 2005; the exemption from the TPA which allows conferences to set freight rates should be clarified (it should also apply to 'terminal-to-terminal' but fixing of 'door-to-door' freight rates should be deleted); the existing practice of allowing members of shipping conferences to negotiate collectively with stevedores should be confirmed; section 10.05, which prohibits price discrimination in certain circumstances be repealed; an explicit requirement to ensure that shippers' interests are taken into account by the Minister in considering misuse of market power; the enforcement of undertakings should be made more effective and flexible; importers should be allowed to form a collective to negotiate terminal handling charges; discussion should not be treated differently from other forms of cooperation among carriers; and sufficient competitive pressures exist to negate any potential monopoly power of closed conferences.[31] The Government announced that amendments would be made in order: to ensure that the arrangements applying to outward conferences should also apply to inward conferences, and to give the Minister for Transport and Regional Services, and the ACCC increased powers to deal with concerns that may arise from the operation of discussion agreements and partially closed conferences.[32]

[29] It recommended including retention of Part X with a series of proposed amendments particularly with a view to enhancing shippers' positions. In particular it argued that the provisions available to shippers be extended to importers, that the Commonwealth Government provide funding to a peak shipper body and that the Minister have powers to refer accords and discussion agreements to a proposed Liner Cargo Shipping Authority. The review recommended establishment of the Liner Cargo Shipping Authority to resolve disputes between carriers and shippers and take over the role of competition regulator under Part X.

[30] Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report, 15 September 1999, p. 43.

[31] Id, pp. XXXVIII-XLI and Bills Digest No. 29 2000-01 Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, www.apr.gov.au

[32] Bills Digest No. 29 2000-01 Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, www.apr.gov.au

6. *Trade Practices Amendment (International Liner Cargo Shipping) Act 2000.*
In 2000, the Trade Practices Amendment (International Liner Cargo Shipping) Act 2000 (No. 123 of 2000) was passed. The Act had 180 amendments. The most noteworthy features were:

- To extend the exemption to Australian importers in negotiating with conferences.
- To extend the exemption between a stevedoring operator and an ocean carrier.[33]

More specifically, sections 45 (price fixing agreement/exclusionary act) and 47 (exclusive dealing) (other than ss. 47(6) and (7)) do not apply to a stevedoring contract, conduct of a party, ocean carrier or stevedoring operator to a stevedoring contract.[34] Some of the other amendments include increasing the power of the Minister by providing two other grounds whereby he may direct the Registrar to deregister a conference agreement. These two grounds were substantial lessening of competition without benefit to the public[35] and unreasonable entry requirements of closed conferences.[36] The Minister may also declare a facility that is outside a designated port area as an inland terminal.[37] The Australian Competition and Consumer Commission (ACCC) was given the power to initiate an inquiry but, in such a situation, the ACCC may only do so in relation to the additional grounds for deregistration introduced in 2000.[38] The additional grounds were: i. exceptional circumstances (i.e. substantial market power, unreasonable increase in rates or reduction in services, majority of lines or capacity, and detriment that outweighs benefits) where the agreements substantially lessens competition without benefit to the public;[39] and ii. unreasonable entry requirements of closed conferences.[40] The amendments also include 'freight rate agreement' so that parties to a conference agreement are not permitted to collectively agree on freight rate charges, or implement such agreed charges, unless this is done under the Part X exemptions.[41] A few of the amendments to the Act are shown in Table 7.

Table 7 – TRADE PRACTICES AMENDMENT (INTERNATIONAL LINER CARGO SHIPPING) ACT 2000

10.14 Exemptions apply only to certain activities
10.15A Application of exemptions to inwards liner cargo shipping services
10.17A Exemptions from section 45 for freight rate agreements
10.18A Exemptions from section 47 for freight rate agreements
10.21A Application of exemptions to inwards liner cargo shipping services

[33] See Trade Practices Amendment (International Liner Cargo Shipping) Act 2000 (No. 123 of 2000), s. 10.24A.

[34] Section 10.24A, also defines 'stevedoring contract' and 'stevedoring operator'. ***Stevedoring contract*** means a contract between: (a) an ocean carrier; and (b) a stevedoring operator; under which the stevedoring operator provides, or arranges for the provision of, stevedoring services to the ocean carrier in connection with cargo transported on international liner cargo shipping services provided by the ocean carrier.
stevedoring operator means a person who: (a) provides, or proposes to provide; or (b) arranges for the provision of, or proposes to arrange for the provision of; stevedoring services in connection with cargo transported on international liner cargo shipping services.

[35] S. 10.45(3)

[36] S. 10.45(4)

[37] Id. s. 10.02A "1) The Minister may, by writing, declare that a specified facility is an ***inland terminal*** for the purposes of this Part. (2) The facility must be in Australia, but outside a designated port area.

[38] Id. s. 10.48(2A) "(2A) The Commission may, on its own initiative, hold an investigation into the question whether grounds exist for the Minister to be satisfied in relation to a registered conference agreement of either or both of the matters referred to in subparagraphs 10.45(1)(a)(viii) and (ix)."

[39] Id. s. 10.45(1)(a)(viii).

[40] Id. s. 10.45(1)(a)(ix), and Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report 32, February 23, 2005, pp. 93-110.

[41] See Government amendments to the trade practices amendment (international liner cargo shipping) bill 2000, www.austlii.edu.au

10.24A Exemptions from sections 45 and 47 in relation to stevedoring contracts
10.72A Exemption orders for inwards conference agreements etc.

In 2005, a Review of Part X of the Trade Practices Act 1974 on International Liner Cargo Shipping led to the *Sloan Review*. It made recommendations on retention of the Part X, alternatives, and how to improve the effectiveness of Part X if retained.[42] On August 4, 2006, the government provided a detailed response to each of the Commission's recommendations. It decided to retain Part X but to amend it to 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.[43] These reforms were never implemented.[44]

7. *Competition and Consumer Act 2010.*

In 2011, the Australian government amended the *Trade Practices Act 1974* (Cth) (TPA) and renamed the Act as the *Competition and Consumer Act 2010* (CCA). Part X of the TPA – which in broad terms exempted shipping lines from most of the anti-competitive provisions of the TPA – was carried over into the CCA. It permits liner shipping operators to enter into agreements among themselves in relation to the freight rates to be charged, and the quantity and types of cargo to be carried, on particular trade routes and register those agreements. Registration of those agreements confers an exemption from the cartel conduct prohibitions in the CCA that would otherwise be applicable. This Part X sets up a system for regulating international liner cargo shipping services beginning with the objectives. The main components of that system are as follows: (a) registration of conference agreements; (b) regulation of non-conference ocean carriers with substantial market power; (c) regulation of unfair pricing practices; (d) registration of agents of ocean carriers. The parties to a conference agreement relating to international liner cargo shipping services may apply for the registration of the agreement. If the conference agreement is registered, the parties will be given partial and conditional exemptions from: (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK (cartel conduct criminal and civil); and (b) section 45 (contracts etc. that restrict dealings or affect competition); and (c) section 47 (exclusive dealing). The parties to a registered conference agreement are required to negotiate with, and provide information to, representative shipper bodies. The Commission may investigate whether grounds exist for the Minister to deregister a conference agreement. The main ground for deregistration is a breach by the parties to the agreement of requirements imposed on them by this Part. Part X also establishes a role for 'peak shipping bodies', which represent the interests of Australian cargo owners. It is important to note that any changes in the sections of the competition

[42] Id. On *retention*, the Commission would prefer that alternative mechanisms be used to provide immunity for efficiency enhancing agreements or agreements that could be shown to provide a net public benefit. 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, it should therefore be repealed. On *alternatives*, the Commission would prefer the liner cargo shipping industry be subject to the general provisions of the TPA. Authorization could be undertaken under Part VII of the TPA as occurs for other industries. Under Part VII, agreements would be assessed individually on the basis of their net public benefit by the ACCC. It could be achieved with a four-year transitional period and is unlikely to result in practical inconsistencies with the regulations as currently applied in the US and the EU. On *improvements*, 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. See Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, pp. 1-15, www.aph.gov.au

[43] Government Response to Productivity Commission Report Review of Part X of the Trade Practices Act 1974 (International Liner Cargo Shipping), August 4, 2006, www.ministers.treasury.gov.au

[44] Competition Policy Review, Final Report March 2015, p. 381, www.parliament.net.gov.au

laws that are referred to in Part X have a direct effect on the scope of regulation affecting international liner cargo operations. The fifteen divisions of this Act are shown in Table 8.

Table 8 - COMPETITION AND CONSUMER ACT 2010 PART X— INTERNATIONAL LINER CARGO SHIPPING

Division 1 – Preliminary
Division 2—Additional restrictive trade practice provisions applying to ocean carriers
Division 3—Minimum standards for conference agreements
Division 4—Registers and files and public inspection of them
Division 5—Exemptions from certain restrictive trade practice Prohibitions
Division 6—Registration of conference agreements
Division 7—Obligations of ocean carriers in relation to registered conference agreements
Division 8—Powers of Minister in relation to registered conference agreements
Division 9—Obligations of non-conference ocean carriers with substantial market power
Division 10—Powers of Minister in relation to non-conference ocean carriers with substantial market power
Division 11—Unfair pricing practices
Division 12—Registration of ocean carrier agents
Division 12A—Exemption orders for inwards conference agreements etc.
Division 13—General provisions relating to registers and conference agreement files
Division - Administration
Division 14A—Review of decisions of Commission
Division 14B—Review of decisions of Minister
Division 15—Miscellaneous

No significant developments[45] occurred until the Liberal-National Party Coalition Government of Tony Abbott commissioned an independent 'root and branch' review of Australia's competition laws and policy in 2013. It led to the *Harper Review* draft report in September 2014[46] and the final report in March 2015. These reports contained recommendations relating to the *Competition and Consumer Act 2010* and to Part X in it.[47] Regarding the latter report, the recommendations were: 1. The exemption should be repealed and the liner shipping industry should be subject to the normal operation of the CCA. 2. The Australian Competition and Consumer Commission (**ACCC**) should be given power to grant block exemptions for conference agreements which contain a minimum standard of pro-competitive features. 3. The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with cargo interests and the liner shipping industry. 4. Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation (presumably on the basis of the normal net public benefit test). 5. A transitional period of two years is allowed for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption.[48]

[45] In 2012, in a joint Australian-New Zealand study on strengthening trans-Tasmanian relations, The Australian Productivity indicated that removing regulatory barriers to competition could be useful. 'For shipping, the exemption of ocean carriers from key parts of competition regulation is no longer necessary and removing it would generate gains.' It accordingly made the recommendation that "The Australian and New Zealand Governments should remove — preferably on a coordinated basis — the exemption for international shipping ratemaking agreements from legislation governing restrictive trade practices" (R4.14).

[46] In September 2014, the Review Panel released a Draft Report, it concluded that the exemptions available to shipping lines under Part X were too broad and recommended that Part X be repealed. In the place of Part X, the Review Panel has recommended that the Australian Consumer and Competition Commission (ACCC) be given power to issue 'block exemptions' for exempt categories of conduct. See Proposed overhaul of Australian competition law in the shipping liner trade, October 1, 2014, www.hfw.com

[47] Two of the 56 recommendations dealt with the maritime industry, one on the liner shipping exemption to Australia's anti-cartel laws; and the other on the current cabotage regime, See Competition Policy Review, Final Report March 2015, p. 385., www.parliament.net.gov.au

[48] The recommendations were made despite the repercussions that the repeal would have and the opposition from key stakeholders should the Abbott Government contemplate on adopting the recommendations.[48] They contend that Consortia arrangements between shipping lines enable the sharing of space on pooled vessels so that a more frequent and wider range of port calls can be offered to shippers at a much lower cost than would otherwise be possible. It is therefore not surprising that: 1. Part X has enjoyed (and continues to enjoy) strong support from shippers in Australia; and 2. Many of Australia's major trading partners, including China, Japan, Korea, Singapore and the United States, have competition laws permitting similar consortia arrangements between shipping lines.

8. Competition and Consumer Amendment (Misuse of Market Power) Act 2017

In August 2017, the Australian Parliament passed the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017*. The first is intended to strengthen the prohibition on the misuse of market power by corporations. It is important to note that any changes in the sections of the competition laws that are referred to in Part X have a direct effect on the scope of regulation affecting international liner cargo operations. For example, as the section on misuse of market power is expanded to include new stricter tests in 2017, liner conferences which are not exempt from the section on misuse of market power (s. 46) will now be subject to the new stricter tests and not the tests for this section under the previous Act.[49] See Table 9.

Table 9 - *COMPETITION AND CONSUMER AMENDMENT (MISUSE OF MARKET POWER) ACT 2017*

1 Section 46 Repeal the section, substitute: 46 Misuse of market power (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in
2 Section 46 of Schedule 1 Repeal the section, substitute: 46 Misuse of market power (1) A person who has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in

9. *Competition and Consumer Amendment (Competition Policy Review*) 2017.

In October 2017, Australian Parliament passed the *Competition and Consumer Amendment.* The Act contains a broad range of amendments to the *Competition and Consumer Act 2010* in areas that include cartels, price signalling and concerted practices, exclusionary provisions, third line forcing, resale price maintenance, merger authorisations and non-merger authorisations, notifications and class exemptions, access and evidentiary provisions. It is worthwhile nothing that the definition of 'competition' has been broadened to include imports of goods and services in Australia and making it clear that the cartel conduct provisions are focused on conduct which has an effect on trade or commerce within, to or from Australia and clarifying the scope of the exceptions for joint ventures and vertical trading restrictions to apply to common, pro-competitive business arrangements. It also introduces a prohibition against concerted practices. The same reasoning above applies to those sections to which the exemption in Part X applies in the 2017 *Competition and Consumer Amendment*.[50] The Act now provides power for the ACCC to issue Class Exemptions and may withdraw the benefit of class exemptions. See Table 10.

[49] Under the previous Act, the misuse of market power section was subject to the 'take advantage test' the revised section on misuse of market power makes it subject to the 'effects test' and the 'substantial lessening competition test', see 'Changes to competition law: The Misuse of Market Power Bill', www.dentons.com The older section in part reads: (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of: (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; (b) preventing the entry of a person into that or any other market; or (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

[50] "The Competition and Consumer Amendment (Competition Policy Review) Act 2017 contains a broad range of amendments to the CCA that will affect the work of the ACCC significantly. The changes include: 1. broadening the definition of 'competition' to include potential imports of goods and services, to fully reflect the range of competitive pressures facing Australian firms; 2. making it clear that the cartel conduct provisions are focused on conduct which has an effect on trade or commerce within, to or from Australia and clarifying the scope of the exceptions for joint ventures and vertical trading restrictions to apply to common, pro-competitive business arrangements; 3. amending the National Access Regime declaration criteria, including to ensure that third-party access is only mandated where it is in the public interest, rather than "not contrary" to the public interest as currently required; 4. consolidating the various authorisation processes into a single, streamlined process; and 5. simplifying the CCA by repealing separate, specific prohibitions on price signalling and exclusionary provisions, and introducing a prohibition against concerted practices." See Annual Report on Competition Policy Developments in Australia, OECD. November 14, 2017, p. 4, www.one.oecd.org

Table 10 - *COMPETITION AND CONSUMER AMENDMENT (COMPETITION POLICY REVIEW) 2017*

45AO Joint ventures—prosecution
Part VII—Authorisations, notifications and clearances in respect of restrictive trade practices
Division 3—Class exemptions
95AA Commission may determine class exemptions
95AB Commission may withdraw the benefit of class exemption in particular case

Part X still remains in the Act and contains fifteen divisions and is renumbered from s.10.01 to s.10.91. A simplified outline of Part X is as follows:[51]

- (a) registration of conference agreements;
- (b) regulation of non-conference ocean carriers with substantial market power;
- (c) regulation of unfair pricing practices;
- (d) registration of agents of ocean carriers.
- The parties to a conference agreement relating to international liner cargo shipping services may apply for the registration of the agreement.[52]
- If the conference agreement is registered, the parties will be given partial and conditional exemptions from:
- (a) sections 45AF, 45AG, 45AJ and 45AK (cartel conduct criminal and civil);[53] and
- (b) section 45 (contracts etc. that restrict dealings or affect competition);[54] and
- (c) section 47 (exclusive dealing).[55]
- The parties to a registered conference agreement are required to negotiate with, and provide information to, representative shipper bodies.[56]
- The Commission may investigate whether grounds exist for the Minister to deregister a conference agreement.[57]
- The main ground for deregistration is a breach by the parties to the agreement of requirements imposed on them by this Part.[58]

In addition to the above, parties to an agreement are subject to section 46 if the conferences together have a substantial degree of market power.[59] Non-conference carriers with a substantial degree of market power are required to negotiate with a certain designated shipper bodies and provide information similar to the requirement for parties to a registered conference agreement. Further, non-conference ocean

[51] See s.10A, *Competition and Consumer Act 2010*, Compilation date 1 January 2023.

[52] See 10.25 Application for provisional registration of conference agreement and s. 10.30 Application for final registration of conference agreement.

[53] See s10.17A Exemptions from sections 45AF, 45AG, 45AJ, 45AK and 45 for freight rate agreements. Sections 45AF and 45AK are on Making a contract etc. containing a cartel provision (criminal and civil) and ss. A5AG and 45AK are on Giving effect to a cartel provision.

[54] See Division 2—Other provisions 45 Contracts, arrangements or understandings that restrict dealings or affect competition

[55] See s.10.18 Exemption from section 47 and s. 10.18A Exemptions from section 47 for freight rate agreements

[56] See s.10.41 Parties to registered conference agreement to negotiate with certain designated shipper bodies etc.

[57] See 10.47 Investigation and report by Commission on reference by Minister and s. 10.48 Investigation and report by Commission on own initiative or on application by affected person

[58] See s. 10.44 Powers exercisable by Minister in relation to registered conference agreements etc.

[59] See s. 10.04.

carriers with a substantial degree of market power are not to hinder Australian flag shipping operators. The Minister may exercise his power to prevent ocean carrier from engaging in unfair pricing practices.[60]

C. Developments that played an important role in the evolution of the liner legislation

1900

The *Australian Industries Preservation Act* required parties to the agreement to show that the agreement was not detriment of the public and was not unreasonable. To relieve shipowners, and members of a conference on the Australia-United Kingdom/continent route, that their agreement which was approved by the Australian Oversea Transport Association was not to the detriment of the public and was not unreasonable, the Prime Minister met with shipowners and shipper interests in 1929. This led to an amendment to the Act in 1930 by adding a section exempting the above conference.[61]

1930

After the 1930 amendment, before the introduction of the 1966 amendments to the *Trade Practices Act* (TPA), the Government planned to introduce additional provisions. There were numerous representations to government by shipowners and shippers. Shipowners urged retention and extension of the exemption to other shipping routes from Australia in the *Australian Industries Preservation Act*, provision for recording conference agreements and agreements between shipowners and shippers together with provision for arbitration. Shipper's favoured the shipowners approach subject to adequate safeguards to ensure the shipper body would receive adequate information for negotiations together with some formula for determining freights.

The Department provided its views that any legislation must have regard to four requirements: need to avoid statutory regulation; need for Government responsibility for action against ocean shipping operators; need for closed conferences provided they operate acceptably; and need for genuine negotiations between Conferences and shippers. Further, closed conferences should be open to an Australian line with a overall philosophy 'combine acceptably, or else compete'. "The object of the proposed provisions, while accepting Conferences and their limitation on competition, was to give organised shippers a voice and to place the Government in a position to influence Conferences not only to give organised shippers that voice, but also to provide services having due regard to the need for ocean shipping to be efficient, economical and adequate."[62] In addition, the Minister should be able to seek appropriate undertakings from shipowners including inquiry by the Trade Practices Tribunal.

[60] See Division 11—Unfair pricing practices - 10.61 Powers exercisable by Minister in relation to pricing practices etc. (1) Subject to section 10.62, the Minister may, by writing served on an ocean carrier, order the ocean carrier not to engage in a pricing practice.

[61] Overseas Cargo Shipping Legislation, Report by Department of Transport, October 1977, www.nla.gov.au, p. 27.

[62] Id. p. 29.

In February 1966, an Inter-Departmental Committee released its report. It favoured closed conference subject to control after considering alternatives as conferences would provide uniform and stable freight rates; would enable shipowners to control over-tonnaging; and ship owners could guarantee to lift cargoes under such a system. It noted that there was no practical alternative to accepting conferences in the liner trades. The real questions were what form conferences should take and what safeguards there should be. A proposal to provide for Boards of Inquiry rather than reference to the Tribunal was dropped.

In the Second Reading speech on the Trade Practices Bill, 1966, the Attorney General noted three special characteristics of ocean shipping: the magnitude; the importance of trade; the involvement of Australia as a maritime nation. The application of principles should devolve upon a government. "The Government believed that restrictive arrangements relating to outwards cargo shipping were not in Australia's interests unless accompanied by suitable safeguards, in which case they could have beneficial effects for shippers, shipowners and Australian interests generally. Accordingly such arrangements were to be permissible only if parties to them gave and observed certain specified undertakings. These undertakings were to constitute necessary safeguards for the protection of Australian interests."[63] It was also recognized that arrangements should be commercial and if negotiations fail government intervention would be needed and there was need to protect the interests of Australian flag shipping operators. The final decisions regarding the permissibility of conference agreements was to rest with the Governor-General and the Government. To avoid conflict with other nations the provisions of the bill would apply to outbound traffic. Provision was also to be made where a route was served by a single shipping line.

1972

In 1972, the Australian Shippers' Council was formed as the designated shipper body.[64] The Act was accordingly amended providing for designation by the Minister of a single shipper body to negotiate with shipowners in all outwards liner trades.

1974

There was need to change the TPA 1966.[65] The amendment to this Act resulted in the 1974 TPA covering a wider range of anti-competitive practices. This meant a widening of the exemption to liner conferences as a result of the amendment.

[63] Id. p. 30.

[64] It was divided into ten groups for each regional conference. Previously there had been separate shipper bodies for each conference. The Council ceased operation in 1989 after Commonwealth Government funding was withdrawn. The newly established Australian Peak Shippers Association became the designated peak shipper body in 1990. See Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report, 15 September 1999, p. 42.

[65] The underlying philosophy of the TPA 1966 was that everything was permissible unless shown to be contrary to the public interest. Under the 1974 Act, all anti-competitive conduct is prohibited unless shown to be in the public interest. Anti-competitive acts were given a wider ambit not only to cover restrictive practices but also unfair and deceptive practices and by doing so for the first time incorporated consumer protection legislation.

After the 1974 Act was amended, in 1977 the Australian Minister of Transport announced the establishment of a study group within the Department of Transportation to review Australia's Overseas Cargo Shipping Legislation. Two factors were behind the establishment of this study group: the rapid rise in freight rates; and the dependence of Australia on shipping services provided by other nations. This led to a report, the *Grigor Report*, which made thirty-six recommendations but did not lead to any amendments. Seven years later a task force was established to review overseas liner shipping. *The Industry Task Force* released its report in 1984. The report recommended a separate Shipping Act granting continued allowance of cooperative agreements between carriers but with stronger pro-competitive safeguards on agreements, prohibition of predatory and discriminatory practices and establishment of a Shipping Industry Tribunal to consider conference agreements and complaints made about them. This report provided the basis for amendments to Part X in 1989.

On March 8, 1989, the Minister for Transport and Communications introduced the Trade Practices (International Liner Cargo Shipping) Amendment into the House of Representatives. The Minister provided the following reasons for the amendment according to a particular source: 1. To recognise the importance of Australia's foreign trade ($34 billion); 2. To encourage a more competitive environment for the benefit of Australian shippers and encourage Australian flag shipping (8% of foreign trade). 3. To minimise conflict of law with other countries (the law is confined to outward conferences); and 4. To introduce an object clause and provide safeguards against abuse of conference power.[66] The House passed the bill on 13 April 1989 which was later passed by the Senate on May 11, 1989. On May 30, 1989, the bill received Royal Assent and came into effect on August 1, 1989.

1989

Four years after the 1989 amendments a task force was established to review overseas liner shipping. In 1993, it released its report (*Brazil*). It recommended including retention of Part X with a series of proposed amendments particularly with a view to enhancing shippers' positions. In particular it argued that the provisions available to shippers be extended to importers, that the Commonwealth Government provide funding to a peak shipper body and that the Minister have powers to refer accords and discussion agreements to a proposed Liner Cargo Shipping Authority. The review recommended establishment of the Liner Cargo Shipping Authority to resolve disputes between carriers and shippers and take over the role of competition regulator under Part X. The government only accepted one recommendation i.e. retention of Part X.[67]

In 1999, in accordance with the *Productivity Commission Act 1998*, the Treasurer referred *Part X of the Trade Practices Act 1974* and associated regulations to the Productivity Commission for inquiry and report. Six months later, the Productivity Commission released its report (*Byron Report*). The Report

[66] See 'A summary of the provisions of the Trade Practices (International Liner Cargo Shipping) Amendment Bill 1989 Warren Pengilley', http://www4.austlii.edu.au. The safeguards indicated are: 1.enacting additional restrictive trade practices provisions applying to ocean carriers; 2. requiring conference agreements to meet certain standards; 3. making conference agreements publicly available; 4. permitting only partial and conditional exemption from restrictive trade practices prohibitions; 5. requiring conferences to take part in negotiations with respective shipper bodies; 6. increasing reliance on private commercial and legal processes and a reduced level of government regulation of routine commercial matters; 7. exercising, consistent with international law, jurisdiction over ocean carriers who have a substantial connection with Australia because they provide international liner cargo shipping services: and 8. enabling remedies for contravention of the provisions of the legislation to be enforced within Australia. Pp. 26-27.

[67] Productivity Commission, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974, Inquiry Report, 15 September 1999, p. 43.

made nine major recommendations and findings. These were: Part X should be retained and re-examined in 2005; the exemption from the TPA which allows conferences to set freight rates should be clarified (it should also apply to 'terminal-to-terminal' but fixing of 'door-to-door' freight rates should be deleted); the existing practice of allowing members of shipping conferences to negotiate collectively with stevedores should be confirmed; section 10.05, which prohibits price discrimination in certain circumstances be repealed; an explicit requirement to ensure that shippers' interests as taken into account by the Minister in considering misuse of market power; the enforcement of undertakings should be made more effective and flexible; importers should be allowed to form a collective to negotiate terminal handling charges; discussion should not be treated differently from other forms of cooperation among carriers; and sufficient competitive pressures exist to negate any potential monopoly power of closed conferences.[68] The Government announced that amendments would be made in order: to ensure that the arrangements applying to outward conferences should also apply to inward conferences, and to give the Minister for Transport and Regional Services, and the ACCC increased powers to deal with concerns that may arise from the operation of discussion agreements and closed conferences.[69]

2000

A few years after the 1989 amendments, in accordance with the referral from *Parliament Secretary to the Treasurer* in February, 2005, the Productivity Commission submitted its report on the 'Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping' (*Sloan Report*). It made recommendations on retention of the Part X, alternatives, and how to improve the effectiveness of Part X if retained. On *retention*, the Commission would prefer that alternative mechanisms be used to provide immunity for efficiency enhancing agreements or agreements that could be shown to provide a net public benefit. 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, it should therefore be repealed. On *alternatives*, the Commission would prefer the liner cargo shipping industry be subject to the general provisions of the TPA. Authorization could be undertaken under Part VII of the TPA as occurs for other industries. Under Part VII, agreements would be assessed individually on the basis of their net public benefit by the ACCC. It could be achieved with a four-year transitional period and is unlikely to result in practical inconsistencies with the regulations as currently applied in the US and the EU. On *improvements*, 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.[70] On August 4, 2006, the government provided a detailed response to each of the Commission's recommendations. It decided to retain Part X but to amend it to promote further competitive reform. The amendments to Part X were to: clarify its objectives; remove discussion agreements from its scope; protect individual confidential contracts between carriers and

[68] Id, pp. XXXVIII-XLI and Bills Digest No. 29 2000-01 Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, www.apr.gov.au

[69] Bills Digest No. 29 2000-01 Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, www.apr.gov.au

[70] Id. and Trade Practices Amendment (International Liner Cargo Shipping) Bill 2000, pp. 1-15, www.aph.gov.au

shippers; and introduce a range of penalties for breaches of its procedural provisions.[71] These reforms were never implemented.[72]

2010

After 2011, the Australian government amended the *Trade Practices Act 1974* (Cth) (TPA) and renamed the Act the *Competition and Consumer Act 2010* (CCA), Part X of the TPA was carried over into the CCA. In 2012, in a joint Australian-New Zealand study on strengthening trans-Tasmanian relations was released. The Australian Productivity indicated that removing regulatory barriers to competition could be useful. 'For shipping, the exemption of ocean carriers from key parts of competition regulation is no longer necessary and removing it would generate gains.' It accordingly made the recommendation that "The Australian and New Zealand Governments should remove — preferably on a coordinated basis — the exemption for international shipping ratemaking agreements from legislation governing restrictive trade practices" (R4.14). In 2013, the Liberal-National Party Coalition Government of Tony Abbott (Abbott Government) commissioned an independent 'root and branch' review of Australia's competition laws and policy in recognition of the fact that the Australian economy has changed markedly since the last major review of competition policy in 1993. The review was undertaken by a four-member Competition Policy Review Panel chaired by Professor Ian Harper.[73]

On March 31, 2015, the Final Report of Australia's Competition Policy Review Panel (*Harper Review*) was released. Two of the 56 recommendations dealt with the maritime industry, one on the liner shipping exemption to Australia's anti-cartel laws; and the other on the current cabotage regime. Regarding Part X of the *Competition and Consumer Act 2010,* the Harper Review[74] recommended that: 1. The exemption should be repealed and the liner shipping industry should be subject to the normal operation of the CCA. 2. The Australian Competition and Consumer Commission (**ACCC**) should be given power to grant block exemptions for conference agreements which contain a minimum standard of pro-competitive features. 3. The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with cargo interests and the liner shipping industry. 4. Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation (presumably on the basis of the normal net public benefit test). 5. A transitional period of two years is allowed for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption. The recommendations were made despite the repercussions that the repeal would have and the opposition from key stakeholders should the Abbott Government contemplate on adopting the recommendations.[75] The stakeholders contended that Consortia arrangements between shipping lines enable the sharing of space on pooled vessels so that a more frequent and wider range of port calls can be offered to shippers at a much lower cost than would otherwise be possible. It is therefore

[71] Government Response to Productivity Commission Report Review of Part X of the Trade Practices Act 1974 (International Liner Cargo Shipping), August 4, 2006, www.ministers.treasury.gov.au

[72] Competition Policy Review, Final Report March 2015, p. 381, www.parliament.net.gov.au

[73] In September 2014, the Review Panel released a Draft Report, it concluded that the exemptions available to shipping lines under Part X were too broad and recommended that Part X be repealed. In the place of Part X, the Review Panel has recommended that the Australian Consumer and Competition Commission (ACCC) be given power to issue 'block exemptions' for exempt categories of conduct. See Proposed overhaul of Australian competition law in the shipping liner trade, October 1, 2014, www.hfw.com

[74] Competition Policy Review, Final Report March 2015, p. 385., www.parliament.net.gov.au

[75] Australia: Harper Review Recommends Changes To Australia's Cabotage Regime And Liner Shipping Exemption, 14 April 2015, by Christopher D. Keane , Joel Cockerell and Maurice Thompson, www.mondaq.com

not surprising that: 1. Part X has enjoyed (and continues to enjoy) strong support from shippers in Australia; and 2. The competition laws of many of Australia's major trading partners, including China, Japan, Korea, Singapore and the United States, permit similar consortia arrangements between shipping lines.

2017
In 2017, class exemptions for conference agreements were provided for based on the above recommendation when the Australian Parliament passed the *Competition and Consumer Amendment* in October 2017.

D. Legislative developments after the last amendments

On December 3, 2019, the ACCC in its Discussion paper *Proposed Exemption for Ocean Liner Shipping* was considering making a Class Exemption for liner shipping agreements contemplated by the Harper Review. It sought information from relevant stakeholders on: which aspects of Part X are in the public interest and could be included in a class exemption and why; and which aspects of Part X are detrimental to competition and should not be included in a class exemption and why, in making its determination. "The ACCC has the power to make 'class exemptions', for eligible businesses to engage in conduct of a kind that might otherwise breach the competition provisions in Part IV of the CCA where it is satisfied that the conduct: would not have the effect or likely effect of substantially lessening competition, and/or would result or be likely to result in overall public benefits. A class exemption effectively provides a 'safe harbour', so businesses can engage in the conduct specified by the class exemption without breaching the competition law."

As of November 2021, the ACCC received eight submissions on the Discussion Paper "Overall, stakeholders are supportive of a liner class exemption limited to operational coordination that should not include prices."[76] This can be seen in one of the important submissions by two major Australian groups.[77] Before the ACCC could conclude its work on the Block Exemption three major developments occurred,[78]

[76] Container Stevedoring Monitoring Report 2020-21, October 2021, p. 26.

[77] The Australian Peak Shippers Association (APSA) and Freight & Trade Alliance (FTA) recommended: 1) repeal of Part X, 2) replace block exemption regime with terms to be drawn as narrowly as possible to permit the desired activities to be operationalised, 3) retain positive features of Part X into a block exemption regime including prescribed minimum levels of service, 4) exclude in price fixing or surcharges in a block exemption, 5) mandate incorporation of stevedore fees within shipping line contracts (negating stevedore-imposed Infrastructure Surcharges administered on the transport sector), 6) introduce a registration process administered by the ACCC, 7) continue APSA as a designated peak industry body to support registration approval, ; 8) align the block exemption with the New Zealand regime to form a regional approach, and; 9) allow shippers to negotiate collective freight contracts with shipping lines. (February 28, 2020)

[78] 1. In September 2021, the Australian Competition and Consumer Commission began an investigation into possible competitive conduct in the container transport industry. Mr. Rod Sims head of the ACCC said "We have a narrowly focused investigation as to whether there is a breach of competition laws in relation to containers." "Is there a breach? Is there not a breach? And we'll get to the bottom of that."
2. On October 2021, the ACCC released its Container Stevedoring Monitoring Report 2020-21. The report outlined several areas that Australia needs to act on by: 1) addressing industrial relations and restrictive work practices issues across the supply chain; 2) ensuring that privatised ports do not levy excessive rents and charges; 3) repealing Part X of the Competition and Consumer Act 2010; and 4) investing in infrastructure to fix inefficiencies in the supply chain caused by larger ships, lack of rail access to Australian container ports and shortage of space in empty container parks. "Without this, Australia may end up being serviced by fewer shipping lines than would otherwise be the case. This would mean less competitive tension between shipping lines, and freight rates on Australian trade routes would likely be higher than they would otherwise be." (p. xxii) The report indicated that freight rates on key global trade routes are currently about seven times higher than they were just over a year ago (i.e.$1,000/FEU in June 2020 compared to $7000/FEU in June 2021), despite this shipping lines cannot guarantee on-time delivery. See p. xxii.
3. On 10 December 2021, the Treasurer requested that the Productivity Commission undertake an inquiry into the long-term productivity of Australia's maritime logistics system. The Terms of Reference for the review indicate that the Productivity Commission should have regard to the

the last one was an inquiry by the Productivity Commission. Subject to the outcomes of the Productivity Commission inquiry the ACCC will recommence its work on developing a class exemption. In August 2022, the Australian government sought comments to draft legislation that would increase penalties for engaging in anti-competitive conduct for example: cartels, misuse of market power, and exclusive dealing.[79] The legislation proposes maximum penalties imposed on corporations that will increase to the greater of: $50 million (previously $10 million); or If the court can determine the value of the benefit obtained, three times the value of the benefit; or 30% of a corporation's annual turnover during the period in which the breach occurred (previously 10%). For individuals, the maximum pecuniary penalty will increase to $2.5 million (previously $500,000.00).[80]

In September 2022, the Productivity Commission released a draft report Lifting productivity at Australia's container ports: between water, wharf and warehouse. It recommended that "The Australian Government should repeal Part X of the Competition and Consumer Act 2010 (Cth) (CCA)".[81] In other words, a repeal of antitrust exemption. The reasons provided for this recommendation were: 1. No other industry has an exemption like Part X, even though there are industries with similar characteristics to the shipping industry. 2. Shipping lines should show that their agreements provide a net public benefit. 3. Either a class exemption or the existing provisions under Part VII of the CCA could deal with shipping line agreements under a net public benefit test once Part X is repealed.

On December 21, 2022, the Productivity Commission released its final report *The King Review.*[82] The Report in its review of Part X of the Act pertaining to international cargo liner services stated "Competition is robust in the market for shipping lines' services. While lines have been consolidating over the past three decades, multiple providers service Australia and cargo owners can easily switch between them. Before the COVID-19 pandemic, competition between lines resulted in declining prices. Steep increases in blue-water charges following the onset the pandemic reflected market responses to pandemic-related pressures. Rates have fallen markedly during 2022 and are likely to fall further as markets normalise, especially if trade volumes drop as efforts by central banks to slow inflation bite and as new ships on order come on line. That said, lines are permitted to cooperate on ship use, schedules (timetables), containers, use of terminals and freight rates through agreements registered with the Registrar of Liner Shipping. For example, three lines might agree to run one service a week between Australia and Singapore. At a 42-day round trip, the service requires six vessels. The lines will agree on how many vessels each will contribute and on how much capacity each gets per vessel. Unused capacity can be sold to competitors that are not party to the agreement. (The Commission understands that none of the current agreements include price cooperation.) While agreements enable shipping lines to achieve

ACCC's container stevedoring monitoring report and the Government's in-principle acceptance of the Harper Review's recommendation to repeal Part X, and consult with the ACCC as part of its review.

[79] The Australian Peak Shippers Association sees merit in the proposed legislation that would increase the penalties under the following provisions under Part X: 1. subsection 10.49A – enforcement of undertakings agreed by parties to a registered conference agreement under subsection 10.49; 2. subsection 10.60 – enforcement of orders given under subsection 10.54(1) by the Minster to a non-conference ocean carrier with substantial market power and undertakings offered by a registered non-conference ocean carrier with substantial market power under subsection 10.59; and 3. subsection 10.65 – enforcement of orders under subsection 10.61(1) served by the Minster on an ocean carrier not to engage in a pricing practice and undertakings offered by an ocean carrier not to engage in a pricing practice.

[80] Australia: Penalties to increase under proposed amendments to Competition and Consumer Law, October 2, 2022, www.mondaq.com

[81] See Lifting productivity at Australia's container ports: between water, wharf and warehouse, p. 42. Also see pp.16-17 and Australian commission calls for end to carriers' antitrust immunity, September 13, 2022, https://www.joc.com › Maritime News › Container Lines.

[82] Lifting productivity at Australia's container ports: between water, wharf and warehouse Inquiry report, Report No 99, 21 December 2022.

economies of scale, the law permitting them (Part X of the Competition and Consumer Act) does not require shipping lines to show that their arrangements provide a net public benefit to Australia — a requirement faced by similar industries. Putting shipping lines onto the same footing as other industries would ensure that any anticompetitive avenues for price cooperation are only available to shipping lines when the cost of reduced competition is outweighed by other benefits to the Australian community."[83] Based on the above it made the following recommendation:

- The Australian Government should repeal Part X of the Competition and Consumer Act 2010 (Cth) (CCA).
- No other industry has an exemption like Part X, even though there are industries with similar characteristics to the shipping industry.
- Shipping lines should show that their agreements provide a net public benefit.
- Either a class exemption or the existing provisions under Part VII of the CCA could deal with shipping line agreements under a net public benefit test once Part X is repealed.[84]

The Report then went to examine the three other related components in the supply chain of ocean water services: 1. the container terminal market; 2. the intermodal transport market; and 3. the warehousing or storage market for containers Regarding the container terminal market it made the following observations: First, greater competition between container terminal operators and consolidation of shipping lines over the past decade have increased shipping lines' bargaining power relative to container terminal operators. This has contributed to declining quayside revenue for container terminal operators. Second, container terminal operators have exercised their market power by increasing fees and charges to transport operators. These increased fees and charges will be passed on to cargo owners and, for imports, to Australian consumers.[85] It light of the above, it recommended that "Treasury should develop a mandatory container terminal operator code that would be administered and enforced by the Australian Competition and Consumer Commission (ACCC)."[86] Further, it recommended that "Shipping contracts should not be exempt from the unfair term provisions in Australian Consumer Law. The Australian Government should remove this exemption."[87] Regarding the other two markets, the Commission indicated its finding but did not make any specific recommendations.

E. Summary

In 1930, a specific exemption was granted to a conference from the provisions of the *Australian Industries Preservation Act.* It required parties to agreements to show that this agreement was not detriment of the public and was not unreasonable. It was not until that the Trade Practices Act (TPA) was introduced that a specific part XA was introduced providing exemptions from all of the competition rules in Part IV of the TPA for all registered conference agreements in return for undertakings to enter into negotiations and provide information to the designated shippers Group. In 1972, an amendment to the TPA provided designation by the Minister of a single body to negotiate with shipowners in all outward liner trades. In 1974, Part X of the Act was extended to cover a wider range of anti-competitive practices (contracts, arrangements or understandings in restraint of trade or commerce; monopolization; exclusive dealing;

[83] Id. p. 17.

[84] Id. p. 42, Recommendation 6.1.

[85] Id. p. 43.

[86] Id. p. 220, Recommendation 6.2. The recommendation also spells what should be included in the code.

[87] Id. p. 43, Recommendation 6.3.

resale price maintenance; price discrimination; and mergers) in Part IV. This meant that the exemption granted to conferences became more extensive. In 1989, the Act was amended with a new Part X. Recognizing, the importance of overseas trade, the possibility of conflict with laws of other maritime countries and the need to protect Australian shipowner interests, the amendments introduced an object clause together with safeguards against abuse of conference power with a view to encouraging a more competitive environment. In 2000, Part X contained 180 amendments. The Minister for Transport and Regional Services, and the ACCC were given increased powers to deal with concerns that may arise from the operation of discussion agreements and closed conferences. The exemption was extended to include Australian importers in negotiating with conferences; and to a stevedoring operator and an ocean carrier. Collective agreement on freight rate charges were not permitted unless done under the Part X exemptions. In 2011, the Australian government amended the Trade Practices Act 1974 (Cth) (TPA) and renamed the Act as the Competition and Consumer Act 2010 (CCA). Part X of the TPA was carried over into the CCA. In 2013, the Liberal-National Party Coalition Government of Tony Abbott (Abbott Government) commissioned an independent 'root and branch' review of Australia's competition laws and policy in recognition of the fact that the Australian economy has changed markedly since the last major review of competition policy in 1993. In 2017, the Australian Parliament passed the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* and the *Competition and Consumer Amendment*. The revisions to the latter contained provision to issue class exemptions for conference agreements based on the recommendation of the Harper Review. On December 21, 2022, in accordance with section 11 of the Productivity Commission Act 1998, the Productivity Commission released its final report and made one recommendation: repeal Part X.

SECTION V–EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION IN CANADA

A. Background to Conference Legislation in Canada

In the early 1900s, Canada did not have any specific legislation governing shipping conferences until 1971. The Canadian approach to conferences was dominated by the shipping policies in Great Britain, after World War I. The Canadian Government which favoured a system of rate control with Great Britain was never successful in persuading the British Government. This was apparent in a number of inquiries into shipping conferences. The British Royal Commission on Shipping Rings of 1906 took no particular notice of Canadian interests as their written representations were ineffectual. A few years later, one of the Commissioners sent to represent Canada in the Dominions Royal Commission also failed in his attempt to influence the control of ocean freight rates as a result of opposition from the United Kingdom Board of Trade.[1]

In the early 1920's, three separate inquiries in their reports were strongly critical of shipping conferences. The Special Select Committee on Agriculture reported that it found a steamship combine in operation in the Canada to United Kingdom trade. It recommended publicity as a deterrent and cure for unfair shipping practices, investigation of complaints and operation of ships setting rates at costs plus a reasonable profit. The report of the Department of Trade and Commerce found the above combine as part of a larger combine to control all shipping interests. It noted other objectionable features such as discriminatory treatment favouring American ports, discriminatory rates on flour thereby favouring American millers and other rates that prevented exports. A Special Committee was also appointed to review a contract made with a British shipowner for the provision of a subsidy in return for rates set by the Canadian government. However, before the Committee finished its deliberation on the matter, the shipowner died and with it the Government's attempt to influence rates on the North Atlantic.[2]

After the 1920's no formal inquiries were made into shipping conferences or ocean freight rates till 1959, nor did the government attempt to legislate the regulation of rates.[3] In February 1959, the Industrial and Trade Bureau of Greater Québec invited the Helga-Dan, a ship specially fitted for winter navigation, to sail to and from the port of Québec. As the Helga-Dan belonged to a shipping line not a member of the shipping conference it was necessary for the shipper to obtain a release from their exclusive patronage contract with the Eastern Canada-United Kingdom Shipping Conference. The Conference refused to release the shipper despite the fact that it did not provide winter service. This resulted in a complaint being filed with the Director of Investigation and Research and led to an inquiry under the *Combines Investigation Act*. The investigation subsequently resulted in charges by the Director and hearings before the Restrictive Trade Practices Commission (R.T.P.C.). In 1965, the R.T.P.C. issued its report.

[1] The Commission made a number of recommendations on: government supervision; setting up a board of inquiry to deal with conferences that adversely affect shippers; filing of shipping agreements and agreements with transportation companies; investigation of complaints of unfairness in freight classifications, rates or shippers contracts.

[2] The Committee made a number or recommendations: filing of agreements, rate schedules and other information; hearing of complaints and recommendation of maximum rates.

[3] One final attempt by the government to control rates on shipping grain in the Great Lakes also failed because of the withdrawal of American carriers. This withdrawal was due to the control of rates by the Board of Commissioners.

Though the R.T.P.C. determined that the Conference did hinder competition and take advantage of shippers, its main criticism was against exclusive patronage contracts. However, it declined to apply the *Combines Investigation Act* to shipping conferences. It maintained that "Although the member lines lessened competition within the meaning of the *Combines Investigation Act*, the public interest would not be served by excessive rate competition and instability in the liner trades." The R.T.P.C. also declined to regulate shipping conferences indicating that "governmental regulation of rates in ocean transport would not be feasible or conducive to the welfare of the Canadian public." Based on the rationale and recommendations of the R.T.P.C., the *Shipping Conferences Exemption Act* (i.e. *Act*) was crafted. The introduction of the Canadian Shipping Conference Exemption Act touched off an extensive Parliamentary debate. The Act (S-6) tabled in Senate and was studied in committee with the input of many commercial organizations. According to the government of the day none of these intervenors registered strong opposition to the Bill. It was passed in 1970.

B. Conference Legislation in Canada

1. *Shipping Conferences Exemption Act, 1970*

The Act consisted of fourteen sections. The key provisions of the Act were:

- 1. the grant of exemption to conferences for agreements covering: agreed tariffs, patronage contracts, dual rates, allocation or ports, times of sailing or kinds of service; sharing of profits or losses and closed conference;
- 2. the loss of the exemption if the conference: agreed to use a non-conference vessel for preventing or lessening unduly competition (i.e. the use fighting ships against independents or non-conference vessels), refused to transport goods by a shipper for use of non-conference vessel, and prevented or limited the use of port or other facilities by a non-conference ocean carrier; and
- 3. the initiation of an investigation into shipping conferences by the Director of the Combines Investigation Act on his own initiative or from request by the Minister or R.T.P.C. Such inquiries were pursuant to the Combines Investigation Act and the R.T.P.C was to consider the evidence brought before it and report to the Minister of Consumer and Corporate Affairs.[4]

The Act also required all members of shipping conferences to file[5] a copy of their contracts and agreements, tariffs, changes in membership, patronage contract and changes in contracts, agreements, arrangements, tariffs and patronage contracts in considerable detail with the Canadian Transport Commission.[6] Shipping conferences that failed to file were guilty of an offence and were liable on

[4] Such a report is pursuant to section 19 of the Combines Investigation Act under which remedial action can be recommended. See Section 11 of the Shipping Conference Exemption Act and section 19 of the Combines Investigation Act.

[5] Timing for filing is provided for under section 6. Contracts and agreements, tariffs and patronage contracts are to filed within 60 days of the coming into force of the Act or thirty days after the conference is established which ever is later. Changes to the above are to be filed within 30 days and changes to conference membership are to be filed within 30 days they are entered into or adopted.

[6] See subsection 5(1). Subsection 5(2) spells out the contents of each tariff: every rate and charge, places to which it is applicable; every rule and regulation determining its calculation or affecting or altering any term or condition; and the address in Canada to which communications regarding the above may be directed.

summary conviction to a fine not exceeding $100 per day.[7] All the documents that had to be filed were to be certified as true by the chairman or secretary of the shipping conference and made available for inspection by any person during regular business hours of the Commission.[8] The R.T.P.C. could direct an ocean carrier of a shipping conference to deposit with it a sum of $5000 as financial security to ensure that the carrier would comply with this Act and could order seizure and detention of any vessel of the ocean carrier for failure. In case of conviction of an offence under this Act or the Combines Investigation Act and failure to pay any fine due to conviction, the deposit or sale of any deposited security could be used to pay the fine.[9] A report was to be submitted by the Minister of Transport to Parliament on the working of the Act within the first three months of the year.[10] This Act which went into effect on April 1, 1971 was to expire within three years but was later extended for a further five years until March 31, 1979.[11] The provisions are summarized in greater detail and shown in the Table 1 hereafter.

Table 1 - Shipping Conferences Exemption Act

1. Short Title: Shipping Conferences Shipping Act
2. Interpretation – Definitions of "Commission", "Director", "goods", "ocean carrier", "patronage contract", "shipping Conference", "tariff" and "transportation of goods"
3. Non-application of Combines Investigation Act to agreements between members of a SC to the extent that the agreement requires use or provides for: a. agreed tariffs; b. patronage contract; c. ninety day termination; d. dual rate where the non contract rate is not more that 15 percent of the contract rate; e. no deferred rebates; f. allocation of ports; g. times of sailing or kinds of service; h. sharing of profits or losses; g. regulates membership admission and expulsion. 4. Loss of exemption if conference members agree to: a. the use of non-conference vessels for preventing lessening, unduly competition; b. refusal to transport goods by a shipper for use of a non-conference carrier; c. prevent or limit use by an ocean carrier of port or other facilities by a non conference member.
5. Filing of Documents: a. agreement; b. change in membership; c. established tariff; d. patronage contract; e. changes. Contents of tariff: a. Every rate and charge; b. places rate and charge apply; c. calculation of rate or charge; d. address in Canada to communicate rates or charges
6. Time for filing of documents: 1. a, c and d sixty days after coming into force of act or 30 days after the conference is established. 2. b thirty days after change; 3. c thirty days after entry or adoption.
7. Verification of documents: a. certified by chairman or secretary of conference as true and complete; b. inspection made available by any person
8. Offence and Punishment: Failure to file – $100 for each day of default on summary conviction
9. Limitation: within one year from the time prosecution arose.
10. Security: Deposit not exceeding $5,000 for failure to comply with this Act and Commission may authorize seizure or detention of any vessel. Fines for a conviction under the C.I.A. or fines imposed by Commission may be paid from the deposit. Return of deposit
11. Investigation of Shipping Conferences: At the initiative of Director, Minister, or RTPC. RTPC to consider report of Inquiry by Director. Report made by the RTPC deemed to be report under s.19 of C.I.A.
12. Report to Parliament: By Minister or Transport with 30 day each calendar year
13. Coming into Force and Duration: To be fixed by proclamation.
14. Expiry: After three years of coming into force or fixed by proclamation (to be laid before Parliament not later than 15 days)

There were several shortcomings in the *Act*. 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

[7] See section 8. Such a prosecution can be instituted within one year from the time the prosecution arose, see section 9.

[8] See section 7.

[9] See subsections 10(1) and 10(2). Return or cancellation of security is described in subsection 10(3).

[10] Or in the next five days thereafter if Parliament was not sitting, see section12.

[11] See sections 13 and 14 and Canada Gazette, Part I, January 30, 1971, p. 259 and Canada Gazette, Part II, Vol. 108, No. 8, 24/4/74, SI/TR/74-45, p. 1444.

continued to be subject to the *Combines Investigation Act*. This led to the *Shipping Conferences Exemption Act, 1979*, March 31, 1979.

2. *Shipping Conferences Exemption Act, 1979*

The 'Shipping Conferences Exemption Act, 1979 ' came into force on April 1, 1979.[12] The Act consisted of 23 sections.[13] The new features of the Shipping Conferences Exemption Act, 1979 were:

- 1. the provision for a Shipper Group. The purpose of this group was to strengthen the bargaining position of shippers vis-à-vis the conferences. Members of a shipping conference were obliged to meet with a shipper group when requested in writing and to provide information sufficient for the satisfactory conduct of the meeting;[14] and
- 2. the extension of the exemptions to agreements between members of a shipping conference and those of another shipping conference, and to members of a shipping conference and a non-conference ocean carrier subject to the prohibitions discussed earlier.[15]

There were several other new features. The Canadian Transportation Commission was made responsible for the administration of this Act.[16] The definition of prejudicial to the public interest for purposes of section 23 of the National Transportation Act was also included.[17] With a view to provide information (i.e. non-confidential), members of a conference were to maintain an office in Canada where they operate and make available to the public for inspection or purchase copies of all documents filed and in force with the Canadian Transport Commission.[18] In addition, copies of all current tariffs and any revisions filed with the Commission are to be made available at all their principal offices for inspection.[19] The documents filed by the shipping conference with the Commission may be destroyed five years after they

[12] See section 23 of the Shipping Conferences Exemption Act, 1979.

[13] The short title was now the "Shipping Conferences Exemption Act, 1979", the full title however was not changed. There are nine new sections, one section of the previous act was deleted and one earlier section was divided into two. The definitions in section 2 remained the same, except with minor modifications to the definition of shipping conference and tariff.

[14] See subsection 15(1) of the Shipping Conferences Exemption Act, 1979. A shipper group means an organization or association of shippers designated by the Minister of Transport, see subsection 15(2). The Canadian Shippers' Council was designated to be that organization.

[15] See section 5 of the Shipping Conferences Exemption Act, 1979, previously section 3 of the Shipping Conferences Exemption Act. The wording of this section also substituted in a number of subsections 'ocean carrier' for 'members of the conference' without affecting the meaning. The wording of section 6 pertaining to loss of exemption was slightly changed without affecting the meaning of this section, in a number of places it substituted 'party to such contract, agreement or arrangement' for 'member of that conference'.

[16] See section 3 of the Shipping Conferences Exemption Act, 1979.

[17] It is defined as any contract or agreement required to be filed or practice that has or is likely to have the effect of restricting competition to a degree that exceeds the restriction required to ensure a reasonable degree of rate or service stability. See section 4 of the Shipping Conferences Exemption Act, 1979.

[18] See section 13 of the Shipping Conferences Exemption Act, 1979. The documents filed under the previous act shall be deemed to comply with the filing provisions under this act if a certificate is signed by a member of the conference describing that document and indicating that no modification has been made since the coming into force of the act, see section 21. The wording of the section on filing, section 7 previously section 5, was changed slightly to bring greater clarity without affecting the meaning. For example, 'Every ocean carrier that is a member of' replaces 'Every member of' in s. 7(1); 'an ocean carrier using the tariff' replaces 'members of the conference' in s. 7(2)(a); and 'of the office or agency established pursuant to section 13' replaces 'in Canada' in 7(2)(d). Further subsection 7(1)(a) contains two parts (i) and (ii) with minor wording changes previously the two were combined.

[19] See section 14 of the Shipping Conferences Exemption Act, 1979. It should be noted that the certification of documents need not be by the chairman or secretary but by a person designated by the conference, see section 9 previously section 7(a). The documents that could be inspected now specifically included every notification filed, see section 10 previously section 7(b).

are no longer in effect and necessary for the administration of this Act.[20] The Act also empowered the Governor-in-Council to make regulations requiring the production of information reasonably available by members of a shipping conference to the Canadian Transport Commission, at such times and such forms, necessary for their effective supervision. Further confidential information made available pursuant to the regulations shall not be made available to any competitor.[21] Financial security to be filed with the Canadian Transport Commission was raised to $10,000,[22] and failure to comply with any obligation or regulation under this Act would lead to a fine of $500 for each day of the offence on summary conviction.[23] The Canadian Transport Commission had also to consider evidence and any material from inquiries pursuant to the Combines Investigation Act brought before it by the Director.[24] This Act which went into effect on April 1, 1979, ceased to be in force on March 31, 1984 or not later than five years after the Act ceased to be in force to be fixed by proclamation.[25] The earlier Act was repealed.[26] These new features of the Act are shown in greater detail in the Table 2 hereafter.

Table 2 – Shipping Conferences Exemption Act, 1979

1. s. 15(1) and (2) Members of a conference engaged in the transportation of goods from any place in Canada to any place outside Canada shall, when reasonably requested in writing by any designated shipper group to do so, meet with the designated shipper group and shall provide the designated shipper group with information sufficient for the satisfactory conduct of the meeting. A shipper group means an organization or association of shippers designated by the Minister of Transport.
2. s. 5 Subject to subsections …, the *Competition Act* does not apply in respect of any conference agreement or interconference agreements. And the definition of conference.

The 1979 Act continued to have shortcomings. 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 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*.

[20] See section 11 of the Shipping Conferences Exemption Act, 1979. Further, it should also be noted that minor changes were made to section 8 regarding timing. Agreements, tariffs and patronage contracts are to be filed within 60 days of the coming into force of the Act or on the day they become effective which ever is the later. Changes to the above are to be filed within 30 days that they become effective but notification of such alteration shall be given not later than the day it comes into effect; further changes to conference membership are to be filed within 30 days.

[21] See section 16 of the Shipping Conferences Exemption Act, 1979, further while proposed regulations under this section have to be published in the Canada Gazette at least sixty days before the effective date affording interested persons a reasonable opportunity to be heard, it need not be published more than once whether or not amended as a result of representation by interested persons.

[22] See section 17 of the Shipping Conferences Exemption Act, 1979.

[23] See section 18 of the Shipping Conferences Exemption Act, 1979; the offence and punishment under section 8 of the preceding act pertained to failure regarding filing. Further no prosecution can be instituted after one year from the time the offence was committed, see section 19.

[24] See subsection 12(2).

[25] See section 23 of the Shipping Conferences Exemption Act, 1979. The section on the tabling of the report was further clarified, the words 'Parliament is sitting' is replaced by 'either house of Parliament is sitting', see section 20.

[26] See section 22 of the Shipping Conferences Exemption Act, 1979.

3. *Shipping Conferences Exemption Act, 1987*

The 'Shipping Conferences Exemption Act, 1987' came into force on December 17, 1987.[27] The Act now consists of 29 sections.[28] The substantive new features of the Shipping Conferences Exemption Act, 1987 to promote competition were:

- 1. the restriction of agreements between conference members and independent ocean carriers;[29]
- 2. the restrictions on loyalty contracts to 'all' goods were removed;[30]
- 3. the provision for service contracts;[31]
- 4. the provision for independent action on rates;[32]
- 5. the limitation of exemption in the case of conspiracy, combination, agreement or arrangement to engage in predatory pricing described in section 50(1)(c) of the Competition Act;[33] and
- 6. the restriction of the exemption to agreements that do not cover multimodal rates;[34]

There are several other new features. The exemption is further clarified by requiring that the exemption does not apply unless the shipping conference agreement is filed with the National Transportation Agency (formerly the Canadian Transportation Commission).[35] The filing provisions were extended to include a description of oral agreements, a copy of every service contract, a copy of each loyalty contract and amendment to loyalty contracts.[36] The tariffs to be filed do not have to provide the rates on any service

[27] See Canada Gazette, Part II, Vol. 122, No. 2, 20/1/88, SI/TR/88-9. Subsection 4(3) came into force on February 17, 1987. This is the short title of the Act, see section 1. The full title is now "An Act to exempt certain shipping conference practices from the provisions of the Competition Act, to repeal the Shipping Conferences Exemption Act and to amend other Acts in consequence thereof."

[28] There are nine new sections, three sections of the previous act were deleted, two earlier sections were combined into one and one earlier section was divided into two. The definitions in section 2 were increased to include definitions on conference agreement, loyalty contract, designated shipper group, independent action, interconference agreement, and service contract. It also now contained definitions on contract rate, dual rate and non-contract rate previously in subsection 5(2) of the SCEA, 1979.

[29] See section 4(1) and the definitions of conference and interconference agreement. For further elaboration on this point see "The Canadian Shipping Conferences Exemption Act: Issues and Roles for Shippers and Shipping," External Affairs and International Trade Canada, G. K. Sletmo and S. Holste, August 1991, pp. 11-12 and 16.

[30] See section 4(b)(iv) which specifies that the loyalty contract not contain the requirement that a shipper transport all or one hundred percent of their goods under the loyalty contract.

[31] See section 4(1)(c).

[32] See section 4(3)(a). Any member of a conference may take independent action after giving 15 days notice to other members of a contract, except with regard to service contracts. An earlier version of the Bill on this act provided for independent action on service contracts. But this feature was later deleted in the final Bill. Further, section 4(3)(b) provides that the members of a conference shall publish the new rate or service within 15 days. Furthermore, section 4(3)(c) provides for adopting independent action i.e. independent action in response to independent action, on or after the first day that it is taken.

[33] See Section 4(4). The predatory pricing offence under section 50(1)(c) pertains to engaging in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect.

[34] See section 5(2). This section however does not prevent an individual member of a conference from agreeing with any carrier for inland transportation for a through rate.

[35] See subsection 4(2).

[36] See subsection 6(1). The timing provisions for other agreements, etc. were not changed, see footnote 29 (the alternative timing for filing of contract and agreement, changes in membership, and patronage contract 'after the coming into force of this Act' was deleted, see subsection 7(a)). The service contract or amendments to it shall be filed within thirty days after it becomes effective. Service contracts filed with the Agency or

contract.[37] Written notice of a proposed increase in a tariff shall be given to the Commission and to the designated shipper group thirty days before it becomes effective; and in the case of a surcharge or increase in surcharge fourteen days before it becomes effective.[38] Written notice of any proposed amendment to a loyalty contract or tariff other than a rate increase shall be given to the Commission not later than the date on which the proposed amendment becomes effective. [39]

The Act provides a new mechanism for investigation of complaints. The Director, like any other person, may file a complaint to the Agency.[40] The Agency can conduct an investigation of the complaint if it is warranted in its opinion. It may make an order if it finds that the conference agreement or practice has or is likely to have by a reduction in competition an unreasonable reduction in transportation service or an unreasonable increase in transportation costs. The order may require the parties or member of the conference to remove the offending feature of the agreement or stop the practice or any other order the Agency considers necessary.[41] In conducting such an investigation the Agency may consider the contents of any service contract or hold hearings or may decide the matter on the basis of documents filed.[42] The Director has to be notified by the Commission of every complaint filed under subsection 13(1). Any evidence obtained in an inquiry under the Combines Investigation Act may be brought by the Director to the Agency.[43] The operation of the Competition Act is not affected in case the agreements that are not exempt or any practice of a conference or a member.[44]

The section pertaining to investigation of a conference by the Director was modified. The Director is no longer obliged to carry out an inquiry on direction from the R.T.P.C.[45] Further, provision for the R.T.P.C to consider evidence brought before it and report to the Minister of Consumer and Corporate Affairs was deleted. The Director may take any action under the Competition Act in relation to the evidence obtained

information contained in it shall not be communicated or access to it shall not be provided to any person except to any person engaged in the administration of the act or any person authorized by the parties to the service contract or to the Director who intends to make representation under section 125 of the Competition Act in respect of a complaint filed under subsection 13(1) of the act, see sections 11, 12 and 14(2). The documents filed under the previous act shall be deemed to comply with the filing provisions under this act if a certificate is signed within sixty days by a member of the conference describing that document and indicating that no modification has been made since the coming into force of the act, see section 25. This section now contained a time requirement for the signing of the certificate.

[37] See subsection 6(2)(a). It should also be noted that section 17(1) does not provide for the inspection of service contracts by any person. Members of a conference shall now maintain jointly an office or agency for inspection and purchase copies of all documents and notices in force that have been filed with the Commission under section 6 where they operate. The word jointly was not in the earlier provision. Further it does not have to make available copies of service contracts at the office or agency for inspection. Similarly, every member of a conference has to maintain every tariff and notices of tariff amendments at their principal office or agency. Strangely this section does not exclude service contracts that have been filed with the Commission, perhaps this omission was an oversight, the intent of the Act was to keep service contracts confidential (See sections 18 and 19).

[38] See section 9.

[39] See section 10.

[40] If there is reason to believe that any conference or interconference agreement required to be filed, or any practice of a conference or member has or is likely to have by a reduction in competition an unreasonable reduction in transportation service or an unreasonable increase in transportation costs, see subsection 13(1)(b). However, such a complaint is precluded if an application has been made under subsection 26(2) of the National Transportation Act, see subsection 13(5).

[41] See subsection 13(2). A decision must be rendered within 120 days after the complaint is filed unless the parties agree to an extension, see section 15.

[42] See subsections 13(3) and 13(4).

[43] Which is relevant to a complaint filed under section 13(1), see subsection 16(3).

[44] See subsection 13(6).

[45] See subsection 16(1).

in an inquiry by the Director.[46] The section on regulations was broadened to include access through an electronic network to documents to be filed and fees to be paid for the use of this service.[47]

Failure to comply with any obligation or regulation under this Act would lead to a fine which was now increased to less than $1,000 for each offence.[48] Further, when the offence is committed or continued for more than one day it shall be considered as a separate offence. The time limitation for proceedings in respect of an offence for failure to comply under this section was now raised to less than three years from the time of the proceedings.[49] The new substantive features of the provisions are summarized and shown in greater detail in Table 3 hereafter.

Table 3 - Shipping Conferences Exemption Act, 1987

s. 4 1(b)*(iv)* contains no term or condition in a standard form approved by the members of a conference requiring a shipper of goods to offer to those members for transportation by them all goods shipped by that shipper
s. 4(3). The non-application of the Competition Act unless the conference agreement provides for: a) independent action with five days notice period; b) adopting independent action by any other member of the conference; c) publication of the new rate or service in a tariff not later five days after notice
s. 4(3.1) The terms and conditions established by a conference agreement under paragraph in c shall not have the effect of preventing a member of the conference from negotiating or entering into a service contract on terms and conditions that the member considers appropriate and without having to give notice to the other members or having to divulge the terms and conditions of the contract.
s. 4(4) The non-application of the Competition Act if any member of conference agreement engages in a practice of predatory pricing that has the effect or tendency of substantially lessening competition or eliminating a competitor or is designed to have that effect and that is a practice of anti-competitive acts referred to in paragraph 79(1)(b) of that Act.
s. 5(2) The non-application of the Competition Act does not apply if the parties to the agreement enter jointly into any contract, agreement or arrangement with any carrier in Canada for the purpose of establishing the amount to be paid by any party to the agreement to any such carrier for the inland transportation of goods for which that party has charged a through rate for the transportation of those goods.
s. 20. Members of a conference engaged in the transportation of goods from any place in Canada to any place outside Canada shall, when reasonably requested in writing by any designated shipper group to do so, meet with the designated shipper group and shall provide the designated shipper group with information sufficient for the satisfactory conduct of the meeting.
s. 21 The Minister of Transport may designate any organization or association of shippers as representing, in the opinion of the Minister of Transport, for the purposes of this Act, the interests of those shippers.
s. 24. Offence and Punishment: If a member of a conference fails to comply with an obligation imposed on the member by this Act or the regulations, that member is guilty of an offence punishable on summary conviction and liable to a fine not exceeding $10,000 for each offence.

Though the Shipping Conferences Exemption Act, 1987 introduced several pro-competitive measures, it failed to deregulate the industry through its exemption of shipping conferences from the Competition Act**.**[50] Further, the provision to strengthen the position of the shippers through a shipper group, designated to represent shipper interest, continued to be ineffective due to the vagueness of the provision on the meaning of 'information sufficient for the satisfactory conduct of the meeting'. Finally, it failed to consider the appropriateness of the Act in light of the changing conditions such as superconferences and other types of agreements such as stabilization, discussion and bridging agreements.

[46] See subsection 16(3).

[47] See subsection 22(3).

[48] See subsection 24(1). subsection 24(1). The wording of this subsection was also slightly altered to indicate that the member was 'punishable' and then liable to a fine for failure to comply.

[49] See subsections 24(2) and 24(3).

[50] The limited effectiveness of these procompetitive measures have been indicated in the Submission to the National Transport Review Commission, by the Director of Investigation and Research, Competition Act, June 30, 1992, pp. 12-16. The Director also indicated other measures to enhance competition such as a competitive approach to multimodal rate-setting through independent offering of such rates, reduction in the notice period for independent action, and individual service contracts, see pp. 27-30.

It is worthwhile noting that three reports[51] were released after the enactment of the 1987 Act, the most important was the March 1993 report by the National Transportation Act Review Commission (i.e. NTARC). The Commission noted that the exemption runs counter to the general policy of encouraging competition. In principle opposition was expressed regarding the intent of SCEA as it is clearly in conflict with the thrust of National Transportation Policy 1987. It made three recommendations that: 1. "the Minister of Transport introduce legislation to repeal SCEA at such time as United States antitrust immunity for shipping conferences in withdrawn" (due to the possible uncertainty and the need for international action); 2. conferences should be allowed to negotiate with inland carriers for through freight rates (i.e. multimodal rates); and 3. "the federal cabinet reduce to ten days the notice period for independent action by shipping conference members" (to encourage more carriers to set independent rates). The NTARC also listed a number of other proposals.[52] The last two recommendations were accepted by the Standing Committee on Transport, however regarding the first, it recommended "That the Minister of Transport not accept the NTARC's recommendation to automatically repeal the SCEA when the U.S. government removes antitrust immunity of shipping conferences, but undertake a review of the legislation at that time and refer it to the Standing Committee on Transport."[53]

4. *Amendments to the Shipping Conferences Exemption Act, 1987*

The *Shipping Conferences Exemption Act* was again amended in 2001, it received Royal assent on November 1, 2001 and came into force on January 30, 2002. The key features of the amendments relating to competition and efficiency were:

- a reduction of notice period required for independent action on tariffs to five days from the present fifteen days;
- a provision for mandatory individual service contracts;
- a provision for filing documents electronically;
- a deletion of the requirement to file tariffs and individual service contracts

There are several other new features. The Act provides for adopting independent action on the same day. 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 the substance of the contract. A new provision provides for making tariffs available to the public at a reasonable price. The fine for non-compliance has been increased to $10,000 for each offence. Other amendments are designed to accommodate the above changes and to provide for reorganization of certain sections. These are shown in greater detail in Table 4.

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[51] 1. The Industry Advisory Group Report (the hearings focused on two issues: the need for SCEA; and the difficulties with SCEA); 2. Competition in Transportation, Policy and Legislation in Review, NTARC, 1993 (see Volume I, pp. 28-9, 106-110, 136-142 and 242-3, and Volume II, pp. 105-121); and 3. Report on the Recommendations of the National Transportation Act Review Commission, Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993.

[52] These pertain to the definition of a "conference", "service contract", the nature of information conferences must supply for the satisfactory conduct of a meeting, and filing of tariffs by non-vessel operating common carriers and independent action on service contracts.

[53] Report on the Recommendations of the National Transportation Act Review Commission, Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993.

Table 4 – 2001 Amendments to the Canadian Shipping Conferences Act, 1987 Act in Detail

325. Subsection 2(2) of SCEA has been amended to provide for electronic filing.

326.(1)(a) Subsection 4(3)(a) has been amended to provide for a reduction of notice period for Independent Action to five days from the present fifteen days and is specifically part of this section rather than left to a date to be fixed by the Governor in Council as in the past SCEA.

(b)Subsection 4(3)(b) provides for adopting Independent Action on the same day as the first Independent Action is taken.

(c) Subsection 4(3)(c) provides for the publication of a new rate or service five days after the notice is received by the Conference. (Formerly this was fixed by the Governor in Council. Further the order of subsections 4(3)(b) and (c) have been reversed in the amendments).

(2) Subsection 4(3.1) has been added to indicate that the terms and conditions established by a Conference will not have the effect of preventing a member of a conference from entering 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 the substance of the contract.

327. (1)(b) Subsection 6(1)(b) has been amended to indicate that there is no need for filing of individual service contracts.

(d) Subsection 6(1)(d) has been deleted so that filing of tariffs with the Canadian Transportation Agency will no longer be needed. Subsections 6(1)(e) and (f) relating to filing of loyalty contacts and amendments have been merged into subsection 6(1)(d). (Reference to tariff has been deleted from subsection (f)).

(2) Subsection 6(2) relating to contents of a tariff have been deleted. The contents of this section have basically been moved to subsection 19(3) in the amendments.

328. (d) Subsections 7(d) and (e) relating to time for filing of loyalty contracts and amendments have been merged into section 7(d). (Reference to tariff has been deleted from subsection (d)).

329. Section 18 provides for the maintenance of an office in Canada by a conference where they operate. Previously, it also included a clause for inspection of documents which is now contained in section 19.

Section 19 provides for availability of certain documents, inspection of certain documents and the contents of a tariff. It specifically excludes service contracts which were also not allowed in the present Act. This section basically is a rewrite of sections 18 and 19 in SCEA and an addition of the previous subsection 6(2).

330. Subsection 24(1) has been revised to provide for an increase in the fine for non-compliance to $10,000 (Previously it was $1,000).

C. Developments that played an important role in the evolution of the liner legislation

1970

After the passage of the first law governing shipping conferences in Canada two noteworthy reports appeared. First, in 1978, a study was undertaken for Consumer and Corporate Affairs on *Shipping Conferences in Canada*.[54] The purpose of this study was to reassess the status of shipping conferences in the light of present and possible future developments in the exempted shipping industry. The study examined the operation of the provisions of the Shipping Conferences Exemption Act and offered suggestions as to how the act can be improved in order to provide maximum benefits to Canadian users of shipping services.

Second, a study was prepared by the Canadian Transport Commission in 1979, as the Shipping Conference Exemption Act was to expire in March 1979.[55] "The study is a consolidation of the contents of several working papers completed earlier by the Research Branch of the Canadian Transport Commission. These background papers were prepared at the request of the Commission's Water Transport Committee and of the Interdepartmental Liaison Committee on the Shipping Conferences Exemption Act. The report is divided into five sections: 1) Purpose and Background; 2) General Summary and Conclusions; 3) Characteristics of Canadian Ocean Liner Trade; 4) Shipping Conference Practices in

[54] Shipping Conferences in Canada by I.A. Bryan and Y. Kotowitz (1978).

[55] International liner shipping and Canadian trade. A background study of shipping conferences operating in Canada, CTC, 1979, p. 134.

Canada and; 5) Market Power of Shipping Conferences. Included is a selected bibliography, appendices and eleven tables." Proposed legislation was prepared to be placed before Parliament in light of the "monopoly nature of shipping conferences, the traditional reticence of shipowners to provide details on their operations, and the fact that the member lines of conferences serving Canada are foreign companies, account in large part for a relative paucity of factual information on conferences in the Canadian trades."

The Parliamentary Secretary to the Minister of Transport (Mr. Charles Lapointe) introduced the Bill to the House on March 8, 1979 with the statement: "The government has concluded that conferences continue to serve the public interest in providing stable services at reasonable cost…shipping conferences enable us precisely to avoid, both for the Canadian consumer and for the shipper who uses that system, unduly great fluctuations…"

1979

After the 1979 Act was passed, given that the Act had a sunset clause of March 1984, there were a few noteworthy developments:[56] 1. An Interdepartmental Committee to review the Act; 2. The CTC Hearings on the Act; and 3. Transport Canada, Review of Shipping Conferences Exemption Act. First, in 1981 the Interdepartmental Committee on the Shipping Conferences Exemption Act was formed to review the practices of conferences and the operations and administration of the Act, as well as to consider the views of industry and other parties relative to the possible content of any new legislation. The Director of Investigation and Research, Combines Investigation Act submitted a Report.[57] The Report conducted included a survey of over three hundred large and small importers, exporters and freight forwarders across Canada. Canadian exporters, importers and freight forwarders (85%) were of the opinion that the "present arrangements exempting liner conferences from the Combines Investigation Act are seen as unsatisfactory... Shippers generally have not been able to negotiate loyalty (patronage) contracts which they consider to be fair and reasonable, and which require a commitment of less than their total cargo on routes served by a conference. The practice of imposing surcharges, the unilateral manner in which they are derived, and their levels are considered to be completely arbitrary and generally draw strong criticism from shippers."[58] In conclusion, surveyed shippers were generally dissatisfied with the status quo and have indicated directions in which they feel changes to the Shipping Conferences Exemption Act should be made. While shippers, consignees and freight forwarders are not in full agreement concerning the desired direction of change, their collective views rule out any rubber-stamped renewal of current legislation. Specifically, firms participating in the survey have identified the need to improve the responsiveness and accountability of conferences to the shippers they serve in the matters of general rate increases, loyalty contracts, surcharges and the consultation process. Generally, surveyed

[56] It should also be mentioned that a report was published on Deep-Sea Shipping. The report examines: The role of maritime transportation in Canada's foreign trade, the history of Canadian deep-sea shipping, and the international shipping environment are addressed. The policy options available are examined and five specific recommendations are made. Basically a core deep-sea fleet under Canadian flag is not recommended, however, opposite views held by some members of the task force are included. See Task Force on Deep-Sea Shipping, Report to the Minister, Transport Canada, Marine, Gunnar K. Sletmo, Minister of Supply and Services, Ottawa, 1985.

[57] Shipping Conferences: Survey of User's views, E.M. Ludwig and Associates, Inc., Consumer and Corporate Affairs Canada, 1983. In addition a document was also prepared entitled "Preliminary Analysis of Performance in Ocean Liner Shipping," mimeographed (Ottawa, November 1982), Bureau of Competition Policy, Consumer and Corporate Affairs Canada.

[58] Id.

firms maintain that any departures from normal business rules and regulations in governing conference operations should be contingent on conferences meeting explicitly stated obligations.[59]

Second, in June 1982, the CTC held hearings on the Shipping Conference Exemption Act, 1979, to obtain views from the shippers, conferences and the public as to the usefulness of the existing legislation and to report on continuing the exemption and any changes that may be needed when this Act expired. Notice of the inquiry was published in the Canada Gazette on February 27, 1982. The Director made representation pursuant to section 27.1 of the Combines Investigation Act at the hearings on June 29, 1982 and concluded that the exemption from the Combines Investigation Act provided to the conferences were unusual privileges, and their benefits should be extended to consumers. Further, this exemption should not be broadened to include other parties, or to broaden the scope of this Act to multimodal transport. In addition, the powers of the conference should be reduced, by eliminating loyalty contracts thereby increasing competition and the bargaining position of shippers through the right of independent action and greater disclosure on a breakdown of rates to justify additional charges. The CTC published its findings in The Shipping Conferences Exemption Act, 1979, Report of December 1982 and recommended three major changes. First, the meaning of "patronage contract" should be modified, so that the contract would be applicable to a proportion of goods mutually agreed upon or to all the goods of the shippers by the conference. Second section 15 of the Act should be modified, to provide for negotiation of rates and other terms and conditions for the carriage of goods, when requested in writing by the shipper's designated group, and to provide information sufficient for the satisfactory conduct of such negotiations. Further, if negotiations were not successful, the matter could go to a conciliator, to be appointed by the CTC, if a mutually agreed upon conciliator could not be found. Finally, the presence of the Commission may be requested by any participant in consultations between a conference and a shipper or shipper group.

Third, in 1984, Transport Canada released its review of the Shipping Conferences Exemption Act.[60]

1987

After *SCEA 1987* was enacted, several major developments on legislative proposals occurred.[61] First, in 1991, a report was prepared as part of the preparation for the 1992 Comprehensive Review of Transportation Legislation, which included the Shipping Conferences Shipping Act, 1987. "The most remarkable observations are that the legislation is little known by most shippers and that all parties involved believe that legislation has had little effect in the industry."[62] Several issues were identified in the report: 1. The difficulties of definition and interpretation; 2. The definition and status under SCEA of the emergence of new agreements (consortia, discussion, etc); 3. The negotiation of inland rates by shipping conferences – should it be allowed?; 4. The definition and status of 'open rates' under SCEA; 5. The issue of General Rate Increases and Bunker Surcharges (should it be limited per year and should it be regulated?); 6. The need for independent action on service contracts and should the 'essential terms' be

[59] Id.

[60] Review of Shipping Conferences Exemption Act, Transport Canada, Ottawa, 1984.

[61] There were also other publications such as: Canada's New Shipping Conferences Legislation: Provision for Competition within the Cartel System, Canadian Competition Policy Record 9, No. 1, March 1988, pp. 51-54; and An Assessment of the Impact of Ocean Shipping Contracts, Conference Board of Canada, Ottawa, 1991.

[62] The Shipping Conferences Exemption Act: Issues and roles for Shippers and Shipping Conferences, G.K. Sletmo and Susanne Holste, External Affairs and International Trade Canada, August 1991, p.2.

disclosed?; 7. The shortening or lengthening of the notice period from the present 15 days; 8. The difficulties with consultation (the Shipping Council of Canada deems consultation under the SCEA not satisfactory and the clause 'sufficient information' is problematic); and 9. Should SCEA be discontinued?

Second, an Industry Advisory Group conducted hearing on *SCEA 1987*. The major issues recurring through the majority of the submissions submitted to the Group were: 1. Is there need for conference exemption from the Competition Act?; and 2. What are the major difficulties with SCEA? The majority of submissions indicated that SCEA had little or no impact and that the potential repercussions do not provide any convincing reasons for the retention of the exemption. The discussion on the major difficulties with SCEA focussed on: the interpretive difficulties of the Act pertaining to definitions, the ineffectiveness of the Canadian Shippers' Council, the dispute mechanism provision, the notice period provision and how SCEA should be interpreted in a changing environment? The roles and responsibilities of the National Transportation Agency and Industry Canada were also raised.

Third, in March 1993, the National Transportation Act Review Commission (NTARC) reviewed transportation legislation and released its report.[63] It made three recommendations and a few proposals on conference liners.[64] The Commission noted that the exemption runs counter to the general policy of encouraging competition. In principle, opposition was expressed regarding the intent of SCEA as it is clearly in conflict with the competitive thrust of the NTA, 1987. Due to the possible uncertainty and the need for international action the Commission recommended that "the Minister of Transport introduce legislation to repeal SCEA at such time as United States antitrust immunity for shipping conferences is withdrawn." On the issue of multimodal rates, the Commission recommended that conferences should be allowed to negotiate with inland carriers for through freight rates. To encourage more carriers to set independent rates, the Commission recommended teat "the federal Cabinet reduce to ten days the notice period for independent action by shipping conference members." The NTARC also listed a number of other proposals.[65]

Fourth, the Standing Committee on Transportation in June 1993[66] commented on the recommendations of the NTARC Commission. The Standing Committee agreed with two of the recommendations of the NATRC: to shorten the notice period to 10 days, and to permit intermodal conference contracts for 'through freight rates for precarriage or onward land carriage'. Regarding the NTARC's recommendation to repeal SCEA when the US repeals its legislation, the Standing Committee recommended "That the Minister of Transport not accept the NTARC's recommendation to automatically repeal the SCEA when the U.S. government remove anti-trust immunity of shipping conferences, but undertake a review of the legislation at that time and refer it to the Standing Committee on Transport."

[63] Competition in Transportation, Policy and Legislation in Review, NTARC, Minister of Supply and Service in Canada, 1993. See V. I, pp. 28-29, 106-110, 136-142 and pp. 242-243, and V. II, pp. 105-121.

[64] The recommendations are in line with proposals put forward by the Director of Investigation and Research other than the one pertaining to conference agreements with other transport modes.

[65] These pertain to a definition of a "conference", "service contract", the nature of the information conferences must supply for the satisfactory conduct of the meeting, and filing of tariffs by non-vessel operating carriers and independent action on service contracts.

[66] Report on the Recommendations of the National Transportation Act Review Commission, Report of the Standing Committee on Transport, Robert A. Corbett, M.P. Chairman, June 1993.

Fifth, on January 12, 1999, Transport Canada invited stakeholders to express their views on the Shipping Conference Act, 1987 in light of recent changes to the shipping environment in the United States and as a result of developments in liner shipping in other parts of the world. The Competition Bureau provided its comments in March 1999. The comments reviewed the 1987 reforms, indicated the definitional problems with SCEA, and reviewed the developments in liner shipping since 1987. The Bureau indicated that the above developments suggest that the rationale for continuing the exemption is no longer relevant. It accordingly suggested two options: first, revoking the exemption of shipping conferences from certain provisions of the competition law; or second introducing additional competitive provisions into the existing SCEA laws. Four measures were suggested to introduce competition. First, reducing the notice period before introducing independent action (i.e., the right of a conference member to establish rates or service different from established tariffs); second, introducing confidential service contracts by any member of a conference; third, retaining and clarifying the mulitmodal provisions; and fourth, clarifying and amending certain provisions of SCEA. The Bureau indicated that in an era when promoting international competition and facilitating the role of market forces have become a cornerstone of government policy in the industrialized world, it is worthwhile reconsidering whether the current philosophy towards conferences is relevant. It maintained that conferences laws must not only be relevant to the present shipping environment but should also be designed to encourage competition in international shipping and promote the growth of Canadian exports through a greater reliance on the marketplace. The opinion of stakeholders in general differ as to what should become of SCEA. The majority of responses indicated that amendments are necessary. Many contended that doing nothing will disadvantage Canadian industries, shippers, ports and ultimately the consumer. While some issues gained a wide support for a particular course of action, others received a more varied response.

Sixth, Transport Canada prepared a Consultation Paper in 1999 containing various options for change in light of the earlier submissions from stakeholders. The Consultation paper provided four options and recommended the fourth option – Amend the Act by Introducing Pro-competitive Provisions. "While maintaining antitrust immunity for liner conferences, this Option allows for the implementation of provisions which would have a pro-competitive effect. The changes are responsive to the current environment, continue to protect Canada's competitiveness in international trade, and maintain Canadian legislation in step with major trading partners. These proposals will result in injecting greater competition into the process of carrier-shipper relationships, reducing burden on industry, and moving Canada's legislation for shipping conferences closer to a state when antitrust immunity may no longer be warranted." The list of proposed modifications were: 1. allow electronic filing and access to conference documents; 2. abolish tariff filing for conferences; 3. reduce the number of days notice for Independent Action; 4. permit conferences to no longer establish terms and conditions for the use of service contracts; and 5. increase the level of penalty for offences. A list of issues for further consideration was also provided: the definition of a conference; the complaint mechanism; and a sunset clause. This was provided for comments to stakeholders. The Competition Bureau provided the following comments. It indicated that its comments should not be interpreted to mean support for the continuation of the exemption of shipping conferences from certain provisions of the Competition Act. Nevertheless, it offered its comments on option 4 which proposes to retain antitrust immunity while adding provisions which may have a pro-competitive effect and improve efficiency. The Bureau agreed with the list of proposed modifications concerning: the end of tariff filing; electronic filing of documents; shorter notice period on independent action; and individual service contracts. The first two would have the effect of cutting down on administrative costs and should improve efficiency. The adoption of shorter notice period

on independent action and the right of individual service contracts should serve to increase competition and will bring the relevant Canadian provisions in conformity with similar provisions in the U.S. and the EEC. The Bureau also addressed a number of issues of definition of a conference; complaint mechanism and the sunset provision. Based on the responses to the Consultation Paper, Transport Canada proposed amendments to SCEA, 1987 along the lines in Option 4.

Seventh, the proposed amendments in Bill C-14 were sent to the Standing Committee on Transport and Government Operations. The Competition Bureau made its submission to the Committee supporting four measures in the Bill - a reduction in the notice period for independent action on individual service contracts, mandatory individual service contracts, tariff filing, and electronic filing. The Bureau also indicated that the Committee could require that a) an individual service contract be confidential; b) the scope of the exemption be reduced; c) the clarification of certain provisions; and d) the introduction of a sunset clause.

D. Legislative developments after the last amendments

In June 2001, the Canada Transportation Act Review Panel (appointed by the Minister of Transport, the Honourable David Collenette, to conduct a review of transportation laws on June 30, 2000) submitted its Report – *Vision and Balance* to the Minister. The submissions to the Panel indicated the divergent view of carriers and ports vs. shippers. Carriers and ports largely support the policy of continuing the exemption for liner conferences under SCEA and oppose introduction of a sunset clause – as it represent a significant divergence from U.S. policy. Critics of current Canadian policy, including growing numbers of shippers, complain that SCEA constrains competition among members and limits the influence of competition from non-members. The Panel recognized that shipping conferences are likely to continue to lose influence as increasing amounts of traffic are carried under independent contracts or by non-conference carriers. Nevertheless, the Panel favours removing artificial barriers to competition, as the guarantee of cost efficiency among carriers and of service and price to users. In principle, therefore, the Panel favours eliminating the exemptions provided by SCEA. In view of the above,

- "The Panel recommends that the government make clear its commitment to eventual elimination of the liner conference exemptions from competition law and that it actively pursue multilateral agreement among international partners to do so."[67]

From 2002 to 2014, there were no reports on SCEA other than that Transport Canada was monitoring the impact of the SCEA reforms together with developments occurring on the international front. In 2014, Transport Canada undertook a review of Canada's transportation laws. On February 27, 2015, the Commissioner of Competition made a submission to this Review Panel. The submission stated

- "The rationale for shipping conferences laws is outdated. Tariffs resulting from market driven decisions lead to a more efficient allocation of resources than tariffs established on a common collaborative basis. The special privilege that international shipping is given does not apply to other sectors of the economy. For instance, collective rate making was abolished in 1987 in the railway sector. The increased trends toward globalization of trade reinforce the need to instill greater competitive forces into the shipping industry, including marine transportation. By way of

[67] *Vision and balance*, report of the Canada Transportation Act Review panel, June 2001, p. 146. Also see pp. 142-145.

comparison, in 2006, the European Union repealed its block exemption from European competition law for liner shipping conferences. The repeal ultimately went into effect in October 2008 after a two-year transition period."[68] It therefore recommended "*That the Government end the exemption to shipping conferences from competition law."*[69]

Similarly, The Freight Management Association of Canada (FMA) in its submission stated

- "While FMA has not noted any pressure from its member companies to amend or repeal SCEA, the need to exempt ocean shipping from competition laws seems to be unnecessary as it is generally not working. FMA recommends that Transport Canada open discussions with the U.S. Department of Transport (DOT) to determine if OSRA and SCEA should be amended or repealed."[70] Regarding consortia it stated "While shippers have been broadly supportive of traditional consortia and vessel sharing agreements (VSAs), many shippers are concerned that the new alliances go well beyond vessel sharing in terms of their scale and the sharing of information and data on capacity and costs. FMA recommends that Transport Canada work with European, U.S. and other nations to collect data and monitor the operation of the alliances to promote competition on the major freight lanes."[71]

The review resulted in the publication of the Emerson Report in 2016, *Pathways: Connecting Canada's Transportation System to the World*. The Report made no mention of shipping conferences or amendments to the law governing them.

In 2022, the Canada's Competition Bureau joined the competition authorities of the United States, Australia, New Zealand, and the United Kingdom in a new working group focused on sharing information to identify and prevent potentially anti-competitive conduct in the global supply and distribution of goods.[72]

On December 13, 2022, the Canadian International Freight Forwarders Association (CIFFA) submitted a brief on the Shipping Conferences Exemption Act to Minister of Innovation, Science and Economic Development Canada. It stated that "Under this legislation a specific community of transportation service providers is exempt from the provisions of the *Competition Act*. … It is CIFFA's position that the rationale for this extraordinary measure has long been overtaken by economic realities and the benefits of vigorous competition have been denied to Canadian customers. In consideration of changes to Canada's competition regime, it's essential that this aberrant law be removed. … The main argument in favour of permitting collusion among ocean shipping firms was the supposed benefit of "stable prices." … through the crisis of Covid 19, Canadian customers would have avoided many billions of dollars in shipping fees. … Some members reported rates six times higher than they had paid in 2019. … Far from providing stable

[68] Submission to the Canada Transportation Act Review Panel: Rail, air and marine transportation, February 27, 2015, www.competitionbureau.gc.ca

[69] Id.

[70] Submission # 2 to the Canada Transportation Act Review Covering Air, Marine, Truck Freight Transportation, July 21, 2015, p. 7 www.ontruck.org

[71] Id. p. 8.

[72] Canada joins international group investigating freight competition, February 21, 2022, www.insidelogistics.ca

rates, the industry's ability to cooperate on pricing allowed an unprecedented extraction from customers, exacerbating an economic crisis. … A particular issue vividly outlines how Canadians are not served by the absence of competition in ocean shipping … called demurrage and detention fees. … One explanation for Canada's willingness to exempt ocean shipping from the Competition Act was the supposed benefit the conferences would provide to Canada's domestic shipping industry. But this justification has plainly not worked. At present Canada has no ocean shipping firms registered as part of a conference. … Today, in reality, there are 3 "alliances" … [which] control in excess of 80% of global ocean movements." It concluded by stating "The exemption of ocean shipping from Canadian competition law has not resulted in benefits for consumers. It has not assured us of stable prices, or encouraged the development of domestic ocean shipping. As the government of Canada considers the future of the *Competition Act*, it's essential that this aberrant off-shoot be repealed."[73]

In June 2013, the FMA along with other shipper associations, made a submission to the Canadian Competition Bureau to bring attention to the anti-competitive behaviour of ocean carriers who serve Canadian customers. During Covid, there were serious service issues or no service at all and very high rates. The FMA continues to ask Transport Canada to repeal the Shipping Conference Exemption Act (SCEA), the act that allows ocean carriers to reduce competition.[74]

E. Summary

In 1970, Canada passed its first law, the *1970 Shipping Conferences Exemption Act,* governing shipping conferences. It was based on the rationale and recommendations of the Restrictive Trade Practices Commission, and granted an exemption for shipping conference agreements from the *Combines Investigation Act*. The Act was to expire in 1979, so studies in 1978 were undertaken by the Department of Consumer and Affairs, Transport Canada and Canadian Transport Commission leading to the *Shipping Conferences Exemption Act, 1979*. The Act introduced provisions to strengthen the bargaining position of shippers vis-à-vis the conferences and extended the scope of the exemption to interconference agreements and agreements between conferences and independents. In 1981, an Interdepartmental Review, hearings by the Canadian Transport Commission and a review by Transport Canada led to the *Shipping Conferences Exemption Act, 1987*. The Act reversed the extension introduced in the previous act, introduced competitive provisions to restrict loyalty contracts, make provisions for service contracts, independent action on rates together with limiting the exemptions in the case of predatory pricing and to ocean rates only (i.e. exemption does not cover multimodal rates). In 1991 studies were prepared for the 1993 review of transport legislation. In 1993, NTARC released its report and made three recommendations: repeal SCEA as the intent of SCEA as it is clearly in conflict with the competitive thrust of the NTA, 1987; increase the notice period to 10 days; and permit intermodal conference contracts. In 1999, Transport Canada invited stakeholders to express their views, it then prepared a Consultation Paper and provided four options and recommended the fourth – *Amend the Act by Introducing Pro-competitive Provisions*. It was provided to stakeholders for comment and a bill was

[73] Canadian International Freight Forwarders Association Brief on Shipping Conference Exemption Act, December 13, 2022, www.ciffa.com

[74] Shifting the needle – Part three: FMA, June 9, 2023, www.insidelogistics.ca

drafted and sent to the Standing Committee. In 2001, the *Shipping Conferences Exemption Act* was amended providing for: a reduction of notice period required for independent action on tariffs to five days from the present fifteen days; a provision for mandatory individual service contracts; a provision for filing documents electronically; a deletion of the requirement to file tariffs and individual service contracts. It received Royal assent on November 1, 2001. A review of transportation laws were undertaken in 2001 by the Review Panel. Submission were made to the panel which indicated the divergent view of carriers and ports vs. shippers regarding continuing the exemption. The Review Panel released its report *Vision and Balance* in 2001. It recommended that the government make clear its commitment to eventual eliminate liner conference exemptions from competition law and undertake consultation with the US. In 2014, Transport Canada undertook a review of Canada's transportation laws. Submissions were made and it led to a report in 2016 *Pathways: Connecting Canada's Transportation System to the World*. The Report made no mention of shipping conferences or amendments to the law governing them. In 2022, Canada's Competition Bureau joined the competition authorities of other countries in a new working group focused on sharing information to identify and prevent potentially anti-competitive conduct in the global supply and distribution of goods.

SECTION IV–EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION IN THE EEC

A. Background to Conference – Consortia Regulation in the 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 tolerated them. 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.[1]

B. Conference - Consortia Regulation in the EEC

1. *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*

The Regulation consisted of twenty-seven Articles in two sections and came into effect on July 1, 1987. The key elements contained in Section I of the Regulation were:

- Exemptions to technical, price fixing and transport users and conferences from certain Articles of the Treaty of Rome
- Restrictions on the Agreements
- Monitoring of the Agreements
- Conflicts with international law

The exemption to technical agreements in Article 2 include six types of acts: (a) the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations; (b) the exchange or pooling for the purpose of operating transport services, of vessels, space on vessels or slots and other means of transport, staff, equipment or fixed installations; (c) the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations; (d) the coordination of transport timetables for connecting routes; (e) the consolidation of individual consignments; and (f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.[2] The exemption from Article 85(1) also includes decisions and concerted

[1] See Regulation (EEC) No.4057/86, No.4055/86 and No. 4056/86.

[2] 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, Article 2.

actions when they have as their objective the fixing of rates and conditions of carriage, one or more of the following objectives: (a) the coordination of shipping timetables, sailing dates or dates of calls; (b) the determination of the frequency of sailings or calls; (c) the coordination or allocation of sailings or calls among members of the conference; (d) the regulation of the carrying capacity offered by each member; and (e) the allocation of cargo or revenue among members.[3] The exemption is also provided to agreements, decisions and concerned practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5 (1) and (2).[4]

Restrictions are provided for in sections 4 and 5. The exemption provided for price and transport users and conferences shall be granted subject to the condition that the agreement, decision or concerted practice shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.[5] In addition certain obligations are attached to liner agreements, decisions and concerted practices.[6] These obligations include the right of consultations regarding rates, conditions and quality of scheduled maritime transport services;[7] the right to loyalty contracts that include safeguards;[8] free choice in respect of inland transport operations and quay side services not covered by the freight charge;[9] the availability of tariffs, related conditions, to users at reasonable cost or their availability at offices of shipping lines and their agents;[10] and notification to the Commission when they resolve disputes relating to the practices of conferences of awards at arbitration and recommendations.[11] The loyalty contracts shall offer a system of immediate rebates or deferred rebates; and after consultation with users inclusion or exclusion of any portion of cargo from loyalty arrangement, non unilateral imposition of 100 % loyalty arrangements and circumstances of release from loyalty contracts.[12] It should be noted that prohibition of the abuse of a dominant position within the meaning of Article 86 of the Treaty of Rome is provided for in Article 8. Exemption of agreements may be withdrawn if it has the effects which are incompatible with Article 86. Further all appropriate measures may be taken for bringing an end to infringements of this article.[13]

Monitoring of exempted agreements is provided for in Article 7. In the event of a reach of an obligation, conditions are laid down to put an end to such a breach.[14] Where the agreement which qualifies for exemption is incompatible owing to the special circumstances with the conditions laid down in Article

[3] Id. Article 3.
[4] Id. Article 6.
[5] Id. Article 4.
[6] Id. Article 5.
[7] Id. Article 5(1).
[8] Id. Article 5(2).
[9] Id. Article 5(3).
[10] Id. Article 5(4).
[11] Id. Article 5(5).
[12] Id. Article 5(2) (b).
[13] Id. Article 8.
[14] Id. Article 7(1).

85(3) of the Treaty of Rome, the Commission may take measure whose severity is in gravity to the proportion of the situation. The special circumstances are acts of conferences or a change of market conditions resulting in the absence or elimination of actual or potential competition,[15] acts of conference which may prevent technical or economic progress or user participation in the benefits; and acts of third countries which prevent the operation of outsiders in a trade, impose unfair tariffs on conference members, impose arrangements which otherwise impede technical or economic progress.

Conflicts with international law are provided for in Article 9. Where as a result of this regulation, conflict arises with important Community trading partners, the Commission shall undertake consultations aimed at reconciliation.[16] Where agreements need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.[17] Besides the above substantive provisions, Section II covers Articles 13 to 27 shown in Table 1.

Table 1 - 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

1. Subject matter and scope of Regulation	10. Procedures on complaints	19. Fines
2. Technical Agreements	11. Result of procedures of complaint	20. Periodic penalty payments
3. Exemption for Agreements	12. Application of Article 85(3)	21. Review by the Court of Justice
4. Condition attaching to Agreements	13. Duration & Revocation of decisions applying to 85(3)	22. Unit of Accounts
5. Obligations attaching to Agreements	14. Powers	23. Hearing of the parties and of third persons
6. Exemption attaching for agreements between users and conferences	15. Liaison with the authorities of Member States	24. Professional secrecy
7. Monitoring of exempted agreements	16. Requests for information	25. Publication of Decisions
8. Effects incompatible with the Article 86 of the Treaty	17. Investigations	26. Implementing provisions
9. Conflicts of International law	18. Investigating Powers	27. Entry into force

In September 2006, EU Council adopted Regulation 1419/2006 which repealed Regulation 4056/86. When the EEC, removed the exemption to liner shipping conference which went into effect in 2008, it was not total, it only applied to price agreements of shipping conferences. Non-rate agreements (eg. consortia agreements) continued to enjoy the exemption. The exemption to these agreements were covered under Regulation No. 870/95 which went into effect on April 21, 1995.[18]

2. *Regulation No. 870/95*

The Regulation consisted of thirteen articles in five chapters. The key elements of the Regulation were:

- 1. the exempted agreements cover: joint operation of shipping liner services; temporary capacity agreements; joint operation or use of port terminals and related services; participation in one or more of the following pools: tonnage, revenue or net revenue; joint

[15] The Commission shall enter into consultations with the competent authorities of the third country concerned, if actual or potential competition is absent or eliminated as a result of action by a third country. It can also withdraw the exemption if the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 83 (3(b). It should also rule when an additional exemption should be granted to gain access to the market for non-conference lines. See Article 7(1) and (2).

[16] Id. Article 9(1).

[17] Id. Article 9(2).

[18] COMMISSION REGULATION (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92, www.eur-lex.europa.eu

voting regarding activities; joint market structure/joint bills of lading; and any other ancillary activities. The exemption does not apply to non utilization of capacity.

- 2. the conditions for exemptions are: a. evidence of effective price competition between consortia members (i.e. independent action, or individual service contracts, or competition from non-consortia); b. market share of less than 30% for members within a consortium or market share of up to 35% for carriers not members of a consortium; c. market share of consortium members between 30% or 35% and 50% must notify the Commission; d. the right of withdrawal without penalty on 6 months notice, after an initial period of 18/30 months; e. own service arrangements for individual service contract; and f. independent marketing by consortium members. g. no detriment to EC ports/users/carriers.
- 3. the exemption may be withdrawn if the Commission finds: a. absence of competition from outside; b. failure to comply with other obligations (consultation with users), incompatible with Article 86, and result from an arbitration award.

The Regulation also required: consultation between users and consortium members (together with procedures for consultation), provision of information to users at reasonable costs, notification to the Commission of arbitration awards, and conditions and obligations (set out in Part IV and V of the Regulation) have been met at the Commission request.[19] The **e**xemption also covers agreements between transport users and consortia concerning the use of scheduled maritime transport service – exemptions also applies to arrangements between transport users and consortia.[20] Details of this Regulation are summarized in Table 2.

Table 2 - Regulation No. 870/95 95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92

I. Definitions and Scope: 1. *Definition* - defines: 'consortium', 'liner shipping', 'service arrangement', 'transport user', and independent rate action 2. *Scope* - the regulation apply to consortia that provide international liner transport services to Community ports
II. Exemptions: 3. *Exempted agreements* – the exemption covers: a. joint operation of shipping liner services (i.e., only to - the sailing timetables and ports of call; the exchange, sale or cross-chartering of space or slots on vessels; the pooling of vessels/port installation; the use of: joint offices; equipment; and data); b. temporary capacity agreements; c. joint operation or use of port terminals and related services (e.g. lighterage or stevedoring services); d. participation in one or more of the following pools; d. tonnage, revenue or net revenue; e. joint voting regarding activities; f. joint market structure/joint bills of lading; and g. any other ancillary activities. 4. *Non utilization of capacity* - (exemption does not apply to arrangements on non utilization of capacity of vessels operated by consortium)
III. Conditions attaching to exemption: 5. *Basic conditions for grant of exemption* - there is effective price competition between the members of the conference within which the consortium operates (i.e. at least one condition must exist: independent rate action; individual service contracts; competition from non conference shipping lines) 6. *Conditions relating to share or trade* – to obtain the exemption the consortium market share must be less than 30% within a conference or less than 35% outside a conference 7. *Opposition Procedure* – the exemption also applies to a consortium with a market share of between 30% or 35% and 50% on condition that the Commission is notified and no objection is issued within 6 months. When the Commission may oppose and withdraw opposition is indicated. 8. *Other Conditions* – 1. own service arrangements on individual service contracts must be permitted by consortia members; 2. 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; 3. Consortium members must be free to engage in independent marketing; 4. Consortium or consortia members shall not cause detriment to ports, users or carriers within the common market.

[19] See Article 9 of above Regulation.

[20] See Article 10 of COMMISSION REGULATION (EC) No 870/95. 'transport user` means any undertaking (e.g. shipper, consignee, forwarder, etc.) which has entered into, or demonstrated an intention to enter into, a contractual agreement with a consortium (or one of its members) for the shipment of goods, or any association of shippers

IV. Obligations: 9. *Obligations attaching to exemption* - there shall be real and effective consultation between users and consortium members and the procedures for consultation are laid; consortium and members shall provide information to users at reasonable costs; consortium shall notify Commission of arbitration awards; consortium must demonstrate at the Commission's request that the conditions and obligations have been met. 10. *Exemption for agreements between transport users and consortia concerning the use of scheduled maritime transport service* – exemptions also applies to arrangements between transport users and consortia.
V. Miscellaneous provisions: 11. *Professional secrecy* - information obtained is used for purposes of this regulation; information not to be disclosed. 12. *Withdrawal of block exemption* - Commission may withdraw the exemption when it finds: 1. absence of competition from outside; 2. failure to comply with obligations in Article 9; 3. consortium effects are incompatible with Article 86; 4. effects result from an arbitration award. 13. *Final Provisions* – regulation valid for five years (i.e. 20 April 2000)

3. *Regulation No. 823/2000*

In 2000, regulation 870/95 was amended (823/2000).[21] The Articles in the five chapters increased by one to fourteen. The most important amendments were:

- to provide exemption to consortia applying in more than one trade
- to substitute use of market share for trade share which is required to be met in each market
- to use vessels by the consortium allocated to it and to refrain from chartering space on non-consortium members; and not to assign or charter space to non-consortium members without the consent of its members

The amendments clarified the regulation by indicating that the exemption applied to more than one trade (Article 2(1)) and that the market share thresholds instead of trade share thresholds are required to be met in respect of each market on which such a consortium operates (Articles 6 and 7). It also clarified the meaning of ancillary activities by defining them (Article 3). In addition, the final provisions were now entitled transitional provisions and a new Article 14 was added. Details are shown in Table 3.

Table 3 - Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

2. 1. "consortium" means an agreement between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to one or more trades, and the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements, with the exception of price fixing;
3. The following clauses shall in particular be considered ancillary activities (a) an obligation on members of the consortium to use on the trade or trades in question vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties; (b) an obligation on members of the consortium not to assign or charter space to other vessel-operating carriers on the trade or trades in question except with the prior consent of the other members of the consortium
5. (c) whether or not a conference operates in the trade or trades in question, the consortium members are subject to effective competition, actual or potential, from shipping lines which are not members of that consortium.
6. Conditions relating to market share 1. In order to qualify for the exemption provided for in Article 3, a consortium must possess on each market upon which it operates a market share of under 30 % calculated by reference to the volume of goods carried (freight tonnes or 20-foot equivalent units) when it operates within a conference, and under 35 % when it operates outside a conference. 2. The exemption provided for in Article 3 shall continue to apply if the market share referred to in paragraph 1 of this Article is exceeded during any period of two consecutive calendar years by not more than one tenth. 3. Where one of the limits specified in paragraphs 1 and 2 is exceeded, the exemption provided for in Article 3 shall continue to apply for a period of six months following the end of the calendar year during which it was exceeded. This period shall be extended to 12 months if the excess is due to the withdrawal from the market of a carrier which is not a member of the consortium.

[21] Commission Regulation 823/2000, www.legislation.gov.uk

7. Opposition procedure 1. The exemption provided for in Articles 3 and 10 shall also apply to consortia whose market share on any market upon which it operates exceeds the limits laid down in Article 6 but does not, however, exceed 50% on any market, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation (EC) No 2843/98(5), and that the Commission does not oppose such exemption within a period of six months.
14. Entry into Force - indicating that 'This regulation shall enter into force on 26 April 2000. It shall apply until 25th April 2005.'

4. *Regulation No. 863/2004*

In 2004, before the regulation 823/2000 was to expire in 2005, the regulation was amended by Commission Regulation (EC) No 463/2004 of 12 March 2004 and came into force on May 1, 2004.[22] The noteworthy element of this amendment was:

- to abolish the opposition procedure – (to a consortium with a market share of between 30% or 35% and 50%)

The other amendments were to introduce references to new powers of the national competition authorities and align them with other regulations, to delete reference to notification of consortia (i.e. arbitration awards and recommendations of conciliators, which have been accepted by the parties and which settle disputes concerning practices of consortia) together with introduction of transitional provisions in respect of notifications already made under the opposition procedure. Accordingly, Article 7 on opposition procedure was deleted, paragraph 4 in Article 9 on obligations attaching to exemptions was deleted and paragraph 5 was replaced together with a replacement of Articles 11, 12 and Article 13. The details are summarized in Table 4.

Table 4 - Commission Regulation (EC) No 463/2004 of 12 March 2004 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies

1. Article 7 is deleted (pertaining to the opposition procedure)
2. Article 9 is amended by deleting paragraph 4 and paragraph 5 replaced by Any consortium claiming the benefit of this Regulation must be able, on being given a period of notice which the Commission *or the Member States' competition authorities* shall determine on a case-by-case basis and which shall be not less than one month, to demonstrate at the request of the Commission or the Member States' competition authorities that the conditions and obligations imposed by Articles 5 to 8 and paragraphs 2 and 3 of this Article are met. It must submit the consortium agreement in question to the Commission *or the Member States' competition authorities* as appropriate within that period.
3. In Article 11, paragraph 1 is replaced by the following: '1. Information acquired as a result of the application of Article 9(5) shall be used only for the purposes of this Regulation.'
4. Article 12 is replaced by the following: 1. The Commission may withdraw the benefit of this Regulation … where it finds: (a) absence of effective competition from outside (b) failure to comply with obligations in Article 9; (c) such effects result from an arbitration award. 2. effects (of an agreement, decision, or concerted practice) that are incompatible with Article 81(3)
5. In Article 13, paragraph 2 is replaced by the following: '2. A notification made pursuant to Article 7 in respect of which the period of six months referred to in the second subparagraph of paragraph 1 of that Article has not expired shall lapse as from 1 May 2004.'

5. *Regulation No. 611/2005*

In 2005, regulation (823/2000) was amended by Regulation 611/2005.[23] The amendments in 2005 made four minor amendments. The most noteworthy was:

[22] Commission Regulation (EC) No 463/2004 of 12 March 2004 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, www.eur-lex.europa.eu

[23] Commission Regulation (EC) No 611/2005 of 20 April 2005 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), www.eur-lex.europa.eu

- to include 'individual confidential contracts' to independent rate action as an indication of effective price competition as the former was now considered to be more important.

The other amendments were: to add the definitions 'commencement of the service' and 'substantial new investment'; to clarify how Article 8 was to be interpreted and to give security for new investments the article was amended adding the initial period of 24 months and (for a highly integrated consortium) 36 months if the date of entry into force of the agreement is earlier than the date of commencement of the service; and to amend Article 14 by replacing the date '25 April 2005' by '25 April 2010'. The details are summarized in Table 5.

Table 5 - Commission Regulation (EC) No 611/2005 of 20 April 2005 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

1. In the Article on definitions - new definition on 'commencement of the service' and 'substantial new investment'
2. In Article 5 To apply independent rate action to any freight rate provided for in the conference tariff and/or to enter into individual confidential contracts;
3. In Article 8 Members of a consortium must have the right to withdraw without penalty on six months notice, after an initial period of 24 months (formerly 18 months). In the case of a highly integrated consortium, the initial period is 36 months (formerly 30 months)
4. In the second paragraph of Article 14, the date '25 April 2005' is replaced by '25 April 2010'.

Since the 2005 consortia exemption was to expire in April 2010, the Commission began reviewing the exemption in 2007.

6. *Regulation No. 906/209*

On September 2009, the Commission decided to extend the block exemption to consortia for another five years (Regulation No 906/2009).[24] The regulation was reduced and simplified from five chapters to four and from thirteen articles to seven. The highlights of the amendments were:

- 1. Reduction in market share threshold from 35% to 30%.
- 2. Extension of the exemption to all cargo liner shipping services not just to container.
- 3. Calculation of 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. Extension of exit and lock-in periods for withdrawals.

The details are summarized in Table 6.

Table 6 - Regulation No. 906/209 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

I. Scope and Definitions: 1. *Scope* - the regulation apply to consortia that provide international liner transport services to Community ports. 2. *Definition* - defines: 'consortium', 'liner shipping', 'transport user', and 'commencement of the service'.
II. Exemptions: 3. *Exempted agreements* – the exemption covers: a. joint operation of shipping liner services (including: the sailing timetables and ports of call; the exchange, sale or cross-chartering of space or slots on vessels; the pooling of vessels/port installation; the use of joint offices; and provision of containers and equipment); b. capacity adjustments; c. joint operation or use of port terminals and related services (e.g. lighterage or stevedoring services); and d. any other ancillary activities (such as: use of computer data systems; use of vessels allocated to the consortium and not from third parties; and not to assign charter space to other vessel-operating carriers.

[24] Regulation No. 906/209 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), , www.eur-lex.europa.eu

Hardcore restrictions: 4. The exemption shall not apply where the consortium has as an object: a. price fixing; b. capacity restrictions except for capacity adjustments; c. allocation of markets or customers.
III. Conditions and Exemptions: 5. *Conditions relating to market share* – 1. to obtain the exemption the consortium market share must be less than 30%. 2. market share calculation - now includes: vessels in a consortium; vessels within another consortium; or vessels outside the consortium. *6. Other Conditions* – 1. members of a consortium must have the right to withdraw without penalty on six months notice, after an initial period of 24 months. In the case of a highly integrated consortium, after twelve months notice after an initial period of 30 months.
IV. Final Provisions: *7. Entry into force:* regulation enters into force on 26 April 2010 and applies until 25 April 2015.

It was suggested that the amendments were made by the Commission to facilitate transition to the standard competitive regime applied to all economic sectors. The European Shippers Council (ESC) indicated that it supported the extension of the consortia exemption to 2015, so long as carrier consortia keep to activities that don't reduce competition. On 27 February 2014, the European Commission invited comments on a proposal to amend the liner shipping consortia block exemption (Regulation 906/2009) as regards its period of application. After a public consultation, the Commission on June 24, 2014 concluded "that the exemption has worked well, providing legal certainty to agreements which bring benefits to customers and do not unduly distort competition, and that current market circumstances warrant a prolongation."[25] The Regulation stated "Regulation (EC) No 906/2009 simplified and introduced substantial modifications to the rules applicable to consortia. Since the new legal framework has been in place and applied for only a short period of time, further changes should be avoided at this stage. This will avoid increasing the compliance costs of the operators in the industry."

7. *Regulation No. 697/2014*

On June 24, 2014, the Commission decided to extend the block exemption to consortia for another five years (Regulation No 697/2014).[26] The major feature of this amendment was:

- Extension of the Regulation to April 25, 2020

It therefore extended this regulation to April 25, 2020 - Article 7- (Regulation No 697/2014)[27] as shown in Table 7.

Table 7 - COMMISSION REGULATION (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application

Article 1 In Article 7 of Regulation (EC) No 906/2009 '25 April 2015' is replaced by '25 April 2020'.

In September 2018, before the regulation was to expire, the Commission launched a public consultation and conducted an evaluation of the Consortia Block Exemption Regulation (BER).[28] It reviewed 21 submissions. Most comments submitted to the Commission were against renewing the BER in its current form and mirrored an earlier call for feedback made in 2018, with carriers firmly in favour of the BER

[25] Antitrust: Commission extends validity of special competition regime for liner shipping consortia until April 2020, European Commission, Press Release, Brussels, June 24, 2014, www.ec.europa.eu

[26] Regulation No. 906/209 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), www.eur-lex.europa.eu

[27] Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, www.eur-lex.europa.eu

[28] Antitrust: Commission prolongs the validity of block exemption for liner shipping consortia, Brussels, 24 March 2020, European Commission - Press release, www.ec.europa.eu

extension, and their customers all strongly opposed. The findings of the evaluation were summarised in a Staff Working Document (November 2019). The evaluation showed that despite evolutions in the market (increased consolidation, concentration, technological change, and increasing size of vessels) the Consortia BER is still fit for purpose, in line with the Commission's "Better Regulation" approach to policy-making, and delivers on its objectives. Moreover, the consortia agreements that meet the conditions set out in the Consortia BER continue to satisfy the conditions laid down in Article 101(3) Functioning of the European Union (TFEU). More specifically, the Commission has found that the Consortia BER results in efficiencies for carriers that can better use vessels' capacity and offer more connections. The exemption only applies to consortia with a market share not exceeding 30% and whose members are free to price independently. In that context, those efficiencies result in lower prices and better quality of service for consumers. Specifically, the evaluation has shown that in recent years both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) have decreased by approximately 30% and quality of service has remained stable. The Commission decided therefore to prolong the validity of the Regulation for four years till April 25, 2024, ((EU) 2020/436 of 24 March 2020).[29]

8. *Regulation No. 2020/436*

On March 24, 2020, the Commission decided to extend the block exemption to consortia for another five years (Regulation No 697/2014).[30] The major feature of this amendment was:

- Extension of the Regulation to April 25, 2024

In Article 7 of Regulation (EC) No 906/2009, the second paragraph is replaced by the following: 'It shall apply until 25 April 2024') as shown in Table 8.

Table 8 - Commission Regulation (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application (Text with EEA relevance)

Article 1 In Article 7 of Regulation (EC) No 906/2009, the second paragraph is replaced by the following: 'It shall apply until 25 April 2024'.

Following the EU announcement, the European Transportation Federation (ETF) condemned the decision, noting it disregards the public consultation and reinforces the inequality and unfairness that is rampant in the maritime industry. Estelle Brentnall, Head of Maritime at the ETF said "Shipping lines often act as if they were the only players in the maritime industry. But their market and technological choices have consequences on the rest of the maritime supply chain, including its workers,..."[31] ETF explained that alliances and vessel sharing agreements practices, along with vertical integration of shipping companies into container terminals, have a significant impact on other parts of the industry. The current situation has a particularly negative effect on the financial profitability of terminals and other segments of the maritime industry, such as the tug sector and feeders, and adversely affects maritime jobs.

[29] COMMISSION REGULATION (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application, www.legislation.gov.uk

[30] Regulation No. 906/209 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), www.eur-lex.europa.eu

[31] EU Commission extends Consortia Block Exemption Regulation, March 26, 2020, www.safety4sea.com

C. Developments that played an important role in the evolution of the liner legislation

1. Council Regulation (EEC) No. 4056/86

Fifteen years after Regulation 4056/86 was adopted, the Lisbon European Council called on the Commission "to speed up liberalisation in areas such as gas, electricity, postal services and transport" in 2000. 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[32] 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.[33]

This led to a Review of Council Regulation (EEC) No. 4056/86 and a number of studies and papers. In light of the above report, in a historic move, on December 14, 2005, the European Commission called for an abolition of the liner conference exemption 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." [34] 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."[35] The European Shippers' Council consisting of seventeen Shippers' Council from various European countries were calling for a withdrawal of the block exemption for liner conferences.

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 25th September 2006, the matter was finally put to rest.[36] 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

[32] "This review has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers and recommends that limited anti-trust exemptions *not* be allowed to cover price-fixing and rate discussions. It also finds that capacity agreements should be carefully scrutinized to ensure that they do not distort the markets in which they are present."

[33] Competition Policy in Liner shipping, DSTI/DOT (2002)2, OECD, 2002, p. 6.

[34] Commission Proposes Repeal of Exemption, December 14, 2005, p. 1.

[35] Id.

[36] Competition: repeal of block exemption for liner shipping conferences - frequently asked questions, Memo/06/344, Brussels, September 25, 2006.

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.[37] 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.

In addition to the above, there were interpretative difficulties. The regulation required that a conference must operate under 'uniform or common rates' sometimes termed as the 'uniform rates doctrine'. Taken literally, this could imply that a carrier agreement which allows its members to deviate from the conference tariff is not a true conference and consequently loses its exemption from the competition laws.[38] Thus according to a 1995 OECD report "It is apparent that, with respect to tariff discipline, the idea of a common or uniform rate by conferences is a definition which no longer reflects the reality of ocean container shipping industry."[39] Some organizations were calling a new regulation that would force shipping lines wanting to form a conference to apply for individual exemptions rather than obtaining block exemption without having to notify the European Commission. Reports indicated that the EC was unlikely to revise its Regulation in the immediate future since it was a new law and in light of cases before the courts. Finally, in September 2006, EU Council adopted Regulation 1419/2006 which repealed Regulation 4056/86.

2. Regulation No. 870/95

Regulation 870/95 was adopted as a result of two developments, the emergence of new developments in shipping and the repeal of Regulation 4056/86. First, a number of new commercial agreements had emerged in the early 1990s such as agreements between conferences, agreements between conference and non-conference carriers, and consortia. For example, the most notable agreements between conference and non-conference carriers were Eurocorde I, the Trans Atlantic Agreement and the Trans Atlantic Carriers Agreement. The development of consortia was particularly noticeable in the EEC. Of the 57 consortia operating worldwide in 1990, 40 consortia operated in Community liner trade.[40] A *Report on the Possibility of a Group Exemption for Consortia Agreements in Liner Shipping*, states "… there are 47 European Lines participating in 35 consortia serving European trades. (In the remaining 5 consortia serving European trades there seems to be no shipping lines participating). Some of these shipping lines are members of more than one consortium."[41] For example CGM participates in 13 consortia; Nedlloyd in 12; Hapag Lloyd in 11; P&OCL in 7; CMB in 6, etc. The importance of consortia agreements was also reflected in the EC Council Decision of December 1991 and in the formation of consortia such as the St. Lawrence Coordinated Service between North Europe and Canada, the Joint Mediterranean Canada

[37] Competition: Commission welcomes Council agreement to end exemption for liner shipping conferences, IP/06/1249, September 25, 2006.

[38] While the EC views that an agreement that provides for total pricing flexibility does not qualify for exemption (as it could be viewed as eliminating competition through attracting non-conferences lines and as it serves no benefit to consumers in the form of meaningful and stable prices) there appears to be some continuum where some flexibility is compatible with present day commercial practices and EEC Regulation 4056/86.

[39] Damas Philip, "Are conferences obsolete?," American Shipper, July 1996, pp. 12-13.

[40] See *Report on the Possibility of a Group Exemption for Consortia Agreements in Liner Shipping*, Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990.

[41] Id. p. 7.

Service, the East African Container Service between Europe and East Africa, and the U.K./Poland Joint Pool Agreement as soon as the regulation on consortia was passed.

Second, as mentioned, the removal of the exemption to liner shipping conference which went into effect in 2008, was not total, it only applied to price agreements of shipping conferences. Non-rate agreements (eg. consortia agreements) continued to enjoy the exemption. The exemption to these agreements were covered under Regulation No. 870/95 which went into effect on April 21, 1995. In adopting the regulation, the Commission of European Communities provided a number of reasons.[42] First, consortia agreements generally help to improve the productivity and quality of available liner shipping services through rationalization and economies of scale in the operation of vessels and utilization of port facilities. Second, they also help to promote technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity.[43] Third, users of the shipping services provided by consortia generally obtain a fair share of the benefits (i.e. frequency of service, improvement of scheduling, and better quality and personalized service through the use of more modern vessels and other equipment including port facilities) resulting from the improvements in productivity and service quality which they bring about.[44] Therefore, these agreements should benefit from a block exemption provided they do not give the companies concerned the possibility of eliminating competition in a substantial part of the trade in question.[45]

3. *Regulation No. 823/2000*

Regulation 823/2000 was adopted because of ambiguities in the interpretation of the Regulation 870/95. There were three major ambiguities. First, does the exemption apply to more than one trade lane. The amendment clarified this by stating that the regulation applies to more than one trade or trade lane. This was accomplished by substituting the words 'one or more trades' for the word in the definition and in the Articles in 5 and 6.

Second, the regulation used the word 'trade" this created some ambiguity as to what was meant by trade, does it cover all individual markets or market pairs. The amendment substituted the word 'market share' for 'trade share' in Article 6. The market share threshold applies to each pair of markets that the consortium operates to qualify for the exemption rather than the entire trade. By narrowing the definition to each market, it reduces the scope of exemption provided. A wider market definition which includes all of its market pairs would likely make it easier to satisfy the 30% to 35% threshold. One source states "The most important change that Regulation 823/2000 makes to the block exemption as compared with Regulation 870/95 is in referring to market share thresholds instead of trade share thresholds (i.e. the share of trade held by the consortium between the pairs of ports that it actually serves). Market share is the usual indication of market power used in competition legislation. The trade share criterion was adopted in the previous regulation because shipping companies had considered that market shares would be difficult to calculate; experience had however shown that shipping companies were able to provide market shares."[46]

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[42] See Preamble to Regulation 870/95 and *Report on the Possibility of a Group Exemption for Consortia Agreements in Liner Shipping*, Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990.

[43] See Preamble to Regulation 870/95, paragraph 4.

[44] See Preamble to Regulation 870/95, paragraph 5.

[45] See Preamble to Regulation 870/95, paragraph 6.

[46] European Commission 2000, www.oecd.org

Third, the exemption in the previous definition simply stated 'ancillary activities'. The amendment clarifies the meaning of 'ancillary activities' that is to be considered: a) an obligation on members of the consortium to use on the trade or trades in question vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties. This has the effect of reducing the exemption to those vessels that belong to the consortium; and (b) an obligation on members of the consortium not to assign or charter space to other vessel-operating carriers on the trade or trades in question except with the prior consent of the other members of the consortium. This has the effect of increasing the power of the consortium as members of the consortium had to obtain consent of its other member before it could charter space to other vessel-operating carriers.

4. *Regulation No. 863/2004*

The adoption of Regulation 863/2004, a year before the expiry of Regulation 823/2000 was because of the adoption of Regulation No. 1/2003 in 2003. It introduces a directly applicable exception system in which the competition authorities and the courts of the Member States have the power to apply Article 81(3) of the Treaty, in addition to Article 81(1) and Article 82. As a result, undertakings no longer have the obligation or option to notify agreements to the Commission with a view to obtaining an exemption decision. Under the new system, agreements that fulfil the conditions of Article 81(3) are legally valid and enforceable without the adoption of an administrative decision. Undertakings will be able to invoke the exception from the prohibition on agreements which restrict competition laid out in Article 81(3) as a defence in all proceedings.[47] So to align the present regulation on consortia with the above, the opposition procedure in Regulation 823/2000 was abolished and references to notification of consortia deleted.

5. *Regulation No. 611/2005*

Regulation 611/2005 was adopted to correct deficiencies in the existing regulation. Three deficiencies were noted. First, to attune the regulation on withdrawal to current practice applied in the industry Article 8 was amended. Practice indicated that it is unclear how this provision is to be interpreted in the event that the date of entry into force of the consortium agreement is earlier than the date the service actually starts, for example, when vessels are unavailable, or still under construction. Therefore in the above event the withdrawal period was extended by six month for both a consortium (to 24 months) and highly integrated consortium (to 36 months). Otherwise 18 months and 30 months[48]

Second, related to the above, the Commission regulation states "It is justifiable for consortia to seek security for new investments committed to an existing service. Therefore, the possibility for the parties to a consortium agreement to enter into a 'non-withdrawal' clause should also apply where the parties to an existing consortium agreement have agreed to make substantial new investments and the costs of such new investments justify a new 'non-withdrawal' clause."[49]

[47] See paragraph 4 in Commission Regulation (EC) No 463/2004 of 12 March 2004 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies.

[48] See paragraph 3 in Commission Regulation (EC) No 611/2005 of 20 April 2005 amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), www.eur-lex.europa.eu

[49] Id, See paragraph 5.

Third, individual confidential contracts had become more important in various trades. It was therefore decided to add this to the list in Article 5 as an indicator of effective competition, especially as independent rate action on any freight item which was presently authorized had become less important.[50]

6. *Regulation No. 906/209*

Regulation 906/209 was adopted by the Commission to facilitate transition to the standard competitive regime applied to all economic sectors. Accordingly, the regulation was reduced and simplified from five chapters to four and from thirteen articles to seven. There were three important revisions. The first was with regard to market share. Market share is the usual indication of market power used in competition legislation. The share will change depend on what is included in calculating that share and on the definition of the market. If the lines in a consortia include only what its vessels are in the consortia its share will be less than if it includes vessels that it uses with other consortia or with other independent ocean carriers or its own vessels outside the consortia agreement. Accordingly, its market share will be higher and with it its market power. Similarly, if the definition is port to port (Antwerp to Montreal) its market share will be higher than if the definition is (Antwerp to Canada), in other words a narrower definition will indicate a larger market share and its market power. So the revisions include both how the market share will be calculated and what its threshold limits will be to obtain an exemption. The calculation of 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 (Article 5(2)).[51] The threshold limits to obtain an exemption were reduced to 30% from 35% (Article 5(1)). So the revisions have the effect of both reducing the scope of the exemption and expanding the exemption.

Second, investments over fifteen years had become more costly and larger investments were made in shipping. To bring the regulation in line with reality, the notice period for withdrawal was changed on six months notice, after an initial period of 24 months (previously 18 months). In the case of a highly integrated consortium, after twelve months notice after an initial period of 36 months (Article 6(1)) (previously it was six months and initial period of 30 months).[52]

Third, the scope of the exemption was extended to all cargo lines shipping services not just to container. The previous definition of 'consortium' included 'the carriage of cargo, chiefly by container, relating to one or more trades'. The revised article on the definition of 'consortium' excluded the words 'chiefly by container' (i.e. 'the carriage of cargo relating to one or more trades'). This extends the scope of the exemption to all cargo not just container services.

On 28 September 2009, the Commission decided to extend the block exemption (Regulation No 906/2009) to consortia for another five years.[53] The European Shippers Council (ESC) indicated that it

[50] Id, See paragraph 6.

[51] See "For the assessment of whether a consortium fulfils the market share condition, the overall market shares of the consortium members should be added up. The market share of each member should take into account the overall volumes it carries within and outside the consortium. In the latter case account should be taken of all volumes carried by a member within another consortium or in relation to any service provided individually by the member, be it on its own vessels or on third party vessels pursuant to contractual arrangements such as slot charters." Paragraph 10 in Regulation No. 906/209 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), , www.eur-lex.europa.eu

[52] Id, See paragraph 11 and Article 6.

[53] Id.

supported the extension of the consortia exemption to 2015, so long as carrier consortia keep to activities that don't reduce competition.

7. *Regulation No. 697/2014*

Before the previous regulation was to expire, in 2013 the European Commission conducted an investigation. It indicated that the main tenets of the Commission's approach are still valid. In 2014, the Commission invited comments on a proposal to amend the liner shipping consortia block exemption (Regulation 906/2009) as regards its period of application. The responses to the consultation were received and posted on the Commission's website.[54] After a review of the responses to the public consultation, the Commission on June 24, 2014 concluded "that the exemption has worked well, providing legal certainty to agreements which bring benefits to customers and do not unduly distort competition, and that current market circumstances warrant a prolongation."[55] Accordingly, no changes were made to the regulation other than the extension of this regulation to April 25, 2020 - Article 7- (Regulation No 697/2014).[56]

8. *Regulation No. 2020/436*

Before the expiry date of April 25, 2020, the Commission launched a public consultation and conducted an evaluation of the Consortia Block Exemption Regulation (BER) in September 2018.[57] On 8 February 2019, to consider the issue, the International Transportation Forum brought together stakeholders from the containerised maritime supply chain for a Stakeholder Meeting, in Paris, France. "The stakeholders included representatives from the shipping sector, shippers, ports, terminals, freight forwarders, port service providers and inland waterway transport. Country representatives from the US, France, Italy, Denmark and Israel also participated in the meeting, as well as selected experts. The meeting provided an opportunity for exchange to support the European Commission in carrying out its review. The European Commission participated with a delegation of eight representatives, including Henrik Mørch, Director at DG Competition of the European Commission. The shipping sector wants to keep the exemption as is. All other stakeholders have proposed changes to it. Most of these stakeholders did not rule out repeal if such changes were not enacted. An important concern shared by all stakeholders - except the shipping representatives - is a lack of transparent data on consortia, their performance and their effects. Much of the discussion focused on possible ways to have more data available on the sector. On the one hand, this could be needed for the regulator to effectively monitor consortia, for example, data provided directly by the lines. On the other hand, stakeholders also expressed interest in publicly available data on performance and aspects that directly impact their activities."[58]

The Commission received and reviewed 21 submissions. Most comments submitted to the commission were against renewing the BER in its current form and mirrored an earlier call for feedback made in 2018, with carriers firmly in favour of the BER extension, and their customers all strongly opposed. The

[54] http://ec.europa.eu/competition/consultations/2014_maritime_consortia/index_en.html.

[55] Antitrust: Commission extends validity of special competition regime for liner shipping consortia until April 2020, European Commission, Press Release, Brussels, June 24, 2014, www.ec.europa.eu

[56] Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application, www.eur-lex.europa.eu

[57] Antitrust: Commission prolongs the validity of block exemption for liner shipping consortia, Brussels, 24 March 2020, European Commission - Press release, www.ec.europa.eu

[58] Reviewing competition exemptions for liner shipping, February 2019, www.itf-oecd.org

findings of the evaluation were summarised in a Staff Working Document (November 2019).[59] The evaluation showed that despite evolutions in the market (increased consolidation, concentration, technological change, and increasing size of vessels) the Consortia BER is still fit for purpose, in line with the Commission's "Better Regulation" approach to policy-making, and delivers on its objectives. Moreover, the consortia agreements that meet the conditions set out in the Consortia BER continue to satisfy the conditions laid down in Article 101(3) Functioning of the European Union (TFEU). More specifically, the Commission found that the Consortia BER results in efficiencies for carriers that can better use vessels' capacity and offer more connections. The exemption only applies to consortia with a market share not exceeding 30% and whose members are free to price independently. In that context, those efficiencies result in lower prices and better quality of service for consumers. Specifically, the evaluation showed that in recent years both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) have decreased by approximately 30% and quality of service has remained stable. The Commission decided therefore to prolong the validity of the Regulation for four years till April 25, 2024 ((EU) 2020/436 of 24 March 2020).[60] In Article 7 of Regulation (EC) No 906/2009, the second paragraph was replaced by the following: 'It shall apply until 25 April 2024').

This decision extending the exemption did not please everyone, especially as shipping alliances became a force to reckon with and in view of two major reports in Europe the *Global Shipping Forum Report (2016)* and the *OECD Report (2018)*. The European Transportation Federation (ETF) condemned the decision, noting it disregards public consultation and reinforces the inequality and unfairness that is rampant in the maritime industry. Estelle Brentnall, Head of Maritime at the ETF said "Shipping lines often act as if they were the only players in the maritime industry. But their market and technological choices have consequences on the rest of the maritime supply chain, including its workers,..."[61] ETF explained that alliances and vessel sharing agreements practices, along with vertical integration of shipping companies into container terminals, have a significant impact on other parts of the industry. The current situation has a particularly negative effect on the financial profitability of terminals and other segments of the maritime industry, such as the tug sector and feeders, and adversely affects maritime jobs. The expectation that the EU would put an end to antitrust immunity to consortia as it did to conference agreements has not yet materialized. But the recent change in sentiment towards global shipping alliances might have that effect.

[59] The Staff Report consisted of six chapter: 1. Introduction; 2. Background to the Intervention; 3. The Implementation of Consortia BER; 4. Evaluation Methods; 5. Answers to the Evaluation Questions and Analyses; and 6. Conclusion. The conclusion states "Their [ports/ terminal operators] complaints however were materially directed towards the alliances that to a large extent do not appear to be covered by the Consortia BER. …the overall available evidence reveals that there was no deterioration in the parameters of competition. Indeed, in recent years both costs for carriers and prices for customers per TEU decreased by approximately 30% and levels of services seem not to have deteriorated but rather remained stable since 2014. Consequently there is no reason to depart from the longstanding view that consortia are an efficient way for providing and improving liner shipping services that also benefits customers. A fair share of the benefits resulting from the efficiencies is passed on to transport users. The Consortia BER remains relevant as its objective to facilitate consortia remains appropriate in view of the ensuing benefits for customers." See COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) November 11, 2019, p. 32, www.ec.europa.eu

[60] COMMISSION REGULATION (EU) 2020/436 of 24 March 2020 amending Regulation (EC) No 906/2009 as regards its period of application, www.legislation.gov.uk

[61] EU Commission extends Consortia Block Exemption Regulation, March 26, 2020, www.safety4sea.com

D. Legislative developments after the last amendments

In October 2021, the European Commission was questioned on the unfair practices in the container shipping industry. Three questions were asked: "1. Is the Commission of the opinion that the current EU regulatory framework is fit for purpose to ensure a well-functioning container shipping market that uses fair practices? 2. What is the Commission's view on the exemptions from normal competition protections provided by the CBER in the light of the current distortion of the container shipping supply chain? 3. When can we expect the Commission to take the aforementioned necessary measures to facilitate the return to normal operations and fair practices in the container shipping supply chain?" On January 14, 2022, Executive Vice-President Vestager on behalf of the European Commission provided the following answer "The monitoring of the container shipping sector carried out by the Commission, in cooperation with other regulatory and competition authorities since the start of the pandemic, has not led to identifying anti-competitive behaviour from alliances aimed at increasing freight rates. As a consequence, the Commission does not currently consider that the applicable EU regulatory framework, including the Consortia Block Exemption Regulation, would fail to prevent unfair practices or distortions of competition in the sector. Considering the multiplicity of the causes for the price hikes and service disruptions linked to the pandemic, the Commission is still exchanging information and analyses with all relevant stakeholders to identify whether specific measures may be needed to increase the system's resilience."[62]

On July 25, 2022, ten associations in the ports, shipping and logistics sector sent a letter to the European Commissioner for Competition, Margrethe Vestager, the signatories demanded an immediate review of the EU's Consortia Block Exemption Regulation for the container shipping industry. The signatories said supply chains have suffered huge disruption, blanked and diverted sailings, skipped calls and a quadrupling of freight rates on some routes. As a result "The effects of lockdowns on the production of goods and the shifts in demand due to the effects of the Covid pandemic were certainly significant. But the ability of the shipping industry to collectively manage these impacts, and at the same generate profits totalling over $186 billion in 2021, at the expense of the rest of the supply chain, and ultimately Europe's consumers, demonstrate that something is wrong."[63] A few weeks later, they got their wish.

The European Commission sent out a notice calling for evidence on how to evaluate the Consortia regulation on August 9, 2022. The notice stated "To evaluate the Regulation, the Commission seeks to examine whether it is still effective, efficient, coherent, relevant and brings 'EU added value', considering developments on the market since it was last extended in 2020, particularly the challenges posed by the COVID-19 pandemic. While the challenges faced by the sector during the evaluation period are exceptional and unprecedented, their impact on the functioning of the maritime supply chain brings useful lessons on the role of consortia in the productivity of liner shipping services, as well as the overall efficiency and resilience of the global logistics system. As such, they provide useful information on the relevance of the Consortia Block Exemption Regulation. The assessment of whether the Regulation is still fit-for-purpose will also take into account (i) the trend towards consolidation between carriers, (ii) their vertical integration and (iii) cross-membership between consortia since 2020. Indeed, the changes in the competitive structure of liner shipping have a bearing not only on the suitability of the sector for a

[62] Question for written answer E-004569/21 to the Commission, Tom Berendsen (PPE), Annie Schreijer-Pierik (PPE), Henna Virkkunen (PPE), October 6, 2021, www.europarl.europa.eu

[63] Calls for EU container line block exemption review grow louder, Gary Howard, July 25, 2022, www.seatrade-maritme.com

block exemption from antitrust rules, but also on the number of small and medium-sized carriers that could be the main beneficiaries of the reduced compliance costs that underpin the efficiency of the block exemption."[64] The Commission has also sent targeted questionnaires to interested parties in the maritime liner shipping supply chain on the impact of consortia between liner shipping companies, as well as of the CBER on their operations since 2020.[65]

On 24 August 2022 the UK's Competition and Markets Authority (CMA) announced that it would conduct a review of the retained CBER (retained in UK law following the UK's exit from the EU). The CMA intends to assess whether the retained CBER meets its intended purpose in order to make a recommendation to government on whether to replace or vary it when it expires. In carrying out its review, the CMA will take account of specific features of the UK economy serving the interest of UK businesses and consumers. It will also consider the possible implications for the retained CBER of recent developments in liner shipping, including the impact of global supply chain difficulties. The CMA will consider responses to the consultation before making a final recommendation to the Secretary of State later in 2023. The CMA will consider responses to the consultation before making a final recommendation to the Secretary of State later in 2023.[66]

In response to its call for evidence, the European Commission received 51 submissions at the close of the call in October 3, 2022. The wide spectrum of views can be captured in two submissions. First, the Global Shipping Forum (GSF), in its response to the call for evidence states "GSF asks the Commission not to renew the Consortia Block Exemption Regulation after 2024, believing its benefits have not been fairly shared with users of liner shipping services in the time since it was last renewed in 2020."[67] GSF believes the CBER is an outdated legal instrument, which is difficult to enforce,…" If exemptions remain justified "GSF calls on the Commission to expand the scope of its evaluation beyond its customary criteria…" GSF believes the CBER is undermining users' confidence in the ability of the Commission to monitor and protect users' interests which is detrimental to international trade. "The experiences, frustrations, and dissatisfaction of large swathes of European and global business with the recent behaviour of global shipping markets justifies a change in the legislative approach, as a means of restoring trust and confidence in the container shipping industry, an industry which is vital to the economies of trading nations and meeting the needs of citizens and businesses worldwide."[68] Second, three Associations (WSC, ICS and ASA[69]) in a joint submissions have called for a renewal of the exemption. They attempted to demonstrate "how vessel sharing contributes to the EU policy goals of reducing transport emissions, increasing competitiveness and improving efficiency to reduce costs."[70] Yuichi Sonoda, Secretary General of Asian Shipowners Association said "From an operational and environmental perspective, vessel sharing is like public transport and car-pooling schemes: seeking to

[64] Call for evidence - evaluation of the Consortia Block Exemption Regulation, October 3, 2022, www.competition-policy.ec.europa.eu

[65] EU calls for feedback on performance of exemption for liner shipping consortia, August 10, 2022, www.safety4sea.com

[66] Liner Shipping Consortia Block Exemption Regulation - GOV.UK (www.gov.uk)

[67] "The deterioration of service levels experienced by shippers, together with historically high shipping rates, constitutes a manifestly unfair distribution of benefits arising from the operation of the CBER, and constitute grounds for the Commission concluding that the benefits of the Consortia Block Exemption Regulation have not been shared fairly with the users of consortia services." Response to the Call for Evidence for the Evaluation of the EU Consortia Block Exemption Regulation, October 2022, p. 15.

[68] Id. p. 2.

[69] WSC (World Shipping Council), ICS (International Chamber of Commerce) and ASA (Asian Shippers Association).

[70] Associations plead case for EU Consortia Block Exemption Regulation, Gary Howard, October 4, 2022, www.seatrade-maritme.com

maximise efficiency and reduce emissions through the shared use of transport assets and infrastructure, significantly reducing emissions per unit of cargo transported."[71] John Butler, President & CEO of World Shipping Council, said: "The frustration that shippers have understandably experienced from service delays and increased cost has been channelled towards carriers, their vessel sharing arrangements, and the regulatory tools which facilitate such arrangements, including the CBER. But data shows and regulators concur that the problems were caused by factors outside carriers' control and not by vessel sharing."[72] The Associations claim that the CBER is essential, brings benefit to the EU and has no downside from a competition or consumer welfare perspective.

E. Summary

In 1986, the European Union passed its first regulation laying down detailed rules which granted shipping conferences exemption from the competition provisions of Articles 85 and 86 of the Treaty of Rome. The OECD workshop and Report led to a review of the regulation. Based on further studies and reports which called for a repeal of the regulation on December 14, 2005, the European Commission called for an abolition of the liner conference exemption. In 2006, it adopted a regulation which repealed the regulation. But the repeal was not total, it only applied to price agreements of shipping conferences. Non-rate agreements (eg. consortia agreements) continued to enjoy the exemption. In view of the above and in light of the emergence of consortia agreements, in 1995 the European Council adopted Regulation 870/95 to grant exemption to consortia agreements. Before the expiry of the above regulation in 2000, the Council adopted Regulation 823/2000 to clarify the applicability of the regulation to more than one trade lane, substituting market share for trade share which narrowed the scope of the exemption and defined ancillary services. To clarify deficiencies in the existing regulation, in 2005, it adopted Regulation 611/2005 to extend the notice period for withdrawal, add a non withdrawal clause for new investments and also added a new requirement of individual confidential contracts as an indication of effective competition. In 2009, to facilitate transition to the standard competitive regime applied to all economic sectors, the regulation was reduced and simplified together with three revisions in Regulation 906/209. The revisions pertain: to calculation of market share to include all consortia vessels in and out of the consortia; to increase the notice period for withdrawal; and to include all vessels not just container vessels in the exemption. Before the regulation was to expire in 2015, the Commission invited comments before it revised the regulation. After its consultation, it decided to adopt regulation 697/2014 extending the regulation to 2020 as it was of the opinion that the regulation had work well providing legal certainty and benefits to customers without distorting competition. In 2018, it launched a public consultation to evaluate the block exemption. The International Transportation Forum brought together stakeholders to exchange their views and later the Commission received submissions which indicated the diverging view of carriers and shippers in its Staff Working Document. The Commission then adopted Regulation 2020/436 to prolong the validity of the exemption to April 25, 2024 as both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) had decreased by approximately 30% and quality of service had remained stable. The decision did not please everyone especially in view of the Global

[71] Id.
[72] Id.

Shipping forum Report of 2016 and the OECD Report of 2018 as shipping alliance had become a force to be reckoned with. Given that the regulation is up for review in 2024 and the events that have unfolded after Covid-19, the Commission received questions and letters and has sent out a notice how to evaluate consortia regulation.

SECTION VII–EVOLUTION OF OCEAN SHIPPING LINER LEGISLATION IN NEW ZEALAND

A. Background to Conference Legislation in New Zealand

In New Zealand the first conference is believed to have been established in 1915 with the formation of the New Zealand Overseas Shipowners' Committee. An informal agreement, however, is known to have existed as early as 1873 after intense competition between three companies.[1] As more shipping lines entered the trade during the final quarter of the 1800s and early part of the 1900s competition became more intense. By 1918, there were four shipping lines which became embodied within the Conference Agreement.[2] The development of the Conference system in New Zealand was therefore similar to the development of conferences in other parts of the world.

In the early 1900s, New Zealand appears to have adopted United Kingdom's "laissez-faire" approach to ocean shipping conferences. Ocean shipping conferences appear to have been tolerated by the New Zealand government and there was no specific exemption for them in the *Commerce Act* before 1986. Producer boards were given statutory powers by Parliament for the marketing and transport of primary produce which included shipping rates by conferences.[3] By 1980, there was growing unease among exporters, importer, farmers and politicians. On one side was the anti-conference sentiment and on the other side was the sentiment that it was the best available. The Prime Minister, Mr. Muldoon, on June 9, 1980 said: "While the Government recognises the advantageous aspects of shipping conferences, we also appreciate the dangers inherent in such a system."[4] On November 22, 1980, the *Christchurch Star* reported that the Government wants to launch a major policy review of shipping early next year because of the soaring cost of shipping our exports. It believes that the producer boards may be too conservative in their attitudes.[5] This led to an industry-specific regime, the *Shipping Act 1987*, providing an exemption to outward shipping conferences and the *Commerce Act 1986* granting an exemption.

B. Conference Legislation in New Zealand

Shipping Act 1987

The 1987 Shipping Act contains fifteen sections in three parts. I. Shipping policy and practices. II. Inter·governmental shipping relations. III. Miscellaneous provisions. It was An Act to promote fair dealing and safeguard competition in New Zealand's outwards shipping services, and to discourage discrimination against New Zealand shipping and trading interests by foreign governments. The Act overrides Parts 2 ('restrictive trade practices') and 4 ('regulated goods or services') of the 1986 *Commerce Act*, providing a customised competition framework that permits conferences and other forms of arrangements between carriers. The noteworthy features of the act were:

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[1] Shaw Savill, the Albion Line and the New Zealand Shipping Company.

[2] Shaw Savill and Albion Line, the Commonwealth and Dominion Line, the New Zealand Shipping Company, and the Federal Steam Navigation Company. The latter two are owned Peninsular and Orient. New Zealand Shipping a Marxist Analysis, p. 23 and pp. 39-40, www.ir.cantebury.ac.nz

[3] Id. p. 2. "For example, the Meat Board has total control over all meat exported, and it arranges the meat's transport. Hence, as the Meat Board represents all those who seek to export meat, it can enter into exclusive agreements with the conference lines to have the meat shipped by the Conference. The control of the conference system is therefore strengthened. The controversy about shipping arises from this exclusive system." Id. p. 2. The Meat Board had statutory authority under the *Meat Export Control Act of 1921/22* to control shipping arrangements, even though it does not ship meat on its own account at present. In the major liner trades it still exercises this authority, and negotiates rates and conditions of service with the shipping companies. Current Issues in the New Zealand Shipping Industries, Steven, Davis J., 1988, p. 32.

[4] Id. p. 10.

[5] Id.

- Six shipping policy objectives in section 3.[6]
- Unfair practices justifying use of Minister's powers in section 4.
- Minister may issue directions to carriers engaging in unfair practices in section 7.
- Exemption from the Commerce Act 1986 to outwards shipping in section 14.[7]

The unfair practices in section 4 relate to any practice or conduct that has the purpose or has or is likely to have the effect of limiting, preventing, or reducing competition in outwards shipping services including: abuse of a dominant position; failure to give reasonable notice to the New Zealand shipper of changes to terms and conditions; unreasonable refusal or failure of a carrier to enter into negotiations or consultation with a New Zealand Shipper; and abstaining from tendering for the supply of services or collusion in tendering. Other sections of the Act relate to investigation of suspected unfair practices by the Minister (section 5) and preparation of report on investigation (section 6).[8] Section 8 provides for restrictions that the directions that the minister may issue and the powers of the minister are not to be delegated (section 10). It also covers any land transport within New Zealand preliminary to export. There are other sections related to the making of regulations, designation of flag carriers, etc. These are all listed in Table 1.

Table 1 - Shipping Act 1987

I. Short Title and commencement	9. Period for which direction in force
2. Interpretation: Agreement; Carrier; Direction; Foreign government; Outwards shipping; Registered New Zealand ship; Shipper; Unfair practice.	10. Minister's powers not to be delegated
PART I - SHIPPING POLICY AND PRACTICES	11. Offences
3. Shipping policy objectives	**PART II** - INTER·GOVERNMENTAL SHIPPING RELATIONS
4. Unfair practices justifying use of Minister's powers to initiate investigations and issue directions	12. Regulations may be made for defence of New Zealand shipping or trading interests
5. Minister may investigate suspected unfair practices	13. Designation of national flag carriers
6. Report on investigation	**PART III** - MISCELLANFOUS PROVISIONS
7. Minister may issue directions to carriers engaging in unfair practices	14. Application of other Acts
8. Restrictions on directions	15. Repeal and consequential amendments

2. Commerce Act 1986

The Commerce Act of 1986 promotes competition in markets for the long term benefit of consumers in New Zealand. Part 2 deals with Prohibitions on Restrictive Trade Practices.

- arrangements that substantially affect competition
- practices taking advantage of market power for purposes of restricting entry or eliminating a competitor.
- exemptions to inwards and outwards shipping by sea

[6] In brief (a) To promote and safeguard fair competition in international shipping; (b) To safeguard against the abuse of a dominant position and entry of new carriers into New Zealand's outwards shipping; (c) To discourage practices by carriers that have the effect of limiting, preventing, or reducing competition among carriers; (d) To encourage carriers to give reasonable notice to shippers who will be affected of impending changes to the terms and conditions upon which the carrier carries goods; (e) To encourage consultation and negotiation between shippers and: (f) To recognise that commercial relations between shippers and carriers should be self-regulating while there is a satisfactory balance of advantage between the parties.

[7] Section 14 in Part 4 states "Application of other Acts-Nothing in Parts 2 and 4 of the Commerce Act 1986 shall apply to outwards shipping." Part 2 relates to Prohibitions on Restrictive Trade Practices e.g. arrangements that substantially affect competition; and practices taking advantage of market power for purposes of restricting entry or eliminating a competitor. Part 4 relates to Regulation of goods and services.

[8] "The Minister of Transport can initiate investigations into suspected unfair practices. If, following such an investigation, the Minister is satisfied that a carrier has engaged in unfair practices, he or she can direct a carrier to supply details of agreements, give reasonable notice to shippers, or enter into negotiations. As far as the Commission is aware, there have been no Ministerial investigations under Part 2 of the Act. Accordingly these arrangements must be regarded as untested, though it is possible that they act as a deterrent to unfair practices. This would be consistent with original intentions that shipper and carrier relations would 'continue to be largely self-regulating', underpinned by a 'safety net' (Minister of Transport, 1983). One criticism of the Shipping Act is that current arrangements blur the distinction between the Government's role as policy-maker and regulator (OECD, 2011). Given this and its ability to closely cooperate with foreign regulatory agencies, the Commerce Commission may be better placed to perform the regulatory role." International Freight Transport Services | Issues Paper, July 2011, p. 36, www.productivity.nz.gov

Part 2 also contains certain exemptions: 1. Statutory Exemptions - Inwards and outwards shipping (carriage of goods by sea 44(2)); Other specific practices including partnerships, standards, employment contracts, and IP; and practices specifically authorized by another act or order in council. 2. Case by case authorisation - Practices authorized by the Commission if the public benefits outweigh competition detriment. 3. Statutory exemptions under the Shipping Act - Outwards shipping (carriage of goods wholly or partly by sea 14(2) Exempt from Part 2 and 4 of the Commerce Act. Exemptions from Part 4 relate to regulation of goods and services for markets where there is little or no competition (and little or no likelihood of a substantial increase in competition); and government power to regulate prices, quality, negotiation/arbitration arrangements or information disclosure arrangements. This is shown in Table 2.

Table 2 - Commerce Act 1986

Part II	**Part IV**
….. **44. Other exceptions—** 2) Nothing in this Part of this Act applies— (a) To the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand; or (b) To any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a) of this subsection. [(3) For the purposes of subsection (2) of this section, a provision of a contract, arrangement, or understanding is not a provision exclusively for the carriage of goods by sea if it relates to the carriage of goods to or from a ship or the loading or unloading of a ship.] Subs. (3) was added by s. 11 (1) of the Port Companies Amendment Act 1990.	**…..** **52. "Controlled goods or services" defined** **53. Governor-General may impose price control in circumstances of restricted competition—** **54. Commission may report to Minister as to price control—** **55. Controlled goods or services not to be supplied except in accordance with authorised price—** **56. Records to be kept for pricing purposes—** **57. Other Acts relating to price control not affected—** Nothing in this Part and Part V of this Act shall limit or affect the exercise by any person of any power to authorise the prices for goods or services under any other Act.

There is a minor difference between the exemptions provided in the Shipping Act 1987 and the Commerce Act 1986.[9] A review of the above Acts led to amendments in both the Acts granting the exemption.

3. Amendments to the Shipping Act 1987

The amendments to this Act take effect on August 17, 2019. The amended Act repeals Part 1 on Shipping Policy and Practices (sections 3 to 11) and Part 3 Miscellaneous Provisions (sections 14 and 15) of the 1987 Act. The noteworthy features of the act were:

- Deletion of Shipping Policy and Powers of Minister to deal with unfair practices
- Removal of the exemption from Part 2 and part 4 of the Commerce Act

There are also other minor amendments in section 2 (removal of 'Direction' 'Unfair practice' and rewording of 'Registered New Zealand ship'). Section 2A has been added indicating that the Act is a Maritime act. Section 12 has been amended by adding clause (4) indicating that Regulations under this

[9] "The two exemptions are subtly different, with inconsistent treatment of importing versus exporting. Compared with other approaches, New Zealand's regulatory regime for international shipping is an outlier in that the exemptions apply widely, and largely without the limiting conditions found elsewhere. Moreover, there seems little reason to have two somewhat different exemptions, which create complexity and uncertainty. The automatic exemptions from the Commerce Act contrast with most other New Zealand industries, where the onus is on the parties to the agreement to convince the Commerce Commission that the public benefits of agreements that would otherwise breach the Commerce Act outweigh any anti-competitive detriments." International Freight Transport Services Inquiry Summary version of final report – April 2012, p. 6. The exemption in the Shipping Act 1987 also applies to the land portion of outward shipping.

section are secondary legislation. Section has been amended by deleting clause (2). The amended Shipping Act is shown in Table 3.

Table 3 - Shipping Act 1987

I. Short Title and commencement	**PART II** - INTER·GOVERNMENTAL SHIPPING RELATIONS
2. Interpretation: Agreement; Carrier; Foreign government; Outwards shipping; Registered New Zealand ship; Shipper.	12. Regulations may be made for defence of New Zealand shipping or trading interests
2A. Act is maritime Act	13. Designation of national flag carriers

4. Commerce Act Amendments

The amendments to this Act take effect on August 17, 2019. The noteworthy features of the act were:

- Removal of the exemption to international shipping
- Introduction of a block exemption for certain activities.

The block exemption in section 44A[10] applies to specified activities namely: (a) the co-ordination of schedules and the determination of port calls: (b) the exchange, sale, hire, or lease (including the sublease) of space on a ship: (c) the pooling of ships to operate a network: (d) the sharing or exchanging of equipment such as containers: and (e) capacity adjustments in response to fluctuations in supply and demand for international liner shipping services. This is shown in Table 4.

Table 4 - Commerce Act 1986

44A Exceptions in relation to international liner shipping services	**44B Further exception in relation to international liner shipping services (price fixing in relation to space on ship)**
1) Nothing in section 27(1) applies to a person in relation to a provision of a contract, arrangement, or understanding if, at the time of entering into or arriving at the contract, arrangement, or understanding, the circumstances in subsection (6) apply. (2) Nothing in section 27(2) applies to a person in relation to a provision of a contract, arrangement, or understanding if, at the time of giving effect to the provision, the circumstances in subsection (6) apply. (3) Nothing in section 27(4) affects the enforceability of a provision in any contract to which subsection (1) or (2) applies. (4) Nothing in section 30(1)(a) applies to a person in relation to a cartel provision that has the effect, or likely effect, of restricting output or market allocating if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision, the circumstances in subsection (6) apply. (5) Nothing in section 30(1)(b) applies to a person in relation to a cartel provision that has the effect, or likely effect, of restricting output or market allocating if, at the time of giving effect to the provision, the circumstances in subsection (6) apply. (6) The circumstances are that—(a) the person and all other parties to the contract, arrangement, or understanding that contains the provision are supplying an international liner shipping service in co-operation with each other; and(b) the co-operation improves the service supplied to owners or consignors of goods carried at sea; and (c) the provision relates to—(i) a specified activity carried out for the purposes of the co-operation; or (ii) an activity ancillary to a specified activity that is reasonably necessary for the purposes of the co-operation. (7) For the purposes of subsection (6)(a), *parties to the contract, arrangement, or understanding* excludes persons who are parties only because section 30B(a) applies. (8) In this section,— *cartel provision* means a cartel provision in a contract, arrangement, or understanding *specified activity* means any of the following: (a) the co-ordination of schedules and the determination of port calls: (b) the exchange, sale, hire, or lease (including the sublease) of space on a ship: (c) the pooling of ships to operate a network: (d) the sharing or exchanging of equipment such as containers: (e) capacity adjustments in response to fluctuations in supply and demand for international liner shipping services.	(1) Nothing in section 30(1)(a) applies to a person in relation to a cartel provision that has the effect, or likely effect, of price fixing if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision, the circumstances in subsection (3) apply. (2) Nothing in section 30(1)(b) applies to a person in relation to a cartel provision that has the effect, or likely effect, of price fixing if, at the time of giving effect to the provision, the circumstances in subsection (3) apply. (3) The circumstances are that—(a) the person and all other parties to the contract, arrangement, or understanding that contains the cartel provision are supplying an international liner shipping service in co-operation with each other; and (b) the co-operation improves the service supplied to owners or consignors of goods carried at sea; and (c) the provision relates to the exchange, sale, hire, or lease (including the sublease) of space on a ship between the person and 1 or more parties to the contract, arrangement, or understanding; and (d) the exchange, sale, hire, or lease (including the sublease) is carried out for the purposes of the co-operation. (4) For the purposes of subsection (3)(a), *parties to the contract, arrangement, or understanding* excludes persons who are parties only because section 30B(a) applies. (5) In this section, *cartel provision* means a cartel provision in a contract, arrangement, or understanding.

[10] Section 27 in part 2 relates to Contracts, arrangements, or understandings substantially lessening competition prohibited and section 30 relates to cartels relates Contracts, arrangements, understandings, or covenants containing cartel provisions prohibited.

C. Developments that played an important role in the evolution of the liner legislation

1. 1980s

In the 1980, there was growing unease among exporters, importer, farmers, and politicians.[11] There was the anti-conference sentiment. "In general, the view of this group [Federated Farmers] is that freight rates are too high and that they constitute a serious drain on foreign exchange. That is since the majority of the shipping lines are foreign owned the freight rates paid go out of New Zealand. They further argue that the reason why freight rates are high is because the conference lines have a monopoly control of the trade."[12] The critics of the conference system point to the increasing shipping costs that shippers are forced to pay. The advocates of non-conference lines also suspected that savings achieved by the conferences due to technological developments as a result of the introduction of containerization are not being passed on to the shipper and that the shipowners' profits are increasing.

There was the pro-conference sentiment indicating that use of the conference carriers was the best available option. In the view of producer boards, the conference system provides a reliable and comprehensive service and should not be lost for the sake of a non-conference service which may offer cheaper freight rates, yet does not offer the same reliability of service. There was also the concern by the boards if substantial use was made of the non-conference carriers the boards would lose any advantage of exclusivity provided by the conference system. The supporters of the conference system also indicated that exclusivity did not mean there was no competition. They pointed out that there was competition in terms of service between the members of the conference and the rise in shipping cost was a result of inflation in the Western world, the high price in the cost of marine fuel and the cost of using specialized vessels.

Thereafter, a forum was organized by the Exports and Shipping Council in June 1980. Three major questions that the forum addressed were: 1. Should contractual arrangements with shipping conferences continue to be made? 2. Can New Zealand's interests be more effectively safeguarded by the inclusion of additional parties to shipping negotiations? and, 3. How can the rising trend in shipping costs and freight rates be arrested?

This was the sentiment before the Government launched a major policy review of shipping, the White Paper on New Zealand Shipping Policy in December1983 and the drafting of the Shipping Act of 1987.

2. 1987

After the Shipping Act of 1987 was passed, it was found to be ineffective in achieving its purpose. The reasons for its ineffectiveness were "1. It gives the Minister of Transport an ability to investigate unfair practices but sets a high threshold to initiate an investigation. 2. It contains only limited powers for the Minister to remedy any problem. There is no ability to impose penalties or conditions. The Minister can only direct carriers to provide information and to enter into negotiations with exporters. 3. The provisions of the Act only apply to outward shipping - it provides no oversight of competition in import shipping. 4. Institutionally the Minister of Transport has no standing to investigate capacity or procedure."[13] It was felt that as a result of the inadequate regulatory regime, there is no oversight of competition in the industry and international shipping is essentially unregulated.

[11] Edwards, Brent A., New Zealand Shipping a Marxist Analysis, p. 4, www.ir.cantebury.ac.nz

[12] Id. pp. 3-4.

[13] Regulatory Impact Statement, p. 22.

To add to the above, a number of other developments had occurred. In the domestic arena, exports and imports to New Zealand had increased significantly. The present regulatory regime for New Zealand exporters and importers was being questioned together with the need updated it. In the international arena, the market share of the top 20 carriers had nearly doubled from 44% to 82%; the types of agreements had increased, shifting away from rate agreements; the regulatory regimes in other countries had changed bringing conferences within their competition regimes, etc. Given the above a case for the exemption of conferences from the competition provisions of the Commerce Act was questioned.[14]

So in 2011, the Government of New Zealand asked the Productivity Commission to look at whether the costs of exporters and importers could be lowered and the services improved fifteen years after the Shipping Act 1987 was adopted. The Commission indicated that 'Their brief asked us to identify the: Factors influencing the accessibility and efficiency of international freight transport services available to New Zealand firms; and Opportunities for changes in New Zealand's infrastructure and regulatory regimes that could increase the accessibility and efficiency of international freight transport services for New Zealand firms.' In July 2011, the Productivity Commission released an Issue paper calling for submissions on seventy-nine questions.[15] The Productivity Commission received 50 submissions. It then released a Draft Report and received 101 submissions. In 2012, the Productivity Commission released its final report (Sherwin Report) and made a number of recommendations.[16] The one relating to shipping conferences states[17]:

- R11.1 Ratemaking agreements – ones involving price-fixing or limiting capacity with the intent of raising prices – have a high risk of anti-competitive detriment. Exemptions for such agreements should be removed and authorisation mechanisms should be relied upon for assessing whether these agreements are in the public interest. There should be a transitional period to allow the agreements in place at the time the exemption is repealed to continue until their compliance with the Commerce Act 1986 has been tested.

- R11.2 The exemption for non-ratemaking agreements should be retained in the Shipping Act 1987 and be conditional on filing agreements with the Ministry of Transport for placing on a public register. The exemption and remedial regime should apply equally to outwards and inwards shipping. To be eligible for exemption, agreements must allow and protect confidential individual service contracts. The exemptions for international shipping in the Commerce Act should be repealed.

In December 2012, the Government issued their response to the inquiry by the Productivity Commission.[18] After considering the options with regard to the exemption for shipping conferences,[19] it stated:

[14] See International Freight Transport Services | Issues Paper, July 2011, www.productivity.nz.gov

[15] Eight of these (9 to 26) were directed at international sea freight. International Freight Transport Services | Issues Paper, July 2011, p. 36, www.productivity.nz.gov

[16] 1. Ports could enhance their abilities to meet the future freight needs of the country if improvements were made to the governance framework for council-controlled port companies by: a. clarifying the purpose of those companies by bringing them into line with the statutory objective for state-owned enterprises; b. precluding councillors and council staff from being directors of port and airport companies; and c. establishing a monitoring function to create independent comparative performance information for port owners to consider. 2. There is scope for a significant lift in workplace productivity at a number of ports. The benefits of high-productivity workplaces include higher real wages, better working conditions, higher levels of job satisfaction, and more competitive and profitable businesses. Most New Zealand port companies, their employees and unions have some work to do to fully achieve these benefits. 3. To better coordinate investment in freight infrastructure, greater use should be made of 'facilitated discussion' models, such as the Upper North Island Freight Plan. These are based on information sharing and relationship building but do not bind the participants to particular outcomes. They avoid the trap of excessive central direction which carries a high risk of error, and exposure of the Government to financial risk. 4. The government has an important role in gathering and disseminating freight information. More information on freight in New Zealand – collected and made available on a regular basis – would have considerable value and help freight organisations make better individual and joint decisions. It would also help stakeholders monitor performance, and policy-makers design and evaluate policies and regulations.

[17] International Freight Transport Services Inquiry, Final report – April 2012, p. 288

[18] Government response to the New Zealand Productivity Commission's recommendations on International Freight Transport Services December 2012.

[19] Three options were considered for dealing with this issue: 1. The Recommendation of the Productivity Commission – exemption only for non-rate agreements if placed in a public register. 2. The approach followed in Australia – exemption for both rate and non-rate agreements if they are registered. 3. The transition to a Commerce Act regime.

- The Government considers the objectives of these recommendations may be better achieved through a Commerce Act regime. Currently the Shipping Act provides a parallel, but outdated and unused regime for regulating competition compared with that provided by the Commerce Act.

- The Government is currently progressing the Commerce (Cartels and Other Matters) Amendment Bill. This Bill is designed to encourage pro-competitive collaborations between businesses, while at the same time deterring anti-competitive cartel behaviour. It provides a new broad collaborative activity exemption and has a new clearance regime that would help shipping firms manage the risk that agreements might breach the Commerce Act.

- Following its first reading, the Bill has been referred to the Commerce Committee. The Government has asked the Commerce Committee to examine the international shipping exemption in light of the inquiry recommendations, as part of its consideration of the Bill. This includes seeking the views of affected parties, including shippers (exporters and importers) and carriers as to whether they consider removing the exemption is likely to benefit New Zealand, or whether it will deter carriers from servicing New Zealand

This would allow the Commerce Commission to determine if agreements raise competition issues and to ensure customers benefited from the efficiencies as a result of the collaboration. In addition, the full removal of antitrust immunity was not expected to substantially hinder cooperation between shipping companies. The Commerce Committee did not see any good reason for treating international shipping differently from other sectors regulated by the Commerce Act (NZ Anti-Cartel Bill). They therefore concluded that the carriage of goods by sea between places in New Zealand and places outside New Zealand should be subject to the generic competition regime under the Commerce Act.

In March 2013 the Government announced that international shipping to and from New Zealand would be regulated under the Commerce Act, improving oversight and delivering competitive outcomes for exporting industries. The purpose of applying this regime to the shipping sector is to ensure that our importers and exporters benefit from greater competitive outcomes. Shipping lines would nevertheless – as in other sectors and industries – be able to seek an 'authorisation' from the Commerce Commission for collaborative arrangements that have benefits for the public that likely outweigh the detriments. Concerns were expressed by shipping companies and shippers. The shipping companies were concerned that it would lead to administrative and compliance cost without a specific exemption specifying the types of collaborative activities that would be allowed. The shippers were concerned that these costs would be passed on to them.

In November 2016, the then Minister of Commerce and Consumer Affairs, Hon Jacqui Dean, tabled a supplementary order paper to the Commerce (Cartels and Other Matters) Amendment Bill to introduce a block exemption for specified international liner shipping activities. The supplementary order paper also consolidated previous government supplementary order papers to the Bill.[20] The Minister proposed "that the new block exemption should cover provisions of agreements between international carriers relating to technical, operational and commercial activities for the joint supply of liner shipping services. Similar to the European Commission block exemption and the recent Hong Kong Competition Commission draft block exemption order, this would include activities such as: 32.1 the coordination and/or joint fixing of sailing timetables and the determination of port calls; 32.2 the exchange, sale or cross-chartering of space or slots on vessels; 32.3 the pooling of vessels to operate a network; 32.4 the sharing or interchange of equipment, such as containers; 32.5 capacity adjustments in response to fluctuations in supply and demand; and 32.6 any other ancillary activity to those listed above that is reasonably necessary for the purpose of the joint supply of liner shipping services."[21] With the passage of this Bill, it chose to retain limited antitrust immunity for shipping companies for only a brief period, which would end on 17 August 2019. After that time the generic antitrust rules will apply to all activities in the shipping sector, with the

[20] See 7B New sections 44A and 44B inserted.

[21] Cabinet paper — Block Exemption for Specified International Liner Shipping Activities in Cartels Bill, p.6.

exception of operational and vessel sharing agreements, which will continue to be subject to a block exemption.

D. Legislative developments after the last amendments

Since the last amendments, the noteworthy developments the occurred are: *First*, on April 8, 2019, the Commerce (Criminalisation of Cartels) Amendment Act 2019 received Royal assent, it introduced a criminal offence to cartel conduct. The Amendment Act has a two year transitional period and will come into force in April 2021.[22] *Second*, Covid-19 also left its mark on shipping services in New Zealand. Importers have claimed the price of freight for a shipping container has increased four-fold and that has largely been passed on to consumers.[23] *Third*, on February 18, 2022, the Commerce Commission indicated that it has joined international counterparts in a working group focussing on identification of potential cartel conduct in global supply chains. "The working group includes the Australian Competition and Consumer Commission, Canadian Competition Bureau, United Kingdom Competition and Markets Authority and United States Department of Justice Antitrust Division. Commission Chair Anna Rawlings says that as a member of this multilateral group the Commission will be part of a wider effort to share intelligence and use existing international cooperation tools to help detect and investigate potential cartel conduct arising from disruption in global supply chains. "We recognise that Covid-related supply chain issues have created significant challenges for economies worldwide, and here in New Zealand we've seen businesses respond by cooperating responsibly to ensure New Zealanders continue to be supplied with essential goods and services," says Ms Rawlings. "However, we still have zero-tolerance for unscrupulous businesses using Covid as an opportunity for cartel conduct, such as non-essential collusion between competitors or anti-competitive behaviour. The international working group will strengthen our continued efforts to deter and penalise cartel conduct."[24] *Fourth*, on April 20, 2022, the Prime Minister of New Zealand and Singapore launched a working group to tackle supply chain issues.[25]

E. Summary

In 1987, the New Zealand passed its first regulation which granted shipping conferences exemption from the competition provisions of Part 2 and Part 4 of the Commerce Act 1986. In March 2011, the Government of New Zealand asked the Productivity Commission to look at whether the costs of exporters and importers could be lowered and services improved. Based on the recommendations of the Productivity Commission and a review of the options, the Government of New Zealand introduced the Commerce Amendment Bill on October 13, 2011 and in March 2013 announced that international ocean shipping would fall under the Commerce Act 1986 indicating that the exemption provided under the Shipping Act 1987 would be repealed. In November 2016, the then Minister of Commerce and Consumer Affairs, Hon Jacqui Dean, tabled a supplementary order paper to the Commerce (Cartels and Other Matters) Amendment Bill to introduce a block exemption for specified international liner shipping activities. The amendments were accepted in August 2017 which would become effective after a two year transition period on 17 August 2019. After that time the generic antitrust rules will apply to all activities in the shipping sector, with the exception of operational and vessel sharing agreements, which will continue to be subject to a block exemption.

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[22] In the earlier amendment bill which was passed on August 13, 2017, the provisions which would have imposed criminal sanctions for cartel conduct were dropped.

[23] What's causing the shipping crisis – and when will it end?, 24 November 2021, www.thespinoffcom.nz

[24] Competition agencies working together to identify potential cartel conduct in global supply chains, 18 February 2022, www.comcom.govt.nz; and International working group targets potential collusion by competitors in supply and distribution of goods, February 17, 2022, www.competitionureau.ca

[25] NZ, Singapore join forces on supply chain disruptions, April 20, 20222, www.scope.co.nz

SECTION VIII – CONCLUDING REMARKS

At the start of the last century, ocean shipping services were provided by steamship companies through shipping conferences. These shipping conferences formed a variety of agreements covering services, prices and control of competition, either between the lines to the agreements or from lines outside the agreements. The agreement of these conferences led to investigations into their practices and legislators were faced with prohibiting these agreements or preventing their abuses. They chose the latter, providing antitrust immunity or exemption from competition laws. More than a hundred years later, one is left with the same old question should ocean liner shipping be granted this special privilege?

The choice of the legislators reasoning over time became crystallized in two types of rationale: economic and political. This rationale will be examined for two types of agreements that developed over time in ocean shipping: 1. Shipping Conference Agreements[1]; and 2. Shipping Alliance Agreements[2].

1. In shipping conference agreements the *economic rationale* was based on the need to provide stability of rates and services in an otherwise unstable industry which works to the benefit of carriers as well as users. The legislators in the Alexander report were concerned with shipping conference agreements and were of the opinion that if the exemption was not granted, the ocean carriers would engage in price wars and destructive competition would bring instability in rates that would eventually lead to a monopoly or a merger of carriers resulting in monopoly pricing. This outcome would be no better than the one if the exemption was granted.

To see if the above claim was true, the shipping industry was the subject of study to see if it is subject to destructive competition. Economic theories were suggested to support this destructive competition view and these theories indicated that the industry should have certain characteristics. But no evidence was found to indicate that these characteristics hold and there has been no evidence that the industry is subject to destructive competition. This view was held when the EEC decided to remove the antitrust immunity to conference agreements or price fixing agreements in 2008[3] and when New Zealand decided to do the same in 2017.[4] In addition, a number of countries (Norway, India, etc.) do not grant shipping conferences immunity from antitrust or competition laws and there is no evidence there that there has been destructive competition. Further, it was pointed out that conferences do not provide stability of rates even if this may have been so in the early 1900s. The *political rationale* is based on the argument that conferences are required by considerations of international comity. While considerations of international comity are still important to consider, jurisprudence indicates that the comity doctrine does not require nations to maintain policies which are fundamentally prejudicial to their national interests or to maintain an outdated and wasteful regulatory regime.

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[1] Shipping conference agreements cover commercial and non-commercial aspects of shipping.

[2] Shipping Alliance Agreements cover non-commercial aspects of shipping.

[3] The EC said "Repealing the exemption will benefit EU exporters by lowering transport prices whilst maintaining reliable services. Commission Proposes Repeal of Exemption, December 14, 2005, p. 1.

[4] Ratemaking agreements – ones involving price-fixing or limiting capacity with the intent of raising prices – have a high risk of anti-competitive detriment. Exemptions for such agreements should be removed and authorisation mechanisms should be relied upon for assessing whether these agreements are in the public interest. International Freight Transport Services Inquiry, Final report – April 2012, p. 288.

In sum, given the evolution of shipping over the last hundred and twenty five years, there does not exist any convincing evidence at the present time that there is need for exemption for ocean shipping conferences agreements or price fixing agreements from competition or antitrust laws. The economic and political rationale is at best very weak nor has immunity from these laws shown to provide stability of rates. There is also no evidence of rate wars and destructive competition. The removal of the exemption to shipping conference agreements in the European Economic Commission and in New Zealand provides further testimony after it was done there. In addition, it is worthwhile noting that conferences and conference agreements have lost their prominence in shipping and have been replaced by shipping alliances and consortia agreements. Further, a World Bank Study[5] indicated that enormous gains would accrue to the US through trade liberalization and breakup of private carrier agreements.[6]

2. In shipping alliance agreements, which have replaced shipping conference agreements at the start of 2000, the *economic rationale* is based on the need to provide economies of scale and scope in the operation of vessels. These consortium agreements are non commercial agreements and the economic rationale for the need for antitrust exemption for them was based on network theory. The evidence in the form of economies of scale and scope does support this theory. There has been an increase in container ship size since the 1970s and a decline in container shipping costs per container.[7]

If so, should antitrust immunity be granted to these alliance agreements? If it is not granted would these efficiencies be lost?

One school of thought indicates that a block exemption from antitrust laws could be provided for such agreements if certain criteria are met. Few countries have adopted the use of block exemption in ocean shipping: EU, Hong Kong, Israel, Malaysia, New Zealand (Vessel Sharing Agreements only), and it is being considered by Australia The best known jurisdiction to have opted for the block exemption was the EU in 1995 and is reviewing it in 2024 to determine whether they should continue with it. The EEC provided three reasons initially for permitting it: First, consortia agreements generally help to improve the

[5] "Trade liberalization and the breakup of private carrier agreements would lead to an average reduction in liner transport prices by one-third and to cost savings of up to $3 billion on goods carried to the US alone." This finding is not surprising given that conference rates are at least 15 percent higher than rates of independent carriers. Nevertheless, the study provides useful estimates of potential gains if the conference system and the monopoly power of ports are abolished. The former would cause prices to decline by 25 percent resulting in cost savings of $2 billion and the latter would cause transport prices to decline by 9 percent resulting in a further cost savings of $850 million. Fink, Carsten, Mattoo, Aaditya and Neagu, Ileana Cristiana. (2000) Trade in international maritime services: How much does policy matter?, *Journal of Economic Literature*, November 13 [submitted].

[6] One Observer (Rob Quartel) in the US stated "It's very hard for anyone in the U.S. to agree that a cartel made up of foreign carriers has any benefit for the U.S." If this observation is correct the US government will be under increasing pressure from shippers to remove the antitrust exemption. Edmonson, R. G. (2002) OECD has spoken....now what? *JOC Week*, April 29-May 5, 12-13.

[7] There appears to be cost savings of 30% per teu from moving to a 18,000 teu ship from a 13,100 teu ship. Why Size Matters: Container Ship Economies of Scale, September 3, 2013, www.marinelink.com; Collaborating within SAs allows for combining cargo on the same route enabling economies of scale for carriers, as operating costs per unit (TEU) decline when larger container vessels are deployed. The benefits are related to bunker costs, crew costs, maintenance, lubricants, etc., as total costs increase less than proportionally to the size of the vessel. As a result, the cost of transporting one TEU is reduced in larger vessels as long as high capacity utilization rates are maintained at least on the head haul. See Strategic alliances in container shipping: A review of the literature and future research agenda, Mohammad Ghorbani, Michele Acciaro, Sandra Transchel & Pierre Cariou, Maritime Economics & Logistics, volume 24, pp. 439–465 (2022), www.linkspringer.com; and "SAs also generate economies of scope for their members by enabling them to increase their market coverage and connecting services with cross-ocean and feeder routes (Thanopoulou et al. 1999; Mitsuhashi and Greve 2009; Panayides and Wiedmer 2011; Caschili et al. 2014; Cruijssen et al. 2007). Carriers, by means of SAs, have the opportunity of expanding their service networks via dovetailing the operational service by dovetailing the operational routes of each other. Transshipment ports play an important role in this respect (Agarwal and Ergun 2010)." Id.

productivity and quality of available liner shipping services through rationalization and economies of scale in the operation of vessels and utilization of port facilities. Second, they also help to promote technical and economic progress by facilitating and encouraging greater utilization of containers and more efficient use of vessel capacity.[8] Third, users of the shipping services provided by consortia generally obtain a fair share of the benefits (i.e. frequency of service, improvement of scheduling, and better quality and personalized service through the use of more modern vessels and other equipment including port facilities) resulting from the improvements in productivity and service quality which they bring about.[9] Therefore, these agreements should benefit from a block exemption provided they do not give the companies concerned the possibility of eliminating competition in a substantial part of the trade in question.[10]

Another school of thought indicates that there is no need for block exemption, they should be treated as agreements in other industries and if there are efficiencies they would be permitted if they satisfy the laws pertaining to such agreements. They point to few advantages of this approach: first, equitable treatment of shipping with other transport modes and industries; second, approval of each agreement on its own merits together with determining the extent of efficiencies and ensuring that users of shipping services receive a fair share of the benefits; third, removal of any anti-competitive effect not only on shipping services but also on other related parts of the industry (port service providers, ports etc.) before these agreements go into effect.

Those who support the former view, point out that it provides legal certainty and it reduces transaction and compliance costs which would otherwise be passed on to shippers in the form of increased container rates. In the absence of a block exemption carriers would be required to do a self-assessment of their agreements to see if it violates the competition regulation. Those who support the latter view indicate that "these compliance costs might actually be fairly limited in practice."[11] Further, repeal of the consortia block exemption does not necessarily create a legal vacuum. They view block exemption as a 'free pass' if certain criteria are satisfied. They argue that efficiency gains have diminished over time and that offsetting efficiency costs have increased over time with increased dominance of shipping alliances in the industry.[12]

[8] See Preamble to Regulation 870/95, paragraph 4.

[9] See Preamble to Regulation 870/95, paragraph 5.

[10] See Preamble to Regulation 870/95, paragraph 6.

[11] See The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 78, www.itf-oecd.org. In contrast the EC Staff Working Document states "Although the carriers have not provided very precise figures on the expected increase in the cost of compliance assessment, it is clear that such cost would increase in the absence of the Consortia BER. This increase could be principally significant for small and medium carriers, for which it is more difficult to operate in the sector that is characterised by a general low profitability." p. 19. For example, in New Zealand, it was estimated to be NZ$1 to NZ$4 million based on 30 agreements, in the EU it would be higher given there are more agreements.

[12] "Although alliances were initially a key enabler of economies of scale, consolidation in the industry suggests that this is no longer a major factor. Thus, the size of any efficiency gains has become questionable while, at the same time, the exemptions have facilitated a business model – based on ever larger ships – that has yielded offsetting efficiency costs, by enabling overcapacity, reducing the number of destinations and limiting actual and potential service differentiation. Thus, while the official freight rates have halved over the last two decades, suggesting significant efficiency gains, other price increases, which include various surcharges by carriers, such as for demurrage and detention, have partly offset these gains. The deterioration of service quality, encompassed in lower frequencies, less direct port connections and lack of service differentiation, has yielded further costs." The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 76, www.itf-oecd.org

In sum, given the above views, the evidence does not indicate that there would be price wars, destructive competition and instability of service with or without a block exemption. The recent problems stemming from Covid-19 have highlighted the problem of container rates, demurrage and detention charges and instability of container rates. This has resulted in immediate reaction most notably in the US with revisions to the shipping laws in 2018 and 2022 with the possibility of further amendments and investigation by other countries. Whether shipping alliances and consortia deserve antitrust immunity through a block exemption for efficiency enhancing agreements is the subject of an ongoing controversy. There is much to be said for these efficiency enhancing agreements as they have led to a reduction in container costs. Unfortunately, increasing concerns have arisen because of the increase in market power of shipping alliances and the possibility of misuse of this market power. Even when the ITF-OECD Report recommended that the EU not extend the block exemption when it expires,[13] the EU extended the block exemption in 2020 till 2024.[14] The experience with Covid-19 in 2020 to 2022 cast a shadow over shipping alliances not consortium agreements and the pendulum is now moving in the opposite direction.

Providing clear-cut uncontroversial policy proposals are often not easy, especially when different interest groups have different views. Yet for competition policy advocates one cannot help reaching the conclusion that facilitating and encouraging the role of market forces by eliminating the block exemption could lead to greater competition among ocean liner carriers and ultimately to increased efficiency, lower prices, improved services and perhaps greater international trade. As Learned Hand writing on the merits of competition stated 'that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.'[15] At the same time one should not be oblivious of the fact that efficiency enhancing agreements that are not anti-competitive or have no collusive overtones deserve block exemption.[16]

[13] The report came to the conclusion that: 1. A shipping alliance does not have any unique characteristics that justify the exemption to consortia agreements. 2. The rationale for the block exemption does not exist any longer or the rationale has now become counterbalanced with offsetting effects. 3. The regulatory neutrality in antitrust enforcement would be restored without a block exemption. 4. The other actors in the maritime sector would be able to challenge more easily agreements with undesirable market effects. 5. The application of generic antitrust rules could result in lower risks of anti-competitive conduct and higher probabilities of customers getting a fair share of any cost savings arising from alliances. The report goes on to state that "One could wonder if there are still welfare benefits from maintaining block exemptions." The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 78, www.itf-oecd.org

[14] The Commission Staff Report did not agree with the ITF-OECD Report it stated "To conclude, cooperation in consortia remains prevalent. Arguments that the high concentration level in the industry harms customers remain unsubstantiated as competition in the industry seems to function well, transferring a fair share of cost savings to customers in the form of lower prices and keeping the quality of services stable." See COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) November 11, 2019, p. 32, www.ec.europa.eu

[15] *Alcoa* case, *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

[16] "Professor Galbraith, …., considers that most industries have moved, or are moving, towards a position in which a few large firms inevitably dominate total output. This, he thinks, is all to the good for only firms of considerable size will possess the resources to carry on technical research on an adequate scale." Monopoly and Economic Progress, Economica, August 1953, p. 204. It is also worthwhile noting that the market share of shipping alliance can change dramatically. In 2025, the largest shipping alliance of two carriers with 34% of the market will terminate and the total market share of the remaining two alliances will fall to less than 50%. The Block exemption is further discussed in Appendix V.

APPENDIX I – ECONOMIC THEORIES TO JUSTIFY EXEMPTION OF OCEAN SHIPPING LINER CONFERENCES AND SHIPPING ALLIANCES

Several competing economic theories have been used to justify the exemption of ocean shipping liner conferences and shipping alliances from anti-trust laws, each with its own implications and policy prescriptions. The well known theories are briefly described.[1]

The Cartel-Monopoly Theory

Under the cartel-monopoly theory, firms have an incentive to coordinate their production and pricing activities to increase their collective and individual profits by restricting market output and raising market price. This is because a firm's profits goes up when it forms a cartel even though competitive firms may be "maximizing their profits".[2] As each firm in the competitive situation ignores the increase in profits to other firms from a reduction of its own output, which it believes to be insignificant since it cannot affect price. In contrast, a cartel is able to capture the benefits of a reduction of output by its members.

To visualize the nature of this collective gain, consider two polar cases. Consider a firm made up of many identical competitive firms having identical cost curves with each firm acting as a price taker. In contrast, consider another similar situation where the same firms form a cartel and acts as a monopoly. In the first case, the equilibrium output of the competitive industry is determined by the intersection of the industry demand and supply curves (i.e. the average revenue curve and aggregate marginal cost curve). Note that the industry's marginal cost curve, which is the aggregation of their individual marginal cost curves, is the industry's supply curve. In the second case, the equilibrium output of the cartel is determined by the intersection of the industry marginal revenue curve and the supply curve. This equilibrium cartel output is less than the equilibrium output of competitive firms and it earns a profit.[3] The reason for the reduction in output of the cartel is because the cartel's marginal cost is greater than its marginal revenue at the competitive output. On the other hand, firms in the competitive industry on its own do not reduce its output because the competitive firm sets its output where marginal revenue equals marginal cost. A lowering of its output will cause it to lose more than it gains, as the marginal revenue on the last unit exceeds its cost.

In view of the above is there an incentive for cartel members to cheat since at a higher price, each cartel member would like to sell more than the cartel permits it to do.[4] The above cartel model can also be used to explain differential pricing by a shipping conferences since they can subdivide the market for their services by differentiating between shippers according to the commodities shipped or by varying rates based on the different demand elasticities of the commodities for liner services. The welfare effects of having differential pricing as opposed to a freight all kinds (i.e., FAK) tariff structure are ambiguous. Shippers with more elastic demands would be made worse off and shippers with less elastic demand would be made better off. The overall effect would depend on whether the carriers can increase the amount of traffic they transport. Under a more competitive system, the

[1] For a further discussion of these theories and how they apply to specific aspects of liner practices see Federal Maritime Commission. (1989) Section 18 Report on the Shipping Act of 1984, and The Department of Justice Analysis of the Impact of the Shipping Act of 1984 (1990).

[2] Assuming a competitive case.

[3] The gain to the cartel from a reduction in output comes about because it faces a downward sloping demand curve. On the other hand, each competitive firm is considered to face a horizontal demand curve. More precisely, a nearly horizontal demand curve (i.e., with a small downward slope). While this small downward slope can be ignored for a single competitive firm, it cannot be ignored when taking all firms collectively or for the cartel. The competitive firms place no value on the gain that each other derives from a reduction in output of one unit by each firm because its effect is considered to be negligible. However, the gains to a cartel from a reduction of one unit is internalized, namely the cartel realizes the gain from its reduction.

[4] Carlton, Dennis W. and Perloff, Jeffrey M. (1990) Modern Industrial Organization, p. 233.

ability of a conference to use a differential pricing structure resulting from the exercise of market power would diminish due to entry of carriers to serve such markets.

This model has a number of implications. First, a conference which perfectly discriminates should be making the maximum profit. Second, in order to maximize their joint profit, the lines will price so as to operate on the elastic part of the respective demand curves for their services. Third, there is absence of entry, as entry would imply that the established carriers would not be able to have complete discretion over price. Finally, the model suggests that conference tariffs should be designed so that the lowest quoted tariff rate would make a full contribution to overhead (fixed) costs when a trade is in long-run equilibrium.[5] An econometric study by Clyde and Reitzes on whether liner conferences act as effective cartels indicates that the conference system may contribute to higher shipping rates, particularly when the conference has a sizable market share though they do not act as perfect cartels maximizing joint profits.[6] The authors state "We find no statistically significant relationship between freight rates and the market share of the conference serving the route, which indicates that conferences do not act as perfect cartels maximizing the joint profit of their members. Nonetheless, we find that the level of freight rates is significantly lower on routes where conference members are free to negotiate service contracts with shippers. ... This latter finding provides some support for the conclusion that some aspects of the conference system may contribute to higher shipping rates, particularly when the conference has a sizable market share."[7]

Theory of the Empty Core

The competitive process has also been described by the theory of the core.[8] The core is basically a set of cooperative game solutions that are feasible under which players optimize their winnings. The core could be empty, in other words, there is no optimal solution and therefore no sustainable competitive equilibrium. Markets so characterized can be explained by the theory of the empty core. The reasons for the existence of the empty core will be described.

Assume that firms in the industry are identical, each having a U shaped average cost curve where entry is free and exit is costless. If demand is not an exact integer multiple of the output produced at minimum average cost, there will not be room for all firms to produce at the minimum average cost. Some of the firms will have to exit. Now since, the output produced is less than the total demand, prices will rise. This will attract new firms who charge below the existing price, as entry is costless. This will drive out the existing firms and so on. Thus, there will be no competitive equilibrium or the core will be empty.

The above assumption that the firms are identical, all having the same minimum average costs, is not necessary for the empty core to exist. In such a case, the supply curve is represented by disconnected upward sloping segments, and the length of the gap between the segments is equal to capacity. If the demand curve passes through any of the disconnected segments, the empty core can still exists. The existence of an empty core is more likely when: (1) firms are more homogenous in the industry; (2) an individual firm's capacity is large in relation to total demand (i.e., the smaller the number of incumbents); (3) an industry is more in a slump; (4) demand and/or supply is more variable; (5) market demand is more inelastic; and, (6) entry is legally restricted to a greater extent.[9] In light of the above, it

[5] This assumes that liner shipping is a constant cost industry. This assumption is commonly made.

[6] The study also finds that increases in market concentration are associated with statistically significant but small increases in freight rates. Clyde, Paul S., and Reitzes, James D. (1995), The Effectiveness of Collusion Under Antitrust Immunity, The Case of Liner Shipping Conferences. Federal Trade Commission, p. 1.

[7] Id.

[8] Lester, Telser G. (1988) Theories of Competition, North-Holland, p. xiii.

[9] Sjostrom, William. (1989) Collusion in Ocean Shipping: A Test of Monopoly and Empty Core Models. Journal of Political Economy, 97(5), 1160-1179.

has been argued that core theory can be used to explain the existence of shipping conferences. In the words of one Report: "Core theory offers a raison d'etre for the conference system -- conferences exist to solve the problem of the empty core by imposing an equilibrium where none would otherwise exist."[10]

The above theory was applied by William Sjostrom to test its relevance to shipping conferences. He noted "A test of three differing implications, using data from shipping conferences, clearly rejected the cartel theory and offered support for the theory of the core. The results, although certainly not definitive, offer further evidence for the proposition that market arrangements that appear to be cartels may be attempts to solve the problem of an empty core."[11] The findings of Sjostrom have been questioned by the Antitrust Division of the U.S. Department of Justice. They point out that the existence of a large number of carriers operating at differing levels of capacity suggest a non-empty core in most U.S. liner trades as indicated in the conditions noted above for the existence of a core.

The Theory of Contestablity

The principal focus of the contestability theory is the competitive consequence of potential entry. The theory holds that the number of competitors in themselves are irrelevant as indicators of competition, for what matters is the relative position of the entrant vis-à-vis incumbents. "The message of the new theory is that the strength of competition should be judged not on a priori notions of structure or behavioural variables but on conditions promoting or inhibiting ease of exit."[12]

Consequently, contestability theory highlights the risks of entry. It shows that such risks are determined by the ease or difficulty of recovering the investment costs incurred if firms exit after entry and not necessarily the magnitude of any investment. It indicates that if exit occurs, those investment costs are completely recoverable, as a result the risks of entry will be zero and entrants will exercise a disciplining force on incumbents in the market, sufficient to constrain their use of market power. The costs of exit and the ability to compete are thus the key factors influencing the strength of competition by new entry. The former is determined by sunk costs;[13] the latter by the symmetrical placement of entrant and incumbent. This can be achieved by preventing the incumbent firms from taking price action that will lead to zero expected profits. This condition has been referred to as the "price sustainability" condition. Price sustainability is likely to be achieved if the firms existing in the market cannot change their prices as fast as the new entrant or if the entrant can secure a contract with customers that guarantee him fixed prices and positive profits. There are thus three conditions necessary for perfect contestability: (i) the absence of sunk costs; (ii) a symmetrical positioning of entrant and incumbent; and, (iii) price sustainability. In addition, this theory specifically emphasizes the significance of multiproduct firms and the problems arising from such cost structures. It also emphasizes the cost of joint production. Finally, this theory emphasizes the significance of desirable pricing behaviour in decreasing cost industries and examines the role of Ramsey pricing.[14]

Extensive economic tests were performed by J. E. Davies to test the applicability of the above theory to liner shipping. In determining whether markets are contestable, he ran three basic tests regarding - evidence of ubiquity of entry and exist, its costlessness, and the absence of sunk costs. In discussing the rate structure, he concludes that the process of pricing, accords very closely with the Ramsey optimal system of pricing for declining cost industries, like

[10] See FMC Report, p. 596.

[11] See Sjostrom, 1177.

[12] Davies, J. E. (1984) Pricing in the Liner Shipping Industry: A Survey of Conceptual Models, C.T.C., Ottawa, p. 63.

[13] A sunk cost is an outlay that cannot be recouped without substantial delay.

[14] A decreasing cost industry is one faced with decreasing costs as output increases. In decreasing cost industries, using marginal cost pricing rules to determine output results in loss since average cost is greater than average revenue. To recover this loss, a charge is imposed according to formula suggested by Frank Ramsey. Ramsey Pricing involves adding a markup over marginal cost, the size of which varies inversely with the elasticity of demand of the purchaser.

liner shipping, which have to be financially viable. The author believes that based on the totality of evidence, the predictions of the theory are reasonably confirmed and that open liner trades have a tendency to be highly contestable. Other writers such as R. Pearson and W. B. Jankowski have presented differing views.[15]

In assessing the overall relevance of the above theory to shipping, the FMC notes that "contestable market theory ... provides an academically respectable argument for favoring the retention of the conference system ... because the threat of entry is a sufficiently powerful deterrent ... to prevent market failure." This however does not mean that the conference system should be retained unless it can be shown that the conference system promotes contestability. Further, it has not been convincingly established that barriers to entry, sunk costs (eg. port facilities, terminal and other facilities, etc.), political barriers, cargo reservation rules, state-owned fleets, etc. which are necessary for perfect contestatbility do not exist.

The Austrian Disequilibrium Theory

Austrian economists do not consider markets to be normally in a state of equilibrium. Equilibrium, if achieved at all, is only a transitory state. Focusing on equilibrium, the end result of the process rather than the process itself, may not be realistic owing to constantly changing market conditions. Analysis of the equilibrium is likely to provide insights that are, at best, misleading and, at worst, false. Therefore, this framework is unsuitable for the analysis of the competitive process. Further, Austrian economists have questioned the validity of empirical evidence that supported the enactment of competition laws. Their position on antitrust is that these laws are inconsistent with economic efficiency, liberty and justice, and should be repealed. Accordingly, they would not advocate the prohibition of collective ratemaking nor any other collusive arrangement in liner shipping. They would argue that such arrangements are subject to the discipline of the marketplace and consequently, will persist only if they are efficient.

The Cost-Based Theory

A number of economists have attempted to explain the rate structure in liner shipping in terms of cost-related factors. One well known cost based theory was by P. W. S. Andrews. He developed the normal cost-price theory of the firm to explain the pricing behavior of manufacturing firms.[16] The roots of this theory, can be traced to the work of the Oxford Economists' Research Group. The above theory by Andrew's may be summarized as: 1) "the price which a business will normally quote for a particular product will equal the estimated average direct costs of production plus a costing margin"; 2) "the costing-margin will normally tend to cover the costs of the indirect factors of production and provide a normal level of net profit, looking at the industry as a whole"; 3) "given the prices of the direct factors of production, price will tend to remain unchanged, whatever the level of output"; and 4) "at that price, the business will have a more or less clearly defined market and will sell the amount which its customers demand from it".[17]

Using the above theory, two well known attempts to explain shipping rates were those by J. J. Evans and B.M. Gardner.[18] The first, i.e., Evans, identified five reasons for differences in costs of shipping services which provided

[15] See Pearson, R. (1987) Some Doubts on the Contestability of Liner Shipping Markets. Maritime Policy and Management, 14(1); Jankowski, W. B. (1989) Competition, Contestability and the Liner Shipping Industry: A Comment. Journal of Transport Economics and Policy, 23(2); and Davies, J. E. (1989) Competition, Contestability and the Liner Shipping Industry: A Rejoinder. Journal of Transport Economics and Policy, 23(2).

[16] Andrews, P.W.S. (1949) Manufacturing Business, London, Macmillan.

[17] The quotes are from Andrews and were cited in Ryan, W. J. L. (1966) Price Theory, London, Macmillan & Co. Ltd., pp. 375-376. Under Andrew's theory, production usually occurs at some point on the horizontal portion of the cost curve which is considered to be relatively large. The margin is assumed to be constant and varies with the costs of indirect factors of production.

[18] Evans, J. J. (1977) Liner Freight Rates, Discrimination and Cross-Subsidization. Maritime Policy and Management, 4(4), 227-233, and Gardner, B. M. (1978) An Alternative Model of Price Determination in Liner Shipping. Maritime Policy and Management, 5(3).

the basis for his reasons for differential pricing. Though the five reasons - vessel stability, cargoes requiring special care, low priority cargoes, exploitation of ship size, and the need for high quality service - were associated with breakbulk cargo, some of them are still valid for containerized cargo.

Besides the above attempt, Gardner attempted to explain the rate structure in liner shipping using the above theory modifying it to take account for exploitation of economies of ship size. Barriers to entry in liner shipping were considered as low, accordingly the rates that incumbent firms will charge and forestall entry are the minimum rates at which they would be willing to supply cargo space in the longrun, assuming they are efficient. Gardner argues that carriers fix their rates by adding a markup to average variable costs. This markup or gross profit margin is determined by reference to normal capacity utilization taking account of cost-related factors with due regard to the possibility of inducing entry. As a result, rates could accordingly vary from commodity to commodity providing the argument for differential pricing. If an FAK tariff structure is imposed, the welfare implications would clearly be harmful, as differential pricing is based on cost factors and not due to market power.

The above cost based explanations do not preclude cooperation among incumbent carriers. It is consistent with rates being set by shipping conferences and with independent carriers. It also does not assume exit barriers to be low because it attaches great importance to goodwill dividing up the market among incumbents. An interesting point to note is that the theory severs the link between price and actual output which lies at the heart of neoclassical explanations of price determination. Besides the above two models, two recent attempts using a modified form of the cost-based theory are those by W. K. Talley and J. A. Pope, and J. A. Zerby and R. M. Conlon. These studies indicate that variation in tariffs is not only due to cost based factors but also due to demand or value based factors. This leads us to a brief consideration of value of service models used in shipping.

The Value of Service Models

Two value of service models have been used: a. Ramsey Pricing; and b. Jansson's Pricing Model.

a. Ramsey Pricing: Ramsey Pricing involves adding a markup over marginal cost, the size of which varies inversely with the elasticity of demand of the purchaser. Ramsey pricing resulted from the insightful work of Frank Ramsey and is particularly useful in resolving the dilemma in decreasing cost industries. In such industries, under marginal cost pricing, if welfare is to be maximized and if a firm is to continue production, the firm must receive subsidies. This is because the cost of the welfare maximizing output is greater than the revenue. The issue is how to cover these losses. Economists at one time were of the opinion that these losses should be covered by subsidies. The problems of collecting the subsidies raised problems of arbitrariness in assessment and administrative costs. This is avoided through Ramsey pricing as collecting the losses is achieved through a markup which varies with the reciprocal of the elasticity of demand of the purchaser, an indication of the value to the purchaser. Restricting this differential pricing is likely to cause welfare to fall since it allows firms to cover their total costs while imposing the least amount of distortion on allocation of resources. The application of the above Ramsey pricing has been used in shipping where the industry displays characteristics of being a decreasing cost industry. Given the number of carriers on a shipping route the applicability of Ramsey pricing has been questioned. Further, the Ramsey pricing model applies to a firm facing no fringe competition.[19] This model is generally considered more as a normative model or a model used by public utility regulators. Finally, even if prices are sustainable allowing profits to be maximized it cannot be presumed that conferences will adopt this pricing.

b. Jansson's Pricing Model: Jansson's model attempts to provide an explanation of why price differentials persist over time. It assumes that service competition among conference members leads to chronic overcapacity in the

[19] When fringe firms exist, Ramsey optimal pricing changes. In some cases this requires fringe firms to charge prices above their competitive level. Independents generally charge considerably below conference rates. See Braeutigam, R. (1979) Optimal Pricing with Intermodal Competition. American Economic Review, 69, 38-49.

industry. This is because conferences attempt to capture the higher-rated commodities by offering frequent sailings (adding more ships to their fleet) resulting in overcapacity. This discourages entry as there are no excess profits. The differential pricing arising from this system is believed to stem from excess capacity. Under such a model imposing an FAK tariff structure could have beneficial welfare effects if it leads to elimination of wasteful excess capacity. The fact that conferences do not adopt such a rate structure and increase their profit suggest that the reasons for the cause of the differential pricing may not be correct. Of the two value of service models described, the former has found greater acceptance both on logical grounds and because it explains the observed empirical evidence better.[20]

In conclusion, in our opinion, a brief review of various economic theories does not provide justification for the current conference system. The evidence indicates that liner shipping conferences have not in practice provided stability of rates and service. As stated more forcefully by Professor Trevor Heaver "...Liner shipping no longer has the distinctive characteristics from other industries that warrant the allowance of the cartels (conferences) here and not in other industries."[21] Finally, the literature does not convincingly establish whether one theory is superior to the other in explaining price discrimination in shipping or provide a basis for adopting an FAK tariff system with unambiguous implications for welfare.

Network Theory

The network theory has been used to explain the formation of alliances and mergers. In network industries, efficiencies arise on the supply side from joint provision of service by members of the network and an increase in the network; and externalities arise on the demand side as the value to existing users increase and from more individuals joining the network. The joint provision of service enables the shipping carriers in the alliance to realize efficiencies from fully exploiting economies of scale. Economies of scale are depicted with a declining cost curve indicating falling costs as more is produced.[22] As stated in the ITF-OECD study "Alliances are considered tools to optimise the potentials of these economies of scale. They make it possible for carriers to acquire new bigger ships together, to share vessels to guarantee utilisation rates of ships that would be needed to reap the benefits of economies of scale. In other words, large cost savings could potentially be achieved if partner carriers are willing to collaborate".[23]

The value to existing users increases from two sources a potential increase in service from more routes available to existing shippers (see figure) and an increase in other shippers joining the alliance to avail themselves of the services offered by the alliance especially if the lower costs and increased demand from more shippers joining the network are transmitted to existing shippers. This often described as economies of scope.[24] As stated in the ITF-OECD study "Alliances could also help carriers to improve service offerings to their customers. Most importantly, alliances could help them offer a more comprehensive global shipping network. Extending coverage and providing

[20] See FMC Report p. 415, and DOJ Analysis, p. 56.

[21] See Notes for the Presentation of Trevor D. Heaver to the Industry Advisory Group Relating to a Review of the Shipping Conferences Exemption Act, Vancouver, B.C., 25 September, 1991, p. 2 in Submission to the Industry Advisory Group Relating to a Review of the Shipping Conferences Exemption Act.

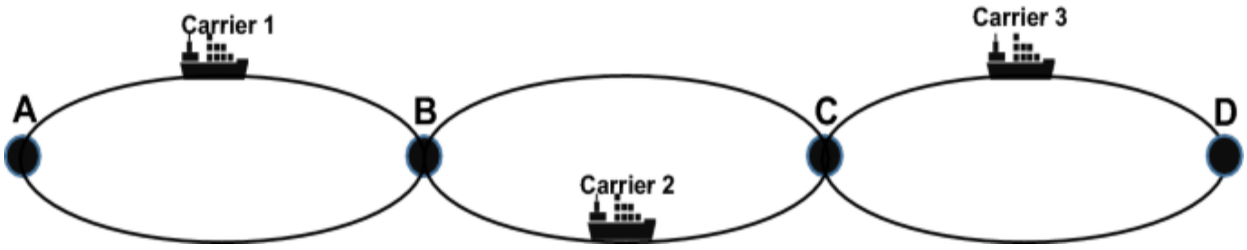
[22] Collaborating within SAs allows for combining cargo on the same route enabling economies of scale for carriers, as operating costs per unit (TEU) decline when larger container vessels are deployed. The benefits are related to bunker costs, crew costs, maintenance, lubricants, etc., as total costs increase less than proportionally to the size of the vessel. As a result, the cost of transporting one TEU is reduced in larger vessels as long as high capacity utilization rates are maintained at least on the head haul. See Strategic alliances in container shipping: A review of the literature and future research agenda, Mohammad Ghorbani, Michele Acciaro, Sandra Transchel & Pierre Cariou, Maritime Economics & Logistics, volume 24, pp. 439–465 (2022), www.linkspringer.com

[23] The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 12. www.itf-oecd.org

[24] "SAs also generate economies of scope for their members by enabling them to increase their market coverage and connecting services with cross-ocean and feeder routes (Thanopoulou et al. 1999; Mitsuhashi and Greve 2009; Panayides and Wiedmer 2011; Caschili et al. 2014; Cruijssen et al. 2007). Carriers, by means of SAs, have the opportunity of expanding their service networks via dovetailing the operational service routes of each other. Transshipment ports play an important role in this respect (Agarwal and Ergun 2010)." See Strategic alliances in container shipping: A review of the literature and future research agenda, Mohammad Ghorbani, Michele Acciaro, Sandra Transchel & Pierre Cariou, Maritime Economics & Logistics, volume 24, pp. 439–465 (2022), www.linkspringer.com

more services is the single most important motivation of participating in strategic alliances, according to a survey study carried out among representatives of container carriers. … alliances between carriers with strengths in complementary regions could be useful for providing services with a broader network to customers. … Large shippers prefer to have contracts with a few shipping firms with highly interconnected route networks. Alliances allow shipping firms to build networks of sufficient size to participate in bids for such contracts…"[25] There may be other reasons for forming an alliance, to gain know-how and technological transfers via exchange with competitors; and because of complementarity of services.[26]

Figure 1



In Figure 1, Carrier 1 initially operates between ports A and B, Carrier 2 between ports B and C, and Carrier 3 between ports C and D. Sharing services within a shipping alliance gives the individual carrier the possibility to expand their service network from port A to port D, without the need for substantial additional investment.

[25] Id.

[26] Some studies have described the above reasons under economies of scale and economies of scope.

APPENDIX II – EVOLUTION OF LEGISLATION

UNITED STATES OF AMERICA

Evolution of US Shipping Act

1916 [44 Sections]	1961* [7 Sections]	1978* [4 Sections]	1979* [11 Sections]	1984 [23 Sections]	1998 [Sections]
1-2. Definitions		2. Section 1 of 1916 amended		3. Definitions	3. Definitions
3-4. US Shipping Board					
5-8. Powers of the Board					
9. Operations of certain vessels					
10. Repossession of certain vessels					
11. Establishments of corporations to construct					
12. Relative cost of construction and operation of vessels in US v. abroad					
13. Issuance of Panama Canal Bonds					
14. Prohibited acts and investigation	Section 1 relates to s. 14b – Foreign commerce, common carriers, dual rate contracts; and Notice and hearing.			10. Prohibited Acts	10. Prohibited Acts
15. Filing of Agreements, modifications, cancellation and antitrust approval	Section 2 relates to s. 15 Filing of Agreements, etc.; and Discriminating agreements disapproval. Section 3 relates to Existing agreements, modifications, etc.			4. Agreements within scope of Act 5. Agreements 6. Action on Agreements 7. Exemption from Antitrust Laws	4.Agreements within scope of Act 5. Agreements 7. Exemption from Antitrust Laws
16-17. Prohibits discriminatory actions and forbid rates other than the filed rates	Section 6 relates to s. 16 Filing of Protests.		2. Section 16 of 1916 Amended – Increased civil penalties		
18-19. Domestic rate regulations	Section 4 relates to s. 18 Filing of carrier rates, etc; Rate Changes; Tariff; Collection of Specified rates only; and Penalty.	3. Section 18 of 1916 amended by adding c(1) to c(6) notice and hearing		8. Tariffs	8. Tariffs
	Section 5 relates to s. 20 to protect the use of confidential information making its release unlawful.				
21. Requirement to file			4. Section 21 – Adding 21(b)		
22. Filing of complaint and investigation			5. Section 22 – Adding (c)(1) to (c) 4	11.Complaints, investigations, reports and reparations	
23. Hearings before order			6. Section 23 – Deleting part of text		
24. Written Report of Every Investigation				15. Reports and certificates 18. Agency Reports and advisory commission	15. Reports and certificates
25. Reverse, suspend or modify orders				14.Commission orders	
26. Investigate discriminatory action of foreign governments against US vessels					
27. Subpoena witnesses and records			7. Section 27 – Deleting part	12. Subpoenas and discovery	

28. Privilege against self-incrimination and immunity					
29. Enforcement of orders			8. Section 27 – Deleting part		
30-31. Procedure and Venue			9. Section 27 – Deleting part		
32. Penalty for violation			10. Section 32 – Amended	13. Penalties	13. Penalties
33. Jurisdiction					
34. Constitutionality severability clause					
35. Appropriation of initial expenses (Repealed)					
36. Refusal of vessel clearance					
37-42. Restrictions during national emergency					
43. Termination of national emergency (repealed)					
44. Short Title		1. Title – Ocean Shipping Act of 1978	1. Title – Shipping Act Amendments of 1979	1. Title	1. Short Title
	Section 7 relates to s. 43 Rules and Regulations.			17.Regulations	17. power to make rules and regulation
				19. Ocean freight forwarders	19. Ocean transport intermediaries.
				16.Exemptions	
				2. Declaration of Policy	2. Declaration of policy
				9. Controlled Carrier	9. Controlled Carrier
				20. Repeals and conforming amendments	
		4. Effective date	11. Effective Date	21. Effective date	21. Effective date
				22. Compliance and Budget Act	
				23. Bonding of non-vessel operating carriers	

*Amendments

AUSTRALIA

Evolution of Trade Practices Act

1966 [35 Sections]	1971 [35 Sections]	1972 [6 Sections]	1974 [35 Sections]
Preliminary	**Preliminary**		**Preliminary**
S. 90_A. Definitions.	S. 104-108. Definitions.	3. Definitions	S. 111. Interpretation.
S. 90_B. Part to be exclusive.	S. 105. Parts to be exclusive of certain ss. S.106. Parts to be exclusive of Part X.		S. 112. Part IV not to Apply.
S. 90_C. Agreements to which Part Apply.	S. 107. Agreements to which Part Apply.		S. 113. Agreements to which Part Apply.
S. 90_D. Shipowners may be required to be represented by agent and give address for services	S. 108. Shipowners may be required to be represented by agent and give address for service		S. 114. Shipowners may be required to be represented by agent and give address for service
Filing of Conference Agreements	**Filing of Conference Agreements**		**Filing of Conference Agreements**
S. 90_E. Clerk of Shipping Agreements.	S. 109. Clerk of Shipping Agreements.	4. Clerk of Shipping Agreements.	S. 115. Clerk of Shipping Agreements.
S. 90_F. Agreements subject to filing.	S. 110. Agreements subject to filing.		S. 116. Agreements subject to filing.
S. 90_G. Particular to be furnished of certain agreements, variations and determinations.	S. 111. Particular to be furnished of certain agreements, variations and determinations.		S. 117. Particular to be furnished of certain agreements, variations and determinations.
S. 90_H. Failure to furnish certain particulars to be an offence.	S. 112. Failure to furnish certain particulars to be an offence.		S. 118. Failure to furnish certain particulars to be an offence.
S. 90_J. Clerk to file particulars.	S. 113. Clerk to file particulars.		S. 119. Clerk to file particulars.
S. 90_K . Filed documents to be evidence.	S. 114. Filed documents to be evidence.		S. 120. Filed documents to be evidence.
S. 90_L. Secrecy.	S. 115. Secrecy.		S. 121. Secrecy.
Powers in relation to Con Agreements	**Powers in relation to Con Agreements**		**Powers in relation to Con Agreements**
S. 90_M. Minister may request undertakings.	S. 116. Minister may request undertakings.	5. Minister may request undertakings. 116 Amended	S. 122. Minister may request undertakings.
S. 90_N. Disapproval of Agreements.	S. 117. Disapproval of Agreements.		S. 123. Disapproval of Agreements
S. 90_P. Effect of disapproval.	S. 118. Effect of disapproval.		S. 124. Effect of disapproval.
S. 90_Q. Reinstatement of disapproved agreements or approval of substituted agreements.	S. 119. Reinstatement of disapproved agreements or approval of substituted agreements.		S. 125. Reinstatement of disapproved agreements or approval of substituted agreements.
S. 90_R. Injunctions.	S. 120. Injunctions.		S. 126. Injunctions.
S. 90_S. Publication of commencement of orders.	S. 121. Publication of commencement of orders		S. 127. Publication of commencement of orders.
Powers in relation to Ind. Shipowners	**Powers in relation to Ind. Shipowners**		**Powers in relation to Ind. Shipowners**
S. 90_T. Minister may request undertakings.	S. 122. Minister may request undertakings.	6. S. 122. Minister may request undertakings. 6.(b)	S. 128. Minister may request undertakings.
S. 90_U. Declaration of shipowners.	S. 123. Declaration of shipowners.		S. 129. Declaration of shipowners.
S. 90_V. Prohibitions applicable to declared shipowners.	S.124. Prohibitions applicable to declared shipowners.		S. 130. Prohibitions applicable to declared shipowners.
S. 90_W. Injunctions.	S.125. Injunctions.		S. 131. Injunctions.
General	**General**		**General**
S. 90_X. Minister may refer certain matters to Tribunal.	S. 126-134. Minister may refer certain matters to Tribunal.		S. 132. Minister may refer certain matters to Tribunal.
S. 90_Y. Ministers to consult with shipowners before making reference.	S. 127. Ministers to consult with shipowners before making reference.		S. 133. Ministers to consult with shipowners before making reference.
S. 90_Z-90_{ZF}. Representations.	S. 128. Representations.		S. 134. Representations.
S. 90_{ZA}-90_{ZF}. Undertakings of Tribunal.	S. 129. Undertakings of Tribunal.		S. 135. Undertakings of Tribunal. S. 136. Failure to comply with undertakings of Tribunal to be contempt of Tribunal. S. 137. Punishment of contempt. S. 138. Protection of certain persons.
S. 90_{ZB}. Publication of reports of Tribunal.	S. 130. Publication of reports of Tribunal.		S. 139. Publication of reports of Tribunal.
S. 90_{ZC}. Institution of prosecutions.	S. 131. Institution of prosecutions.		S. 140. Institution of prosecutions.
S. 90_{ZD}. Aiding and abetting.	S. 132. Aiding and abetting.		S. 141. Aiding and abetting.
S. 90_{ZE}. Protection of certain persons.	S. 133. Protection of certain persons.		S. 142. Protection of certain persons
S. 90_{ZF}. Constitution of Court.	S. 134. Constitution of Court.		S. 143. Constitution of Court.
Civil Remedies in relation to Overseas Cargo Shipping	**Civil Remedies in relation to Overseas Cargo Shipping**		**Civil Remedies in relation to Overseas Cargo Shipping**
S. $90Z_G$. Action for damages.	S. 135. Action for damages.		S. 144. Action for damages.
S. $90Z_H$. Deferment of action on application on Minister.	S. 136. Deferment of action on application on Minister.		S. 145. Deferment of action on application on Minister.

S. 90Z$_I$. Findings in contempt proceedings to be evidence.	S. 137. Findings in contempt proceedings to be evidence.		S. 146. Findings in contempt proceedings to be evidence.
S. 90Z$_G$. Prosecutions.			
S. 90Z$_G$. Commissioner to furnish Annual Report			
		1. Short Title and Citation	
		2 Commencement	

Evolution of Trade Practices Act

1989 [106 Sections]	2000 [180 Sections]	2010 [106 Sections]
Division 1 – Preliminary – S. 10.01 – S. 10.03	S. 1 to 55 on 10.01 – S. 10.03	**Division 1 –** Preliminary – S. 10.01 – S. 10.03
Division 2—Additional restrictive trade practice provisions applying to ocean carriers – S. 10.04		**Division 2—**Additional restrictive trade practice provisions applying to ocean carriers – S. 10.04
Division 3—Minimum standards for conference agreements – S. 10.06 – S. 10.09	S. 56 to 62 on 10.05 – S. 10.08	**Division 3—**Minimum standards for conference agreements – S. 10.06 – S. 10.09
Division 4—Registers and files and public inspection of them – S. 10.10 – S. 10.13	S. 63 to 66 on 10.11 – S. 10.13	**Division 4**—Registers and files and public inspection of them – S. 10.10 – S. 10.13
Division 5—Exemptions from certain restrictive trade practice prohibitions: Subdivision A—Exemptions relating to conference agreements; Subdivision B—Exemptions relating to loyalty agreements; Subdivision C—Exemption relating to inwards liner cargo shipping services; Subdivision D—Other exemptions – S. 10.14 – S. 10.24A	S. 67 to 78 on 10.14 to 10.24A 10.14 Exemptions apply only to certain activities. 10.15A Application of exemptions to inwards liner cargo shipping services. 10.17A Exemptions from section 45 for freight rate agreements. 10.18A Exemptions from section 47 for freight rate agreements. 10.21A Application of exemptions to inwards liner cargo shipping services. 10.24A Exemptions from sections 45 and 47 in relation to stevedoring contracts.	**Division 5—**Exemptions from certain restrictive trade practice prohibitions: Subdivision A—Exemptions relating to conference agreements; Subdivision B—Exemptions relating to loyalty agreements; Subdivision C—Exemption relating to inwards liner cargo shipping services; Subdivision D—Other exemptions – S. 10.14 – S. 10.24A
Division 6—Registration of conference agreements: Subdivision A—Provisional registration; Subdivision B—Final registration; Subdivision C—Confidentiality requests; Subdivision D—Miscellaneous – S. 10.25 – S. 10.40	S. 79 to 98 on 10.27 – S. 10.40	**Division 6—**Registration of conference agreements: Subdivision A—Provisional registration; Subdivision B—Final registration; Subdivision C—Confidentiality requests; Subdivision D—Miscellaneous – S. 10.25 – S. 10.40
Division 7—Obligations of ocean carriers in relation to registered conference agreements – S. 10.41 – S. 10.43	S. 99 to 101 on 10.41 – S. 10.43	**Division 7—**Obligations of ocean carriers in relation to registered conference agreements – S. 10.41 – S. 10.43
Division 8—Powers of Minister in relation to registered conference agreements – S. 10.44 – S. 10.49	S. 102 to 119 on 10.44 – S. 10.49A	**Division 8—**Powers of Minister in relation to registered conference agreements – S. 10.44 – S. 10.49
Division 9—Obligations of non-conference ocean carriers with substantial market power – S. 10.50 – S. 10.53	S. 120 to 132 on 10.50 – S. 10.53	**Division 9—**Obligations of non-conference ocean carriers with substantial market power – S. 10.50 – S. 10.53
Division 10—Powers of Minister in relation to non-conference ocean carriers with substantial market power – S. 10.54 – S. 10.60	S. 133 to 136 on 10.55 – S. 10.58	**Division 10—**Powers of Minister in relation to non-conference ocean carriers with substantial market power – S. 10.54 – S. 10.60
Division 11—Unfair pricing practices – S. 10.61 – S. 10.67	S. 137 to 140 on 10.62 – S. 10.64	**Division 11—**Unfair pricing practices – S. 10.61 – S. 10.67
Division 12—Registration of ocean carrier agents – S. 10.68 – S. 10.72	S. 141	**Division 12—**Registration of ocean carrier agents – S. 10.68 – S. 10.72
Division 12A—Exemption Orders for inwards conference agreements– S. 10.72A – S. 10.72D	S. 10.72A – S. 10.10.72D 10.72A Exemption orders for inwards conference agreements etc.	**Division 12A—**Exemption orders for inwards conference agreements etc. – S. 10.72A – S. 10.72D
Division 13—General provisions relating to registers and conference agreement files – S. 10.73 – S. 10.76		**Division 13—**General provisions relating to registers and conference agreement files– S. 10.73 – S. 10.76
Division 14—Administration. Division A—Review of Decisions of Commission. Division B—Review of Decisions of Minister – S. 10.77 – S. 10.82G	S. 142 to 144 on 10.81 – S. 10.82G	**Division –** Administration– S. 10.77 – S. 10.82G **Division 14A—**Review of decisions of Commission– S. 10.82A – S. 10.82C **Division 14B—**Review of decisions of Minister– S. 10.82D – S. 10.82G
Division 15—Miscellaneous – S. 10.83 – S. 10.91	S. 145 to 153 on 10.87 – S. 10.93	**Division 15—**Miscellaneous– S. 10.83 – S. 10.91
	Amendments Commencing S. 154– S. 170	
	Transitional and Application Provisions S. 171– S. 180	

CANADA

Evolution of SCEA Legislation

1970 [14 Sections]	1979 [23 Sections]	1987 [29 Sections]	2001 Amendments [6 Sections]
1. Short title	1. Short title	1. Short title	
2. Interpretation	2. Interpretation	2. Interpretation	325. Filing of Documents (2)
3. Non-Application of the Combines Investigation Act	5. Non-Application of the Combines Investigation Act	4. Non-Application of the Competition Act	326.(1). (a), (b), (c). (2) Exception to Service Agreements (3.1)
4. Loss of exemption	6. Limitation	5. Limitation	
5. Filing with the Commission	7. Filing with the Commission	6. Filing of Documents	327.(1). 6(1)(b), (2). 6(1)(d),(3).6(2)
6. Time for filing of Documents	8. Time for filing of Documents	7. Time for filing of Documents	328. 7(d)
7. Verification of Documents filed	9. Certification of Documents	8. Certification of Documents	
10. Inspection of Documents	10. Inspection of Documents	17. Inspection and Destruction of Documents	
8. Offence	18. Offence	24. Offence and Punishment	330. Non Compliance of the Act or regulations 24.(1)
9. Limitation	19. Time Limitation	(deleted)	
10. Security	17. Security	23. Security	
11. Investigation of Shipping Conferences	12. Investigation of Shipping Conferences	16. Investigation of Shipping Conferences	
12. Annual Report	20. Annual Report	(deleted)	
13. Commencement	23. Coming into Force and duration	29. Coming into Force	
14. Expiry	(deleted)		
	3. Administration	3. Administration	
	4. Investigation	(deleted)	
	11. Destruction of Documents	(see section 17 above)	
	13. Offices in Canada	18. Office	329. Office in Canada s. 18
	14. Tariffs	19. Inspection of Tariffs	Availability of certain documents s. 19 (1) (a) (b) (c) (2) Contents of Tariff (3) (a) (b) (c) (d)
	15. Meetings	20. Meetings	
		21. Designated Shipper Groups	
	16. Regulations	22. Regulations	
	21. Transitional	25. Transitional	
	22. Repeal	28. Repeal	
		9. Giving of Notices (increase in rates/surcharges or increases)	
		10. Giving of Notices (amendments to loyalty contracts or tariffs)	
		11. Disclosure of Service Contracts	
		12. Exceptions	
		13. Investigation of Complaints	
		14. Commission shall notify Director	
		15. Commission must render decision with 120 days	
		26/27. Consequential and Related Amendments	

EUROPEAN UNION

Regulation No. 4056/86		
1986 [27 Articles]		
1. Subject matter and scope of Regulation	10. Procedures on complaints	19. Fines
2. Technical Agreements	11. Result of procedures of complaint	20. Periodic penalty payments
3. Exemption for Agreements	12. Application of Article 85(3)	21. Review by the Court of Justice
4. Condition attaching to Agreements	13. Duration & Revocation of decisions applying to 85(3)	22. Unit of Accounts
5. Obligations attaching to Agreements	14. Powers	23. Hearing of the parties and of third persons
6. Exemption attaching for agreements between users and conferences	15. Liaison with the authorities of Member States	24. Professional secrecy
7. Monitoring of exempted agreements	16. Requests for information	25. Publication of Decisions
8. Effects incompatible with the Article 86 of the Treaty	17. Investigations	26. Implementing provisions
9. Conflicts of International law	18. Investigating Powers	27. Entry into force

Regulation 4056/86 Repealed by EU Council Regulation 1419/2006 in September 2006 went into effect in 2008.

Evolution of Regulation No. 870/95 95					
1995 [13 Articles]	2000 [2 Articles]	2004 [5 Articles]	2005 [4 Articles]	2009 [7 Articles]	2014 and 2020 [1 Article]
I. Definitions and Scope:					
1. Definition	2. Definition 1.		1. Definitions	2. Definition	
2. Scope				1. Scope	
II. Exemptions:					
3. Exempted agreements. (a)-(g)	3. Exempted (g)			3. Exempted agreements.	
4. Non utilization of capacity					
III. Conditions attaching to exemption:				**III. Conditions and Exemptions:**	
5. Basic conditions for grant of exemption	5. Basic (c)		2. Article 5 Independent Action		
6. Conditions relating to share or trade	6. Conditions relating to market share			5. Conditions relating to market share	
7. Opposition Procedure	7. Opposition procedure (1)	1. A. 7 is deleted			
8. Other Conditions (1)-(4)			3. Article 8(2) Withdrawal	6. Other Conditions (2)	
IV.Obligations:					
9. Obligations attaching to exemption		2. Article 9 is amended			
10. Exemption for agreements between transport users and consortia concerning the use of scheduled maritime transport service					
V. Miscellaneous provisions:					
11. Professional secrecy		3. A. 12 replaced			
12. Withdrawal of block exemption (1)-(4)		4. A. 12 replaced			
13. Final Provisions		5. A. 13 replaced			
	14. Entry into Force		4. Article 14	**IV. Final Provisions** 7. Entry into force	1. Entry into force

NEW ZEALAND

Evolution of Shipping Act 1987	
Shipping Act 1987 [15 Sections]	Amendments to Shipping Act 1987 [5 Sections]
I. Short Title and commencement	I. Short Title and commencement
2. Interpretation: Agreement; Carrier; Direction; Foreign government; Outwards shipping; Registered New Zealand ship; Shipper; Unfair practice.	2. Interpretation: Agreement; Carrier; Foreign government; Outwards shipping; Registered New Zealand ship; Shipper.
	2A. Act is maritime Act
PART I - SHIPPING POLICY AND PRACTICES	*Repealed*
3. Shipping policy objectives	*Repealed*
4. Unfair practices justifying use of Minister's powers to initiate investigations and issue directions	*Repealed*
5. Minister may investigate suspected unfair practices	*Repealed*
6. Report on investigation	*Repealed*
7. Minister may issue directions to carriers engaging in unfair practices	*Repealed*
8. Restrictions on directions	*Repealed*
9. Period for which direction in force	*Repealed*
10. Minister's powers not to be delegated	*Repealed*
11. Offences	*Repealed*
PART II - INTER·GOVERNMENTAL SHIPPING RELATIONS	**PART II** - INTER·GOVERNMENTAL SHIPPING RELATIONS
12. Regulations may be made for defence of New Zealand shipping or trading interests	12. Regulations may be made for defence of New Zealand shipping or trading interests
13. Designation of national flag carriers	13. Designation of national flag carriers
PART III - MISCELLANFOUS PROVISIONS	*Repealed*
14. Application of other Acts	*Repealed*
15. Repeal and consequential amendments	*Repealed*

APPENDIX III – EVOLUTION OF CONSORTIA

The Evolution of Ocean Shipping Alliances

Maersk and Sea-Land introduced the alliance system of sharing vessels in the Atlantic and Pacific oceans in the early 1990s.[1] However, the first global alliance in ocean shipping that attracted attention was formed in 1994. The initial alliances formed have since evolved. The historical development of ocean alliances will be classified according to the entry/exit of a new alliance.

1990 – Maersk and Sea-Land

Maersk and Sea-Land had a vessel sharing agreement in the early 1990s. Some writers view this as the beginning of alliances. However, it was not until June 1996, that Maersk and Sea-Land upgraded their cooperative relationship to form an active alliance.

1994 – Global Alliance

The first formal alliance, the Global Alliance, was cited in the news as early as 1994 but became formal in March 1995. It was initially formed with American President Lines (APL), Orient Overseas Container Lines (OOCL), and Mitsui-OSK Lines (MOL). It included joint operations, the common use of terminals, the common use of containers and equipment and the common use of the inland logistics network. Later other carriers such as Nedlloyd and MISC joined the Alliance by 1996.

1995 – Grand Alliance

The second formal alliance, the Grand alliance, was formed in 1995. The founders of the Grand Alliance were: Hapag Lloyd, NYK Line, Neptune Orient Line (NOL). Later, P&O Container Lines (P&OCL) joined the alliance.

1998 – New World Alliance / United Alliance / CKYH

In 1998 three new alliances were formed. 1. The New World Alliance formed by two former members of the Global Alliance: American President Lines (and also NOL which was acquired in 1997 and formerly a member of the Grand Alliance), Mitsui-OSK Lines (MOL), and Hyundai, a new member. 2. The United Alliance was formed by Hanjin (DSR-Senator which was acquired in 1977), Cho Yang Shipping Co., Ltd., and United Arab Shipping Company (UASC). 3. The CKY Alliance was formed by K-Line, Yang Ming and COSCO.

Two of the older alliances (Maersk and Sea-Land; and Grand Alliance) continued and the Global Alliance came to an end, losing Nedlloyd (which merged with P&O to form P&O Nedlloyd), MISC and Orient Overseas Container Lines (OOCL) to the Grand Alliance. Several reasons were attributed for the new alliances and changes. The most important were: 1. The negative effect of the recession in the liner shipping market and the Asian economic crisis. 2. The expiration of the Global Alliance in March 1998. 3. An increase in the number of mergers. From 1998 to 2011, P&O Nedlloyd and MISC left the Alliances. The former being sold to Maersk. The Asian economic crisis had a negative effect on Cho-Yang which led to its bankruptcy in 2011 and the end of the United Alliance.

2011/2 – G6 Alliance / MSC CMA CGM

In 2011/12, the G6 Alliance and the MSC/CMA CGM were formed and the United Alliance exited. The G6 Alliance was formed with the members of the New World Alliance and the Grand Alliance, except MISC which left the Grand Alliance in January 2010. MISC's withdrawal from the alliance was attributed to the long and significant recession in the liner shipping market and its intention of leaving the

[1] Contestability of Container Liner Shipping Market in Alliance Era, The Asian Journal of Shipping and Logistics, Volume 33, Issue 1, March 2017, pp. 27-32. It has also been pointed out that a space-charter consortium of four Japanese operators and MOL existed at a much earlier date. However, it is doubtful that they considered themselves as a global alliance and since these companies agreed on some commercial aspect of the business that are not allowed by a global alliance as presently defined.

Table 1 – The Evolution in Alliances and shifts in the Member Lines 1990-2022

1990	1994	1995	1998	2011/12	2014/5	2017	2022
1.Maersk and Sea-Land	**1.Maersk and Sea-Land**	**1.Maersk and Sea-Land**	**1.Maersk and Sea-Land**				
	2.Global Alliance	**2.Global Alliance**	**2. New World Alliance**	**1.G6 Alliance**	**1.G6 Alliance**		
	APL OOCL MOL Nedlloyd MISC	APL OOCL MOL Nedlloyd MISC	APL/NOL MOL Hyundai	APL/NOL MOL Hyundai	APL/NOL MOL Hyundai		
		3. Grand Alliance	**3. Grand Alliance**			**1. THE Alliance**	**1. THE Alliance**
		Hapag-Lloyd, NYK Line, NOL (P&OCL)	Hapag-Lloyd, NYK Line, P&O Nedlloyd MISC* OOCL	Hapag-Lloyd, NYK Line, OOCL	Hapag-Lloyd, NYK Line, OOCL	Hapag-Lloyd UASC NY Group, 'K' Line, MOL, Yang Ming	Hapag-Lloyd ONE Yang Ming, Hyundai
			4. United Alliance				
			Hanjin (DSR-S) Cho-Yang# UASC*				
			5. CKYH Alliance	**2. CKYH Alliance**	**2. CKYHE Alliance**		
			K-Line, Yang Ming COSCO	K-Line, Yang Ming COSCO Hanjin	K-Line, Yang Ming COSCO Hanjin Evergreen+		
				3.MSC/CMA CGM	**3.2M Alliance**	**2.2M Alliance**	**2. 2M Alliance**
				MSC CMA CGM	MSC Maersk	MSC Maersk Hamburg Sud Hyundai	MSC Maersk
					4. Ocean 3	**3. Ocean 3**	**3. Ocean 3**
					CMA CGM, ChinaShipping UASC+	CMA CGM, APL COSCO China Shipping OOCL Evergreen	CMA CGM, COSCO Evergreen

* MISC and UASC later left the alliance system. # Cho-Yang becomes bankrupt in 2011. + UASC and Evergreen join the alliance system.
Sources: *The Implications of Mega-Ships and Alliances for Competition and Total Supply Chain Efficiency: An Economic Perspective*', November 2016, p.10. *The tripartite of ocean carrier alliances face multitude of challenges*, George Lauriat, 18 April 2022, Issue 740, www.ajot.com

Asia-Europe route. The MSC/CMA CGM was formed with the two carriers MSC and CMA CGM. The United Alliance's three members joined other alliances (Hanjin became part of the CKYH - and played an important role in reorganizing CKYH which became the largest alliance at that time) or no longer belonged to the alliance system (Cho-Yang went bankrupt and USAC withdrew from the alliance system).

2014/5 – 2M Alliance / O3

In 2014/15, the 2M and the Ocean Three Alliances were formed. The 2M was formed by MSC and Maersk, a ten year agreement beginning in 2015. The Ocean Three was formed with CMA CGM, UASC and China Shipping. The MSC/CMA CGM alliance exited. One member of the MSC/CMA CGM alliance (i.e. MSC) was absorbed by the 2M and the other (i.e. CMA CGM) by the Ocean Three Alliance. The CKY became the CYKE Alliance with the addition of Evergreen Lines to it. On January 21, 2019, CMA CGM announced the extension of the Ocean Alliance cooperation with its partners Cosco Shipping, Evergreen and OOCL until 2027.[2]

2017 – The Alliance

In 2017, The Alliance was formed with the NY Group, 'K' Line, MOL, Yang Ming, Hapag-Lloyd and UASC. Two alliances exited, the G6 Alliance and the CKYHE. There are now three Alliances. 1. 2M; 2. Ocean Three; and 3. The Alliance. The members (11) of the exited alliances joined the other alliances (5 to The Alliance, 4 to Ocean Three, 1 to 2M) or went bankrupt (Hanjin).[3] From 2017 to 2022, there was little change in the number alliances, except mergers among carriers in the alliances and Hyundai leaving the 2M Alliance to join The Alliance.

2025 – 2M Alliance

In January 2025, the 2M Alliance is expected to be terminated. The decision to terminate was based on the decision to focus on the individual strategic priorities and changed market conditions. The Agreement was a 10-year agreement with a two year notice termination period.

The above evolution of alliances over the last thirty years is shown in Table 1.

The evolution of the alliances provides an indication of how ocean carriers have aligned themselves over the last thirty years. The number of alliances peaked in 1998 reaching 5 and then fell to 3 in 2017. Their importance can be seen in Table 2 which indicates their market share.

Table 2 – Alliances in September 1996, July 2007 and June 2022

Ocean Carrier	Maersk & SeaLand	CKYH	Grand Alliance	Global Alliance	New World All	2M	Ocean Three	The Alliance	Combined Alliances	All Carriers
Total TEU 1996	447,371		397,100	453,950						5,454,495
Market Share	8.20%		7.28%	8.32%					23.80%	100%
Total TEU 2007	1,805,005	1,302,080	1,242,587		890,845					11,198,471
Market Share	16.1%	11.6%	11.1%		8%				46.8%	100%
Total TEU 2022						8,632,019	77,446,90	4,731,045		255,278,964
Market Share						33.9%	30.4%	18.5%	82.8%	100%

[2] Members of Ocean Alliance extend partnership until 2027, January 21, 2019, www.transportweekly.com

[3] To The Alliance: MOL; NYK Line; Hapag Lloyd; K-Line; and Yang Ming. To the Ocean Three Alliance: APL/NOL; OOCL; COSCO; and Evergreen.

APPENDIX IV – EVOLUTION OF CONTAINER SHIP SIZE

The Evolution of Container Ship Size[1]

Since the beginning of containerization in the mid-1950s, containerships undertook six general waves of changes, each representing new generations of containerships. The increase in size was driven by the need to achieve economies of scale.[2] The six generations of ships are briefly described and shown in the Table 1.

A. Early containerships: The first generation containerships less than 1,000 TEUs appeared in the 1960s from converted vessels. In the 1970s, the first fully cellular containerships 1,000 to 1,250 TEUs appeared with faster speeds of 20-24 knots. *B. Panamax*: The 1980s saw the construction of larger ships, Panamax[3], to achieve economies of scale. Once the limits were reached, ships known as Panama Max were built. *C. Post Panamax I and II*: In 1996, the Post-Panamax ship (6,600 TEUs) wider and more efficient appeared and then the Panamax II (8,000 TEUs) in 2000 placing pressure on port infrastructure. *D. Very Large Containership (VLCS)*: The next generation called VLCS (11,000-14,500 TEUs) came in 2006, when Maersk introduced the Emma Maersk. *E. New-Panamax, or Neo-Panamax (NPX)*: The expanded Panama Canal in June 2016 led to the building of New-Panamax ships (12,500 TEUs). *F. Ultra Large Containership (ULCV)*: In 2013, ULCVs (18,000 TEUs), named 'Triple E' by Maersk, was introduced and expanded in 2017 (20,000 TEUs). Then in 2019, the Megamax-24 (21-25,000 TEUs) were built close to the technical limits that the Suez Canal can accommodate. Larger ships (25-27,000 TEUs) called the 'Malacca Max' are on the drawing board. The width of the Malacca Straits, Suez Canal, infrastructure at various ports and diminishing economies of scale will have an effect on future ship size.

Table 1 - Evolution of Ship Size

	Container Generation	TEU	LOA*	Beam*	Draft*	Bays	C. Boxes	Upper Deck	Below Deck
A.	Early Containership-1956	500-800	137	17	9		6	4	
	Early Containership-1956	500-800	200	20	9		8	6	
	Fully Cellular - 1970	1-2,500	215	20	10		10	5	4
B.	Panamax - 1980	3-3,400	250	32	12.5	17	13	6	5
	Panamax Max - 1985	34-4,500	290	32	12.5	17	13	8	6
C.	Post Panamax I - 1988	4-6,000	300	40	13	17	15	9	5
	Post Panamax II - 2000	6-8,500	340	43	14.5	20	17	9	6
D.	VLCS - 2006	11-15,000	397	56	15.5	23	22	10	8
E.	New Panamax - 2014	12,500	366	49	15.2	22	19-20	10	6
F.	ULCS - 2013	18-21,000	400	59	16	24	23	11	10
	MGX-24 - 2019	21-25,000	400	61	16	24	24	13	12

* Meters. The interpretation of information shown in each row is shown in the Figure below.

[1] The information in this Appendix has been adapted from Evolution of Containerships, www.transportgeography.org

[2] There appears to be cost savings of 30% per teu from moving to a 18,000 teu ship from a 13,100 teu ship. Why Size Matters: Container Ship Economies of Scale, September 3, 2013, www.marinelink.com

[3] Named after the 4,000 TEUs size limits of the Panama Canal.

APPENDIX V – THE BLOCK EXEMPTION IN SHIPPING

The Block Exemption in shipping[1]

Block exemption is generally introduced as a special regulation or incorporated into laws when the government in a country in which it is given believes that such arrangement generates more positive than negative effects to the economy and that benefits will be passed on to end consumers. Block exemption was popularized in Europe when the European Union first provided exemption from certain laws in 1967, though granting exemptions from laws existed long before that year.

Block exemptions create a 'safe harbour' for companies, where they can assume that their agreements or practices are exempted from being scrutinised in the area of antitrust or state aid, as long as they adhere to specific conducts described in the block exemptions. It thus provides legal certainty for companies in their everyday commercial conduct. There are all types of block exemptions: horizontal, vertical, sector specific, technology transfer, etc.[2]

It was recently introduced in the shipping sector for consortia agreements when "Ship liners claim that fundamental characteristics of the shipping industry require extensive cooperation among competitive carriers. High entry and variable cost and substantive investment requirement, in combination with trade imbalances and low margin are often cited to justify cooperation in resource pooling in order to achieve economy of scale, and to provide reliable and regular shipping services."[3]

Over time the nature of the exemption has been increasingly scrutinized, particularly with the onset of deregulation philosophy, and the desire to introduce competition in world markets and to increase international trade. As a result, in international shipping, certain types of agreements, like price fixing, capacity restrictions, and commercial agreements generally (eg. joint sales, marketing, pricing, pooling of revenues, profits, loss sharing, joint management, allocation of markets/customers, etc.) which were once granted an exemption were outlawed and prohibited in most jurisdictions or competitive clauses were added in the laws (eg. individual confidential service contracts, independent action on rates, restriction of rates to ocean transportation, etc). In response to this, the shipping industry shifted to non-commercial agreements (eg. utilization of ships, sailing schedules and itineraries, containers, use of joint terminals, etc). Many of these non-commercial agreements such as vessel sharing, slot swap etc. provided real efficiencies to the industry and were supported not only by carriers but also shippers who gained from the reduction in costs as a result of larger ships, etc. As a result, block exemptions for certain types of agreements began to be made in certain countries (EU, Israel, India, Malaysia, etc). The industry made a passionate plea for block exemptions when the time for renewal to these block exemptions come up, as can be seen in the following statement by the World Shipping Council, European Community Shipowners Associations and International Chamber of Shipping to the European Commission in March 2014

> "…the industry is not concentrated; there are no regulatory barriers to carriers entering markets; the industry struggles with overcapacity for structural, cyclical and seasonal reasons, but such excess capacity cannot be utilized or easily idled; capital and operating costs are high; the industry is highly competitive with shippers having an array of service choices; and profits (where they exist) and returns on investment typically lag behind those of other major industries. In short, the industry is a very challenging one for vessel operators and is a favorable one for the European importers and exporters that use the services of those vessel operations."[4]

[1] Shipping Block Exemption, 2015, www.unescap.org

[2] See Block Exemption Regulation, The block exemption regulations issued pursuant to Article 101(3) TFEU (Treaty on the Functioning of the European Union) specify the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) TFEU. www.europa.eu

[3] Shipping Block Exemption, 2015, www.unescap.org

[4] Shipping Block Exemption, 2015, www.unescap.org

As the structure of the international shipping industry began changing these non-commercial agreements have come under increased scrutiny and the block exemption is being challenged (as shipping alliances controlled 80 percent of the world market in shipping and as container/demurrage/detention rates rose to heights never seen). Whether shipping alliances and consortia deserve antitrust immunity through a block exemption for efficiency enhancing agreements is now the subject of an ongoing controversy.

One school of thoughts points to the advantages of granting block exemption to efficiency enhancing agreements.[5] The other school of thought points to the advantages of not granting block exemption[6] and have made their argument not only on an assessment of the agreement itself but on the effect of market power of shipping carriers that exists in the industry.[7]

Before arriving at a verdict, one should take account of several problems. First, the scope of the block exemption is defined differently in different countries, some countries include vessel sharing agreements and discussion agreements, etc., others restrict it to specific vessel sharing and operational agreements. Further, in some countries, certain criteria have to be satisfied whereas in other countries no specific criteria have been specified before a block exemption is granted. Second, in some countries, the question of anti-competitive effects of these block exemptions are considered, in other countries, the question of anti-competitive effects are not considered. Third, in some countries, the troublesome question of distribution of the benefits arising from the efficiencies due to the block exemption may be specified, in other countries, the question of distribution of benefits arising from these block exemption is not mentioned.

Advocates for removal of the block exemption generally place a great deal of emphasis on the distribution of the gains in efficiencies if there is an anti-competitive effect, as they are of the opinion that this has to be taken into account as it is usually tied into the regulations when individual assessment of agreements have to be made and not into block exemption. While this may be true, distribution of these efficiencies is a problematic issue in most competition regulations. Those who do not advocate the removal of block exemption point to the view that the incentive to innovate and introduce inefficiencies should not be destroyed.[8] "Professor Galbraith, …., considers that most industries have moved, or are moving, towards a position in which a few large firms inevitably dominate total output. This, he thinks, is all to the good for only firms of considerable size will possess the resources to carry on technical research on an adequate scale."[9] If this is the case, then granting block exemption to efficiency agreements that have no anti-competitive effects should merit the grant of block exemption. One would not want to discourage technological progress that brings about efficiency and penalize those responsible for it by imposing cost of compliance and introducing uncertainty as it would have a chilling effect on it. This would give advocates of block exemption a water-tight case.

However, advocates for the removal of the block exemption have still another string to their bow, they point out that these efficiency agreements can be used as facilitating devices to bring about conscious parallelism and co-ordinated behaviour and to encourage collusive behaviour and foster cartel behaviour. They argue that sharing of vessels, equipment or port infrastructure would bring would be competitors

[5] Improving productivity and quality of available liner shipping services; promoting technological and economic progress; and sharing of benefits. See Preamble to Regulation 870/95, paragraph 5. Included in this is the very large investment required for ships and infrastructure.

[6] Ensuring regulatory neutrality in all transport modes; determining merits on case by case; and ensuring no anti-competitive effects.

[7] They also indicate that compliance and self-assessment costs are limited, efficiency gains have diminished over time and repeal of block exemption would not create a legal vacuum. See The Impact of Alliances in Container Shipping, International Transport Forum, 2018, p. 76 and p. 78, www.itf-oecd.org

[8] It is worthwhile keeping in mind that there are laws to promote monopoly like patent and intellectual property rights.

[9] Monopoly and Economic Progress, Economica, August 1953, p. 204.

into closer contact and if so it would be unlikely that commercial aspects of the business are not also shared. This has led the Global Shipping forum to question the prevailing wisdom that vessel sharing agreements and shipping alliances are good for competition.

In sum, one can conclude that if efficiency enhancing agreements do not have any anti-competitive effects or do not have any collusive overtones,[10] there does not appear to be a case against providing block exemption to certain types of efficiency enhancing agreements. It is worthwhile keeping in mind that over the last hundred years most of economic progress and economic well being has been achieved by technological developments.[11]

[10] It is worthwhile pointing out because of these concerns the EU has had to tighten its Block exemption since its inception and India which provided an exemption for VSAs and Discussion Agreements later changed its policy and only granted an exemption to VSAs.

[11] Competition policy is one type of policy but there are also other types of policies that sometimes takes precedent over competition policy like safety policy in transportation and prudential policy in finance.

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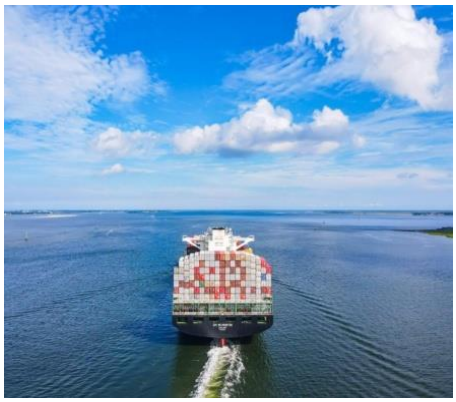


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Joseph has a B.A. and M.A. from the University of Bombay in economics and an M.A. from Queen's University, Canada in economics. He has also completed his Ph.D. course work in the same field. He has worked for thirty-six years with the Competition Bureau, Industry Canada and a year and half at Statistics Canada. His experience includes work as an investigative officer and experience in the regulated affairs area, together with research in various areas such as labour economics, antitrust economics, competition law, transportation economics, etc. He has been a member of the CTRF Board of Directors for twenty years and is VP of Publications. Mr. Monteiro publications are mainly in the area of competition law and economics. He has published about hundred papers and a book on Canadian Transportation System. He also publishes the monthly Transportation Information Update, The Transportation Digest and the Canadian Transportation Quarterly.

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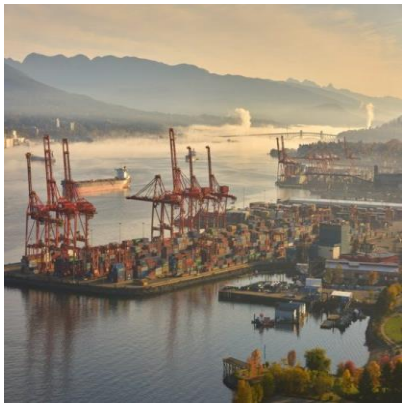

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