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## The Sinking Shipping Industry

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# COMMENTS

## The Sinking Shipping Industry\*

### I. INTRODUCTION

The United States has yet to develop a coordinated national shipping policy despite constant calls for a strong merchant marine dating from the country's inception.<sup>1</sup> The lack of such a policy implicates broader national interests than those of shippers and ship-owners, such as the national defense, diplomatic relations with United States trading partners, and the United States balance of payments.<sup>2</sup> In 1950, the United States ranked second only to the United Kingdom in both number of ships and deadweight tonnage (a measure of ship carrying capacity); however, in 1970, it ranked eighth in number and sixth in size among world merchant marines.<sup>3</sup> Today, the United States flag fleet carries an estimated 4.1% of United States waterborne trade.<sup>4</sup> These statistics demonstrate the depths to which the United States ship-

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<sup>1</sup> George Washington was the first president to express the need for maintaining a strong United States merchant marine: "I recommend it to your serious recollection how far and in what mode, it may be expedient to guard against embarrassments from these contingencies, by such encouragements to our own Navigation as will render our commerce and agriculture less dependent on foreign bottoms. . . ." President George Washington, Second Annual Address to Congress, Dec. 8, 1790, *quoted in* I. HEINE, *THE U.S. MARITIME INDUSTRY—IN THE NATIONAL INTEREST* 3 (1980) [hereinafter cited as *MARITIME INDUSTRY*].

<sup>2</sup> The private merchant marine is the fourth arm of the United States national defense system. The contribution of the shipping industry to the balance of payments may become more important because of the increasing United States trade deficit. *See* *MARITIME INDUSTRY*, *supra* note 1, at 337-38. "The dramatic decline in the percentage of our commerce carried on U.S.-flag vessels has added to our balance of payments deficit." HOUSE COMM. ON MERCHANT MARINE & FISHERIES, *SHIPPING ACT AMENDMENTS OF 1979*, H.R. REP. No. 232, 96th Cong., 2d Sess. 10 (1979) [hereinafter cited as *H.R. REP. No. 232*].

<sup>3</sup> *MARITIME INDUSTRY*, *supra* note 1, at 259-60.

<sup>4</sup> *Id.* at 253. This is an estimate of 1978 trade. In the same year, ships carried 61.7% of

ping industry has descended. This severe decline is due to fragmented and outdated legislation incapable of dealing with problems which the industry is currently experiencing. The present regulatory system is based on an antitrust philosophy which puts the United States flag fleet at a competitive disadvantage because it fails adequately to take account of the industry's present structure and operation. A coordinated national shipping and cargo policy designed to reverse the industry's downward trend is needed.

The strength of the United States merchant marine will depend on its ability to contend with each of the factors contributing to the industry's decline. After an explanation of the industry's organization, this comment will examine the present regulatory scheme, devoting special attention to the liner shipping industry and its antitrust exemption.<sup>5</sup> Next, a critical analysis of industry problems will be presented.<sup>6</sup> A presentation of components of a coordinated national shipping and cargo policy follows the analysis of industry problems.<sup>7</sup>

## II. DEVELOPMENT OF THE PRESENT REGULATORY SYSTEM

### A. Background on the Shipping Industry

Liners serving on United States foreign trade<sup>8</sup> routes operate as either conference members or independents. Shipping conferences are "agreements organized by shipping lines to restrict or eliminate competition, to regulate and rationalize sailing schedules and ports of call, and occasionally to arrange for the pooling of cargo, freight monies, or

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United States foreign trade, airplanes carried 14.1% and the remaining 24.2% was carried by other means (principally railroads, pipelines and trucks). *Id.* at 75.

The statistics cited in the text demonstrate that the industry is back where it was in 1910 when "94% of the entire exports and imports of the United States [were] carried in foreign ships, under the flags of foreign nations who [were] our rivals in trade and possible enemies in war." House Joint Resolution 230 of 1910, *quoted in* Mason, *The Relationship and Parallel Development of Economic Regulation and Antitrust Enforcement in the Ocean Common Carrier Industry*, in PROCEEDINGS: IN SEARCH OF A RATIONAL LINER SHIPPING INDUSTRY 7 (Northwestern University Transportation Center 1978) [hereinafter cited as LINER SHIPPING].

<sup>5</sup> See *infra* notes 34-102 and accompanying text. Liner shipping service is regularly scheduled sailings by an ocean carrier on an established trade route. Liners are common carriers and accept cargo on a first-come, first-served basis.

<sup>6</sup> See *infra* notes 103-97 and accompanying text.

<sup>7</sup> See *infra* notes 198-207 and accompanying text.

<sup>8</sup> United States foreign trade may consist of both American-built ships and foreign-built ships, if they are employed exclusively in foreign trade. Domestic waterborne trade, on the other hand, is reserved for American-built and -manned ships. Act of August 24, 1912, ch. 390, § 5, 37 Stat. 560, 562 *as amended*, 46 U.S.C. § 11 (1976), *repealed by* Act of Dec. 24, 1980, Pub. L. 96-594, tit. I, § 127, 94 Stat. 3459, 3459. Cabotage (carriage of goods or passengers for remuneration taken on at one point and discharged at another point within the territory of the same country) laws of this type are common among maritime nations. MARITIME INDUSTRY, *supra* note 1, at 379-80.

net earnings.”<sup>9</sup> Shipping lines created conferences in response to competitive conditions which prevailed in the late 1800s.<sup>10</sup> During this period, the supply of shipping greatly exceeded the demand due to the enormous growth of tonnage in previous years. Cutthroat competition followed, reducing freight rates to unremunerative levels.<sup>11</sup> As a result, service was disrupted and some lines failed; however, their ships remained and the excess supply continued.<sup>12</sup> In response, surviving shipping lines pooled their resources, made special contracts with large shippers, and formed organizations to regulate the trade and eliminate competition. It is generally believed that the first conference agreement was the Calcutta Conference, formed in 1875 by liner companies engaged in trade to that port from the United Kingdom. The European outbound trades<sup>13</sup> were the first to be organized.<sup>14</sup> In 1979, approximately 350 conferences and agreements existed.<sup>15</sup>

Conferences vary as to type and purpose. Some conferences are created to discuss or resolve specific shipping matters of concern to their members, while each member continues to publish its own tariff.<sup>16</sup> In other conferences, members are parties to a common tariff and meet

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<sup>9</sup> D. MARX, INTERNATIONAL SHIPPING CARTELS: A STUDY OF INDUSTRIAL SELF-REGULATION BY SHIPPING CONFERENCES 3 (1953).

<sup>10</sup> *Id.* at 46.

<sup>11</sup> The industry's cost structure makes it susceptible to this destructive competition.

The crucial fact . . . is that, once a vessel has been scheduled by a liner operator . . . , a large proportion of the total expenses of the voyage has become fixed, and until the vessel is loaded 'full and down' it will be remunerative for that vessel to carry any additional cargo that can be procured so long as it pays anything in excess of the actual out-of-pocket expenses involved. In trades where the flow of commerce is not balanced—and this is the case more often than not . . . liners . . . will be tempted to engaged in cutthroat competition at least on the leg of the voyage on which cargo is light.

D. MARX, *supra* note 9, at 21.

<sup>12</sup> *Id.*

<sup>13</sup> Conferences generally restrict their activities to traffic between two geographic areas or ranges. Inbound and outbound segments of the trade are considered as separate trades. Therefore, separate conferences are usually formed to cover inward and outward operations, though some conferences cover traffic moving in both directions. Large companies operating worldwide will be a member of numerous conferences, generally one for every route on which it operates a liner service. *Id.* at 137-38; S. LAWRENCE, UNITED STATES MERCHANT SHIPPING POLICIES AND POLITICS 14 (1966).

<sup>14</sup> D. MARX, *supra* note 9, at 46-47. For a more detailed discussion of shipping industry economics and conferences, see generally Agman, *Competition, Rationalization, and the United States Shipping Policy*, 8 J. MAR. L. & COM. 1 (1976); Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MAR. L. & COM. 93 (1972); Comment, *Antitrust and the Shipping Industry: Interpretation of the Shipping Act of 1916*, 12 N.Y.U. J. INT'L L. & POL. 115 (1979-80) [hereinafter cited as Comment, *Antitrust & the Shipping Industry*].

<sup>15</sup> MARITIME INDUSTRY, *supra* note 1, at 80.

<sup>16</sup> Tariffs are rate schedules in the shipping industry which list cargo and the freight rate to be charged for its carriage.

frequently to consider freight rates and other matters of concern.<sup>17</sup> Since conferences were created to provide stability, they must exert control over competition. Control may be acquired by using a common tariff whereby each member charges the same freight rates, thereby eliminating price competition between member lines; or by limiting the number of sailings per vessel, thereby limiting available carrying capacity on the trade.<sup>18</sup> However, conferences are still faced with competition from: (1) independent or non-conference liners operating in the same area, but who may or may not charge the conference rates;<sup>19</sup> (2) tramps<sup>20</sup> which compete primarily for commodities moving in bulk and whose presence may cause conferences to exempt certain goods from its rate agreement;<sup>21</sup> (3) other conferences serving as alternate routes or markets; and (4) private or industrial carriers.<sup>22</sup> This competition serves as a check on conference abuse of rate-making power, but also threatens the long-term commitment that conference members have made to their trade.

The conference system encourages the revenue-producing stability which shipping lines require to finance the regular frequent sailings they offer to shippers and to justify investment in new and improved services to shippers.<sup>23</sup> To ensure sufficient cargo for members, conferences provide "incentives" for shippers to use only conference liners. These loyalty agreements take different forms. For example, a shipper requiring the services provided by a conference liner will enter into a deferred rebate agreement which obligates him to utilize conference

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<sup>17</sup> MARITIME INDUSTRY, *supra* note 1, at 80.

<sup>18</sup> *Id.* at 22.

<sup>19</sup> D. MARX, *supra* note 9, at 23.

<sup>20</sup> Tramp carriers have irregular schedules and routes, switching routes as profitability changes. They generally accept cargo only in amounts sufficient to fill their vessels.

<sup>21</sup> The tramp charges rates below the conference rate to attract sufficient cargo to fill the vessel. The conference must meet this price or lose cargo. That is why rates for certain commodities are left open, that is, subject to negotiation. Tramp cargoes consist mainly of commodities which are available for shipment in full cargo lots, of relatively great bulk or weight, capable of being transported with no exceptional facilities of the carrier for handling or preserving the cargo, and valued low enough so that the cheapness of the transport outweighs the value of speed and regularity of delivery. D. MARX, *supra* note 9, at 224. The last characteristic is a reference to the pricing method used in the industry, which is charging what the traffic will bear or price discrimination. In effect, finished goods pay higher rates than semi-finished goods, which pay higher rates than raw materials. The first two are considered high-rated cargo, and the last one, low-rated cargo. *Id.* at 28.

<sup>22</sup> J. WALGREEN, THE ECONOMICS OF OCEAN LINER FREIGHT CONFERENCES 87-89 (1965). Private carriers are owned by firms whose main business is not shipping. They provide shipping services for their owners, but may compete with conferences by operating as common carriers on one leg of their trips. *Id.*

<sup>23</sup> MARITIME INDUSTRY, *supra* note 1, at 80.

liners exclusively.<sup>24</sup> During a specified period, if the shipper violates the agreement and utilizes non-conference liners, he loses his right to the rebate (usually five or ten percent), not only for shipments made during that period but also for shipments made during the previous period.<sup>25</sup> Another exclusive patronage device is the dual rate system. In return for the shipper's exclusive patronage on a specified route, the conference bills the shipper at contract rates lower than those specified in the tariff applicable to shippers who do not sign dual rate contracts.<sup>26</sup> A shipper may be liable for liquidated damages for a contract violation.

Conferences may be either open or closed. United States conferences must be open.<sup>27</sup> Membership is open to any carrier, foreign or domestic, able to satisfy requirements promulgated by the Federal Maritime Commission (FMC).<sup>28</sup> By contrast, the rest of the world operates under a system of closed conferences.<sup>29</sup> Members of a closed conference decide whether to admit new members. As a consequence, closed conferences exercise tighter control over the amount of available cargo space. Such control over cargo space puts the closed conference in a better position to prevent overtonnaging (excess cargo space) and the accompanying cutthroat competition.<sup>30</sup> If the conference members feel that an additional shipping line on the trade would produce excess cargo space, then the members refuse to accept a new member. If the line still wishes to serve the trade route, it can enter as an independent. However, the line will face problems attracting cargo because most closed conferences employ the deferred rebate.<sup>31</sup> Another device of

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<sup>24</sup> Deferred rebates are prohibited on United States trades. 46 U.S.C. § 812 (1976). This method is thought by shipping lines to be the most effective device for control of the trade, although shippers view it as a kind of bondage. D. MARX, *supra* note 9, at 55, 202. They are prohibited in United States trades because of the fear that conferences may retaliate against shippers for violating agreements. Such retaliation could be disastrous to shippers since independents cannot provide the frequent regular service they require. *Id.* at 55. See *infra* notes 34-49 and accompanying text.

<sup>25</sup> Generally, the initial rebate period runs three, six or twelve months; and the deferment period runs an additional three or six months. D. MARX, *supra* note 9, at 55.

<sup>26</sup> *Id.* at 201. In United States trades, the percentage discount between the contract rate and the tariff is limited to 15%. 46 U.S.C. § 813a (1976).

<sup>27</sup> 46 U.S.C. § 814 (1976).

<sup>28</sup> 46 C.F.R. § 523 (1976). The FMC administers the Shipping Act of 1916, see *infra* notes 34-88 and accompanying text. The FMC had five predecessors: the Federal Maritime Board (1950-1961), the United States Maritime Commission (1936-1950), the Shipping Board Bureau of the Department of Commerce (1933-1936), and the Shipping Board (1916-1933). To avoid confusion, they will all be subsumed under FMC.

<sup>29</sup> MARITIME INDUSTRY, *supra* note 1, at 82.

<sup>30</sup> *Id.* See also *supra* notes 10-12 and accompanying text.

<sup>31</sup> See *supra* notes 24-25 and accompanying text.

closed conferences to avoid overtonnaging is the use of "fighting ships." When an independent enters the trade, it must undercut the conference rate to attract cargo. In response, a closed conference may place a fighting ship on the trade to compete with the independent by sailing at the same time with rates so low that the independent no longer finds it profitable to remain on the trade.<sup>32</sup> Losses from the fighting ship's operation are divided among conference members.<sup>33</sup>

## B. The Shipping Act of 1916 and Its Interpretation

### 1. General Regulatory Scheme

The Shipping Act of 1916<sup>34</sup> is the basic regulatory instrument for liner shipping on United States trades. Congress passed the Act after a full investigation, by the House of Representatives Committee on Merchant Marines and Fisheries, into the shipping industry and its use of the conference system.<sup>35</sup> Several factors necessitated the investigation. First, industry concentration increased through mergers and associations, facilitating the formation of more closely knit conferences. Although conferences were initially formed as a defensive mechanism, Congress questioned their willingness to remain defensive in nature rather than turn aggressive and extort shippers. Second, shippers complained about alleged discriminatory practices, particularly the deferred rebate.<sup>36</sup> Finally, in 1911, the Department of Justice filed suits against three conferences, alleging that the granting of deferred rebates violated the antitrust laws, but the cases were mooted by World War I.<sup>37</sup>

Both the United Kingdom's Royal Commission Report and the Alexander Report favored the conference system over free competi-

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<sup>32</sup> Because of their discriminatory character, fighting ships are prohibited in United States trades. 46 U.S.C. § 812 (1976). See also *infra* notes 42-48 and accompanying text.

<sup>33</sup> MARITIME INDUSTRY, *supra* note 1, at 82. If the independent is not driven out of the trade, it may be admitted to the conference as the conference may be unable to sustain the fighting ship's losses.

<sup>34</sup> Ch. 451, 39 Stat. 728, codified at 46 U.S.C. §§ 801-842 (1976 & Supp. IV 1980).

<sup>35</sup> HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND APPLICATION IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. DOC. NO. 805, 63d Cong., 2d Sess. (1914) [hereinafter cited as ALEXANDER REPORT]. Prior to the Alexander Report, the United Kingdom undertook a similar investigation into its own shipping industry. ROYAL COMMISSION REPORT ON SHIPPING RINGS, CMD. NOS. 4668, 4685 (1909) [hereinafter cited as ROYAL COMMISSION REPORT]. For a general discussion of both investigations, see D. MARX, *supra* note 9, at 49-67.

<sup>36</sup> D. MARX, *supra* note 9, at 47-50.

<sup>37</sup> *Id.* The cases were: *United States v. Hamburg-American Co.*, 239 U.S. 466 (1916); *United States v. American-Asiatic Steamship Co.*, 242 U.S. 537 (1917); *United States v. Prince Line Ltd.*, 242 U.S. 537 (1917).

tion.<sup>38</sup> The Alexander Report found the advantages of the conference system to be: (1) greater regularity of sailings; (2) improved ship construction and capacity made possible by the security which conferences gave to the capital invested in the business; (3) uniformity of rates to all shippers, regardless of economic strength; (4) reduction of costs by eliminating wasteful competition between member lines through regulation of tonnage and sailing dates; (5) charging what the traffic will bear since conferences could charge lower rates for goods where a higher rate would bear too heavily, and secure compensation on goods whose value justified a higher rate; and (6) preservation of weaker lines by preventing a "survival of the fittest" result which is inevitable in unrestricted competition.<sup>39</sup> Disadvantages described in the Alexander Report emphasized the monopolistic nature of conference agreements, the arbitrariness of rate increases often made without sufficient notice, the secrecy with which conferences operated, and the unavailability of tariffs.<sup>40</sup>

Notwithstanding the disadvantages of the conference system, the Alexander Report recognized the necessity of the conference system to secure its advantages for shippers and to enable United States carriers and products to compete on a parity with their foreign counterparts.<sup>41</sup> Despite its sanctioning of conferences, the Committee recommended government supervision of conference practices.<sup>42</sup> This report became the basis for the Shipping Act of 1916.

The Shipping Act applies only to common carriers,<sup>43</sup> and not to tramps and private carriers. The Act prohibits deferred rebates,<sup>44</sup> fighting ships,<sup>45</sup> retaliation or discrimination against any shipper, and unfair or unjustly discriminatory contracts with any shipper.<sup>46</sup> Further, it

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<sup>38</sup> ROYAL COMMISSION REPORT, *supra* note 35, at 78, 114; ALEXANDER REPORT, *supra* note 35, at 416.

<sup>39</sup> ALEXANDER REPORT, *supra* note 35, at 295-303. See D. MARX, *supra* note 9, at 56-66, for a comparison of the advantages and disadvantages found by the Alexander Report and the Royal Commission Report.

<sup>40</sup> ALEXANDER REPORT, *supra* note 35, at 415-19.

<sup>41</sup> The Committee found that self-regulation through conferences was a universal practice among other maritime nations and that on most routes to and from the United States, conference lines enjoyed a virtual monopoly. *Id.* at 415-17.

<sup>42</sup> ALEXANDER REPORT, *supra* note 35, at 307, 417. The Royal Commission, on the other hand, opposed government interference with such a complex multinational industry. ROYAL COMMISSION REPORT, *supra* note 35, at 81-84. Rather, the Royal Commission recommended intervention only when national interests were threatened. *Id.* at 89.

<sup>43</sup> 46 U.S.C. §§ 801, 842 (1976 & Supp. IV 1980).

<sup>44</sup> See *supra* notes 24-26 and accompanying text.

<sup>45</sup> See *supra* notes 32-33 and accompanying text.

<sup>46</sup> 46 U.S.C. § 812 (1976). Violations are punishable by a maximum fine of \$25,000 per day



is unlawful to: (1) unreasonably prefer any particular person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) permit transportation by less than the going rate through false billing, weighing, or other unfair means; (3) induce marine insurance companies to discriminate against a competitor;<sup>47</sup> and (4) disclose information detrimental to shippers or consignees.<sup>48</sup> Common carriers must file and observe just and reasonable rates which can be changed only after ten days notice.<sup>49</sup>

## 2. Antitrust Exemption

Perhaps the most important provision of the Shipping Act, and certainly the one that has generated the most controversy, is section 15.<sup>50</sup> Section 15 requires carriers subject to the Act to file with the FMC all agreements, understandings, conferences or other arrangements between carriers which affect competition or change earlier agreements. The FMC may disapprove, cancel, or modify any agreement or modification which it finds operates to the detriment of United States commerce, violates the Act, or is "unjustly discriminatory or unfair."<sup>51</sup> Section 15 further provides that conferences in United States trades shall be open, that conference agreements shall include provisions for self-policing of members, and that approved agreements shall be exempt from the Sherman Act and any supplemental antitrust laws.<sup>52</sup> Antitrust immunity is granted only to approved agreements; disapproved agreements are unlawful.<sup>53</sup> The operative language of section 15 requires the FMC to approve all agreements which do not fall within the specific prohibitions.<sup>54</sup> Violators are subject to a civil pen-

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for each offense. *Id.* If the FMC finds that any carrier, which is not a citizen of the United States, violated § 14 or denied an American common carrier admission to a conference on equal terms with all other parties, the Commissioner of Customs is authorized to bar the vessels of the offender from United States ports. 46 U.S.C. § 813 (1976).

<sup>47</sup> 46 U.S.C. § 815 (1976) (covering the first three prohibitions).

<sup>48</sup> 46 U.S.C. § 819 (1976).

<sup>49</sup> 46 U.S.C. § 817 (1976). If the FMC finds any rate to be unreasonable, it has power to set a reasonable rate, or to disapprove rates it finds to be so high or low as to be detrimental to United States commerce; however, the FMC plays no role in the original setting of rates. *Id.*

<sup>50</sup> Ch. 451, § 15, 39 Stat. 728, 733 (1916), *codified at* 46 U.S.C. § 814 (1976).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Section 15 in pertinent part provides:

Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or

alty of not more than \$1,000 for each day the violation continues.<sup>55</sup>

It is significant that the Alexander Report, which recommended exemption for conference agreements, was produced by the same Congress that enacted both the Clayton Act<sup>56</sup> and the Federal Trade Commission Act.<sup>57</sup> Even in an era absorbed with the promotion of free competition, the Committee recognized that there are circumstances under which free competition will not operate in the best interests of participants and consumers.<sup>58</sup>

From the passage of the Shipping Act to the early 1950s, no shipping-related cases were brought under the antitrust laws. The Supreme Court, using what later became known as the doctrine of primary jurisdiction,<sup>59</sup> held that private parties could not maintain an action for injunctive relief under the Clayton Act, even though the challenged dual rate contract had not been approved.<sup>60</sup> Later, the Court held that the

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other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds 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, and shall approve all other agreements, modifications, or cancellations.

*Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 15 U.S.C. § 12 (1976).

<sup>57</sup> 15 U.S.C. § 41 (1976).

<sup>58</sup> In fact, during World War I, the United States government made shipbuilding contracts for a large number of ships to meet the needs of the war. The majority of the ships, however, were not delivered until after the war ended. The government then had the responsibility of running a shipping line until private purchasers could be found. To do so, the United States itself organized and promoted conferences to obtain rate stability necessary for successful operation. For a complete discussion, see *MARITIME INDUSTRY*, *supra* note 1, at 7; *D. MARX*, *supra* note 9, at 126-30.

<sup>59</sup> The Court in *Cunard* used the term "exclusive primary jurisdiction." *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485 (1932). This is the same as primary jurisdiction, which is:

concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties . . . . "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

*United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956).

<sup>60</sup> *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932). The Court unanimously affirmed lower court holdings that the matter was within the exclusive jurisdiction of the FMC. *Id.* at 486.

government (Department of Justice) was also barred from bringing such a suit.<sup>61</sup> The Court dealt with the issue of unapproved agreements by resort to primary jurisdiction which required the FMC to review the contract before a court could do so.<sup>62</sup> Remedies for unapproved activities arguably within the scope of section 15 had to be found within the provisions of the Shipping Act.

Dual rate contracts of the type challenged in *United States Navigation Co. v. Cunard Steamship Co.*<sup>63</sup> and *Far East Conference v. United States*<sup>64</sup> were not expressly permitted by the Shipping Act, nor were they expressly prohibited.<sup>65</sup> Evidently, the FMC assumed that approval of a shipping rate conference implicitly authorized the use of dual rate contracts. That assumption, combined with what one commentator has termed "the reality of Commission inaction,"<sup>66</sup> led to abuse of the dual rate system.<sup>67</sup>

Constant challenges to the use of dual rate contracts gave rise to *Federal Maritime Board v. Isbrandtsen Co.*,<sup>68</sup> the first case to address the issue of dual rate contracts in the context of an approved agreement. The Supreme Court held that the FMC lacked power to approve the questioned dual rate system. The Court used the FMC's findings approving the agreement to reach this conclusion, stating:

Since the Board found that the dual-rate contract of the conference was "a necessary competitive measure to offset the effect of non-conference competition" required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade," it follows that the contract was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14 Third [paragraph].<sup>69</sup>

A dual rate contract with no anticompetitive animus would be legal. In effect, however, this was a *per se* prohibition since every dual rate contract is intended to "stifle outside competition." This decision struck a

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<sup>61</sup> *Far East Conference v. United States*, 342 U.S. 570 (1952). The Department of Justice brought suit against the Far Eastern conference on the grounds that its exclusive patronage contract violated the antitrust laws and the Shipping Act. The Supreme Court reversed a lower court holding that conference agreements containing the dual rate system were not illegal in themselves and therefore required a trial on the merits, and that the courts had jurisdiction to hear such cases.

<sup>62</sup> *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. at 486.

<sup>63</sup> 284 U.S. 474 (1932).

<sup>64</sup> 342 U.S. 570 (1952).

<sup>65</sup> Subsequently, they were legalized by the 1961 Amendments to the Shipping Act. Act of October 3, 1961, Pub. L. No. 87-346, § 1, 75 Stat. 762, 762, *codified at* 46 U.S.C. § 813a (1976). *See also infra* notes 71-78 and accompanying text.

<sup>66</sup> Llorca, *Anti-trust Exemption of Shipping Conferences*, 6 J. MAR. L. & COM. 287, 294 (1975).

<sup>67</sup> Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 640 (1965).

<sup>68</sup> 356 U.S. 481 (1958).

<sup>69</sup> *Id.* at 493.

severe blow to the conference system, for it raised serious doubts as to the validity of any of the exclusive patronage/dual rate contract systems then being used by over 113 conferences serving United States ports.<sup>70</sup>

The conferences turned to Congress for relief. Congress responded by imposing a moratorium authorizing the use of dual rate contracts.<sup>71</sup> After exhaustive hearings,<sup>72</sup> Congress enacted the Shipping Act amendments of 1961<sup>73</sup> which, in effect, reaffirmed the original findings of the Alexander Report "that some monopoly in ocean shipping is necessary but that it must be regulated to prevent abuses."<sup>74</sup> It was clear, however, that the "antitrust advocates had lost the battle."<sup>75</sup>

As enacted, the 1961 statute amended section 14 to require approval of dual rate contracts unless they were found to be "detrimental to the commerce of the United States, or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports."<sup>76</sup> Section 15 was amended to permit disapproval of

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<sup>70</sup> Fawcett & Nolan, *United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption*, 1 NW. J. INT'L L. & BUS. 537, 547 (1979).

<sup>71</sup> Actually, there was an original authorization, followed by a series of extensions. Act of August 12, 1958, Pub. L. No. 85-626, 72 Stat. 574, extended by Act of June 29, 1960, Pub. L. No. 86-542, 74 Stat. 253 and Act of June 21, 1961, Pub. L. No. 87-55, 75 Stat. 195.

<sup>72</sup> At least three investigations were conducted. *Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, Ocean Freight Industry*, 86th Cong., 1st & 2d Sess. (1959-60); HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, PROVIDING FOR THE OPERATION OF STEAMSHIP CONFERENCES, H.R. REP. NO. 498, 87th Cong., 1st Sess. (1961) [hereinafter cited as H.R. REP. NO. 498]; SENATE COMM. OF COMMERCE, STEAMSHIP CONFERENCES AND DUAL RATE CONTRACTS, S. REP. NO. 860, 87th Cong., 1st Sess. (1961) [hereinafter cited as S. REP. NO. 860]. The House and Senate Reports resulted in the Shipping Act Amendments of 1961. Although the work of the Antitrust Subcommittee did not result in legislation, recognition was given to its views of the applicability of antitrust laws to the shipping industry in the House and Senate Reports but was rejected.

<sup>73</sup> Act of October 3, 1961, Pub. L. No. 87-346, 75 Stat. 762. For detailed discussion of the legislative history, see SENATE COMM. ON COMMERCE, INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, 87th Cong., 2d Sess. (1962); Fawcett & Nolan, *supra* note 70, at 547-51; Note, *supra* note 67, at 639-42.

<sup>74</sup> Note, *supra* note 67, at 641. There are differing viewpoints as to the intent of Congress in enacting these amendments. See Fawcett & Nolan, *supra* note 70, at 551; Llorca, *supra* note 66, at 295 (1975) (Llorca, as well as Fawcett & Nolan, views the amendments as removing the conference system from the reach of antitrust laws in favor of an independent regulatory agency.); Panisius, *Plotting the Return of Isbrandtsen: The Illegality of Interconference Rate Agreements*, 9 TRANSP. L. J. 337, 345 (1977) (expressing the view that the immunity granted was only the minimum necessary to preserve the conference system); Note, *supra* note 67, at 642 (expressing the view that no new balance had been struck between competition and regulation).

<sup>75</sup> Fawcett & Nolan, *supra* note 70, at 551. Subsequent events as set forth below indicate that they may be winning the war.

<sup>76</sup> 46 U.S.C. § 813a (1976).

agreements contrary to the public interest.<sup>77</sup> Under section 18, conferences were required to establish, file, and observe tariffs, with increases to take effect only after thirty days public notice. The FMC was given the power under section 18(b)(5) of the original Act to disapprove rates so unreasonably high or low as to be detrimental to United States commerce.<sup>78</sup>

Although the 1961 Amendments may not have clarified the status of the antitrust exemption, it was clear that any immunity would be subject to careful control because of the FMC's broadened authority to disapprove agreements under section 15. The question of the effect of FMC approval on the legality of agreements remained unresolved. The Supreme Court had consistently held<sup>79</sup> that the remedy for activities which allegedly violated the Shipping Act had to be found within the Act itself.<sup>80</sup> However, in 1966, the Court, contrary to ten years of precedent, reversed the dismissal of a treble damage action based on injuries allegedly resulting from a section 15 rate-making agreement.<sup>81</sup> In *Carnation Co. v. Westbound Conference*, the Court reexamined its earlier position, and concluded that Congress did not intend to grant the industry total antitrust immunity.<sup>82</sup> The Court held that action taken under rate-making agreements not filed with or approved by the FMC was subject to antitrust liability.<sup>83</sup> In other words, there was no need to defer to the FMC since it did not have the power to approve agreements which violated the Act.

*Carnation* established the antitrust laws as an alternative regulatory scheme. The FMC soon followed the Court's lead by incorporating antitrust considerations into the Shipping Act itself.<sup>84</sup> To achieve

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<sup>77</sup> 46 U.S.C. § 814 (1976).

<sup>78</sup> 46 U.S.C. § 817 (1976).

<sup>79</sup> See *supra* notes 59-61 and accompanying text.

<sup>80</sup> The Act makes it unlawful to carry out agreements under sections 14b or 15 if they have not been approved or if they have been disapproved by the FMC. Section 15 provides a civil penalty for such violations. 46 U.S.C. § 814 (1976).

<sup>81</sup> *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, *modified by* 383 U.S. 932 (1966).

<sup>82</sup> *Id.* at 216-20.

<sup>83</sup> *Id.* at 216. The conferences operated under an agreement approved by the FMC and an interconference agreement providing for joint rate setting which was also approved. However, the complaint charged that the defendants entered a secret rate fixing agreement which was beyond the scope of the approved agreements and that any action taken under the secret agreement was not exempt from the antitrust laws. See generally Fremlin, *Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L. J. 733, 763 (1967). It should also be noted that the FMC had defended its jurisdiction and the conferences' position in the lower courts, but it switched sides before the Supreme Court. Fawcett & Nolan, *supra* note 70, at 553 n.80.

<sup>84</sup> For a discussion of what may have led the FMC to introduce this new element, see Fawcett & Nolan, *supra* note 70, at 557-59.

this result, in its own proceedings, the FMC construed the “public interest” test (added by the 1961 Amendments) as encompassing antitrust considerations, and placed the burden of justifying an agreement upon its proponents.<sup>85</sup> Although the FMC had consistently held that conference agreements were to be disapproved only when they operated in a manner prohibited by section 15, it reversed the hearing examiner’s finding that the agreements in question were not contrary to Shipping Act standards.<sup>86</sup> However, the FMC held that the proponents carried their burden. Therefore, there was no immediate challenge to this new formulation of the public interest test.

The Supreme Court accepted the FMC’s interpretation when it was challenged<sup>87</sup> by holding that the FMC was *required* to consider the antitrust laws before approving an agreement under section 15.<sup>88</sup>

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<sup>85</sup> Mediterranean Pools Investigation, 9 F.M.C. 264 (1966).

<sup>86</sup> *Id.* at 294. The FMC explained the shift in position as follows:

For presumptively, all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act.

*Id.* at 289-90.

<sup>87</sup> Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968) [hereinafter cited as *Svenska*]. The Supreme Court restated the standard as follows:

The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conference can “bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.”

\* \* \*

By its very nature an illegal restraint of trade is in some ways “contrary to the public interest,” and the Commission’s antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of the “public interest.”

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The Commission’s approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission’s test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is “contrary to the public interest,” unless other evidence in the record fairly detracts from the weight of this factor. . . . We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory “public interest” standard.

*Id.* at 243-46 (citations omitted).

<sup>88</sup> Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 273-74 (1968). In this case, the Supreme Court reversed the FMC and held that certain components of a union contract with the Pacific Maritime Association had to be filed with and approved by the FMC. In return for consenting to the use of labor saving devices, the Warehousemen’s Union required PMA to create a \$29,000,000 fund to mitigate the effect of technological unemployment. Raising this fund was left to PMA’s discretion. It was the formula used for assessing the contribu-

3. *Recent Amendments to the Shipping Act*

a. *The Ocean Shipping Act of 1978*<sup>89</sup>

This Act, also known as the Controlled Carrier Bill, amends sections 1 and 18 of the Shipping Act of 1916 to establish the category of regulated carriers termed controlled carriers. Controlled carriers are defined in the Ocean Shipping Act as common carriers by water in United States foreign commerce whose operating assets are directly or indirectly owned or controlled by the government whose flag it flies.<sup>90</sup> This legislation was passed in response to the advent of controlled carriers entering United States trades and siphoning off a large volume of high-rated cargo from United States flags and other conference members by cutting rates up to sixty percent below conference rates.<sup>91</sup>

The Act amends section 18 to enable the FMC to:

- (1) suspend rates that it finds to be unjust and unreasonable;
- (2) place the burden of proof on the carrier to demonstrate that its rates are reasonable;
- (3) use constructive costs rather than actual costs as the basis for determining unreasonableness, and define the elements to be used in determining constructive costs;
- (4) issue orders to controlled carriers to show cause why their rates, charges, classifications, rules, or regulations should not be disapproved; and
- (5) suspend such tariffs for a maximum period of 180 days.<sup>92</sup>

Other provisions of the Act authorize the President of the United States to permanently stay any FMC order of suspension or final order of disapproval, if the President deems such action necessary for reasons of national defense or foreign policy, and to exempt certain controlled carriers.<sup>93</sup>

b. *The Shipping Act Amendments of 1979*<sup>94</sup>

These amendments, also referred to as the Anti-Rebating Bill,

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tion of PMA members that was challenged. The Supreme Court found that the assessment formula was a "cooperative working agreement" within the literal language of section 15. *Id.*

<sup>89</sup> Pub. L. No. 95-483, 92 Stat. 1607 (1978).

<sup>90</sup> *Id.* § 2, 92 Stat. at 1607 (amending 46 U.S.C. § 801 (1976)).

<sup>91</sup> SENATE COMM. ON COMMERCE, OCEAN SHIPPING ACT OF 1978, S. REP. NO. 1260, 95th Cong., 2d Sess. 3 (1978).

<sup>92</sup> Ocean Shipping Act of 1978, Pub. L. No. 95-483, § 3, 92 Stat. 1607 (amending 46 U.S.C. § 817 (1976)).

<sup>93</sup> *Id.*

<sup>94</sup> Pub. L. No. 96-25, 93 Stat. 71 (1979).

were passed after similar legislation was pocket vetoed by President Carter in 1978.<sup>95</sup> The purposes of the Anti-Rebating Bill are to strengthen the penalties for illegal rebating<sup>96</sup> and increase the FMC's power to enforce anti-rebating provisions,<sup>97</sup> thereby reducing the economic incentive for carriers to resort to such tactics and equalizing disparity in enforcement as between United States flags and foreign flags.<sup>98</sup> The major provisions of the Anti-Rebating Bill include:

- (1) substantial increases in civil penalties for malpractices;<sup>99</sup>
- (2) FMC authority to initiate investigations into malpractices on its own motion, assess its own penalties, and suspend any tariffs filed with it by carriers who have violated the Act;<sup>100</sup> and
- (3) requiring from the chief executive officer of every vessel operating as a common carrier in United States waterborne foreign commerce, written certification attesting to the shipping company's policies, and efforts designed to prevent or correct illegal rebating and agreeing to cooperate fully with FMC anti-rebating investigations.<sup>101</sup>

According to the FMC, the bill has proven to be the "effective deterrent to malpractices in [United States] foreign commerce that the commission hoped it would be."<sup>102</sup>

### III. ANALYSIS OF PROBLEMS PLAGUING THE INDUSTRY

The developments in the law examined above have not taken place in a vacuum. The United States shipping industry as a whole has been sinking. In 1978, of the total cargo tonnage moving in United

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<sup>95</sup> MARITIME INDUSTRY, *supra* note 1, at 19; H.R. REP. NO. 232, *supra* note 2, at 25.

<sup>96</sup> Rebates are secret kickbacks to shippers. They are used to attract cargo when the trade is overtonnaged. Due to serious overtonnaging of United States trades, the practice was rampant among United States flags and foreign flags. Sections 16 and 18(b)(3) make it unlawful for any common carrier in United States liner trades to permit transportation at less than the published rates on file with the FMC. 46 U.S.C. §§ 815, 817 (1976). Violations are called malpractices, of which rebates are one example. The legislative history of the Anti-Rebating Bill contains an excellent discussion of rebating and its causes. See H.R. REP. NO. 232, *supra* note 2, at 7-11.

<sup>97</sup> H.R. REP. NO. 232, *supra* note 2, at 2.

<sup>98</sup> United States carriers were being investigated and fined while foreign carriers could evade FMC enforcement attempts because of blocking statutes in their home nations. *Id.* at 2.

<sup>99</sup> Shipping Act Amendments of 1979, Pub. L. No. 96-25, §§ 2, 3, 4, 5, 93 Stat. 71, 71-72 (amending 46 U.S.C. §§ 815, 817, 820, 821 (1976)).

<sup>100</sup> *Id.* § 5, 93 Stat. at 72 (amending 46 U.S.C. § 821 (1976)).

<sup>101</sup> *Id.* § 4, 93 Stat. at 71 (amending 46 U.S.C. § 820 (1976)).

<sup>102</sup> PROPELLER CLUB OF THE UNITED STATES, AMERICAN MERCHANT MARINE CONFERENCE PROCEEDINGS 32 (address of John D. Hardy, Staff Counsel, Senate Subcomm. on Merchant Marine and Tourism) [hereinafter cited as MARINE CONFERENCE].



States waterborne foreign trade, United States flag ships carried 2.8% of tanker service, 1.6% in non-liner service, and 28.6% in liner service.<sup>103</sup> Recently, the share of United States flags in liner service has fallen to 27%.<sup>104</sup> Notwithstanding this decline, the liner industry is the strongest element in the United States shipping force. This section is devoted to answering the question: How have we allowed a national asset as valuable as the United States Merchant Marine to reach the brink of extinction?

### A. Antitrust Implications

Antitrust liability has contributed to the general malaise of the industry. Imposition of antitrust liability discriminates against United States flags because United States antitrust laws cannot be effectively applied to foreign flags.<sup>105</sup> Application of antitrust laws would require the cooperation of the nation whose flag the carrier flies. However, thirteen United States trading partners have enacted blocking statutes, legislation which prohibits their carriers from complying with requests for or subpoenas of documents by United States courts and agencies.<sup>106</sup>

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<sup>103</sup> MARITIME INDUSTRY, *supra* note 1, at 253. Non-liner or bulk carriers and tankers carry raw materials for the nation's industries and the oil to fuel them. If their transport is impeded, the United States economy and security would be seriously imperiled. *Id.* at 63. This would occur because the United States is dependent upon foreign sources for 68 of 71 strategic materials (including ore for steel, bauxite for aluminum, and tungsten for missile components) of which less than 2% arrive in this country on United States flag ships. MARINE CONFERENCE, *supra* note 102, at 9 (address of C. William Neuhauser, Executive Secretary, National Maritime Council). See MARITIME INDUSTRY, *supra* note 1, at 336, for a table of essential materials produced in the United States and those imported into the United States.

<sup>104</sup> TRAFFIC WORLD, Oct. 20, 1980, at 34 (statement of Samuel R. Nemirow, Assistant Secretary of Commerce for Maritime Affairs).

<sup>105</sup> H.R. REP. NO. 232, *supra* note 2, at 2-4; Mason, *The Relationship and Parallel Development of Economic Regulation and Antitrust Enforcement in the Ocean Common Carrier Industry*, in LINER SHIPPING, *supra* note 4, at 2; MARINE CONFERENCE, *supra* note 102, at 9. See also Agman, *supra* note 14, at 24 n.26.

<sup>106</sup> H.R. REP. NO. 232, *supra* note 2; LINER SHIPPING, *supra* note 4, at 37-38 (address of Senator Daniel K. Inouye). In this connection, Senator Inouye stated: "Recently, at hearings before my subcommittee, in response to our specific inquiry the governments of Japan and Israel made it quite clear that they would not permit their national-flag operators to produce any documents which the FMC might request in a rebate investigation." *Id.* at 38.

A number of other countries—Belgium, Canada, Denmark, France, West Germany, Greece, India, Italy, Japan, the Netherlands, Norway, the Philippines, Sweden, the United Kingdom, and Yugoslavia—have protested orders made by United States courts for production of evidence located abroad. *Id.* at 73.

For a discussion of various blocking laws, see B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 315-342 (1979); Pettit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982). See Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313 (1982), for a discussion of the Protection of Trading Interest

Any attempt to obtain these documents is viewed as an invasion of national sovereignty because the United States is attempting to apply its domestic regulation to international shipping, an area involving activities and persons subject to the sovereignty of other nations.<sup>107</sup> This problem is exacerbated by the fact that most other nations have totally exempted their shipping industries from operation of anti-cartel legislation.<sup>108</sup>

Antitrust principles preclude the use of various methods of promoting cooperation between the United States government, shipowners, and shippers. The concept of freedom of the seas, under which the world's major ports would be open to ships of all nations so that they could compete equally for the world's trade,<sup>109</sup> is largely defunct. In virtually every other country in the world, "the amount of cargo handled and the promotion of indigenous flag fleets is a partnership effort between the fleet of each country and its government."<sup>110</sup> This partnership generally takes the form of cargo preference laws which require that a certain percentage of the country's foreign trade be carried by its national flag fleet.<sup>111</sup> Although international law prohibits cargo preference, this principle is not reflected in practice, and disregard for it is becoming the dominant view.<sup>112</sup>

Foreign governments also encourage (or require) their shippers to use national flags. This show of support engenders cooperation between shippers and shipowners.<sup>113</sup> The lack of such support by United

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Act, which the author characterizes as the "strongest action taken by a government to resist foreign pressures and foreign government policy 'encroachment' in its territory." *Id.* at 313.

<sup>107</sup> Payne, *International Implications of U.S. Maritime Policy: Are We Exporting U.S. Antitrust Policy?*, in LINER SHIPPING, *supra* note 4, at 72-74. In fact, it has been said that "no other major maritime power has gone as far in extending the authority of its laws over international shipping." Note, *Cargo Preference: The United States and the Future Regulation of International Shipping*, 16 VA. J. INT'L L. 865 (1976) [hereinafter cited as Note, *Cargo Preferences*]. See also Pettit & Styles, *supra* note 106, at 698.

<sup>108</sup> For example, Germany has created an exemption through positive legislation, while the Common Market has a *de facto* practice of not intervening in the operation of conferences. Gleiss, *Evolution of Market Structure, Conferences, Pooling Agreements, Consortia, and the European Antitrust Laws*, in LINER SHIPPING, *supra* note 4, at 19-21.

<sup>109</sup> For the early success of this concept, see S. LAWRENCE, *supra* note 13, at 7.

<sup>110</sup> MARINE CONFERENCE, *supra* note 102, at 10 (address of W. Bruce Seaton, President, American President Lines).

<sup>111</sup> For a listing of cargo reservation and similar preferential laws of foreign nations, see MARITIME INDUSTRY, *supra* note 1, at 211-47. For percentages of each country's foreign trade carried by national flag fleets, see *id.* at 50. See also *infra* notes 170-72 and accompanying text. The United States has similar laws, though they are not strictly enforced. MARITIME INDUSTRY, *supra* note 1, at 25, 89. For a thorough catalogue of such laws, see *id.* at 3-21.

<sup>112</sup> Note, *Cargo Preferences*, *supra* note 107, at 881-87.

<sup>113</sup> MARITIME INDUSTRY, *supra* note 1, at 71.

States shippers for United States flags is regarded by industry members as a major problem.<sup>114</sup> Additionally, however, without government support, antitrust policies preclude cooperation and rationalization at levels which exist in other countries.<sup>115</sup>

Shippers' councils—shippers organized to negotiate with conferences over rates and general needs of shippers—are another potential cooperative device which could foster a community of interest between shippers and carriers.<sup>116</sup> Formation of shippers' councils, however, is also prevented by antitrust policies although other major maritime nations recognize their efficacy.<sup>117</sup> The lack of shippers' councils may not be deemed urgent by large shippers, who probably have some negotiating leverage, but they would be advantageous to smaller shippers.<sup>118</sup>

The prohibition of closed conferences is directly attributable to antitrust principles.<sup>119</sup> Open conferences mean that foreign flags can service United States ports at will, which often leads to overtonnaging. In the 1970s, instability in world trade led to overtonnaging throughout the world. Shipping companies, which were not forced to suspend operations, moved to United States trades to attract high-valued cargo. As a result of this influx of carriers, United States flag shipping was hit especially hard.<sup>120</sup> A more recent threat posed by open conferences is the entry of state-controlled carriers in world trade. These carriers do not operate in pursuit of profit. Rather, they exist to promote their country's national shipping policies and to earn foreign exchange.<sup>121</sup> By cutting their rates up to sixty percent below conference rates, state-controlled carriers have siphoned off high-rated freight.<sup>122</sup> In 1979, nineteen state-controlled carriers operated in United States trades.<sup>123</sup> Of those, the Soviet carriers were the principal competitors on United States liner trade routes to countries other than the Soviet Union.<sup>124</sup> In

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<sup>114</sup> Jessen, *Ails that Shrank the Mightiest Ocean Fleet*, DISTR., Oct. 1980, at 36; MARITIME INDUSTRY, *supra* note 1, at 64.

<sup>115</sup> See *infra* notes 169-89 and accompanying text.

<sup>116</sup> MARITIME INDUSTRY, *supra* note 1, at 82-83.

<sup>117</sup> Agman, *supra* note 14, at 34-43; Butler, *Ocean Shippers, Carriers Offer Legislative Options, Suggestions*, TRANSPORTATION WEEK, Mar. 10, 1980, at 40 (comments of J. F. Muheim, Chairman, European Shippers' Council).

<sup>118</sup> Butler, *supra* note 117, at 40; MARITIME INDUSTRY, *supra* note 1, at 84.

<sup>119</sup> H.R. REP. NO. 232, *supra* note 2 at 8; S. REP. NO. 1260, 95th Cong., 2d Sess. 3 (1978).

<sup>120</sup> MARITIME INDUSTRY, *supra* note 1, at 80; Gallagher, *Ocean Conferences in Upheaval*, HAN- DLING & SHIPPING MGT., May, 1980, at 48. For definition of high-rated freight, see *supra* note 21.

<sup>121</sup> S. REP. NO. 1260, 95th Cong., 2d Sess. 3-18 (1978); MARITIME INDUSTRY, *supra* note 1, at 81.

<sup>122</sup> S. REP. NO. 1260, 95th Cong., 2d Sess. 3 (1978).

<sup>123</sup> MARITIME INDUSTRY, *supra* note 1, at XXVI.

<sup>124</sup> *Id.*

United States trades, they carried 3.5% of total liner tonnage and they are becoming increasingly competitive.<sup>125</sup>

The antitrust laws also have a chilling effect on the United States shipping industry. Parties are reluctant to seek section 15 approval of agreements found necessary in United States trades.<sup>126</sup> There is uncertainty over what effect FMC approval has. As discussed above,<sup>127</sup> conference members have been faced with retroactive antitrust liability when they thought they were operating within the parameters of an approved agreement. Thus, the advantage of immunity which is supposed to accompany FMC approval may be illusory. However, not seeking approval may be advantageous—with no record of the agreement, it may be more difficult to prove an antitrust violation. This paradoxical result is at odds with the Shipping Act's requirement of disclosure of all conference agreements.

The shipping industry is capital intensive. An extensive capital outlay is necessary to enter the industry and to keep abreast of technological developments.<sup>128</sup> This factor provides a barrier to entry, especially since the industry is not very profitable.<sup>129</sup> Potential antitrust liability may also deter entry. In the words of one industry member: "We feel strongly that a carrier such as Great Lakes and European Lines would never have gone into the business without the protection of the Shipping Act of 1916. This is a vital statutory umbrella to any carrier operating in our trade."<sup>130</sup> This is true because a carrier in liner

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<sup>125</sup> MARITIME INDUSTRY, *supra* note 1, at 24; S. REP. NO. 1260, 95th Cong., 2d Sess. 12 (1978). The legislative history of the Controlled Carrier Bill is in large part devoted to the dangers inherent in Soviet penetration of United States trades. *Id.* at 3-19. See discussion of the Controlled Carrier Bill, *supra* notes 90-93 and accompanying text.

<sup>126</sup> Butler, *supra* note 117, at 39 (address of Senator Daniel K. Inouye, Democrat, Hawaii).

<sup>127</sup> See *supra* notes 81-88 and accompanying text.

<sup>128</sup> H.R. REP. NO. 232, *supra* note 2, at 8; MARITIME INDUSTRY, *supra* note 1, at 45-64; D. MARX, *supra* note 9, at 19-25.

<sup>129</sup> One commentator states:

Contrasted with other industries reported in the then current Standard & Poor's Comparative Financial Analysis of American Industry, American liner shipping over the seven-year period 1956-1962 had experienced: an average return on common equity of 6% for a standing of 47th out of the top 50 industry groups which had a composite average of 11%; an average return on invested capital of 5% for a standing of 50th out of 50 which had a composite average of 50%; an average generation of dividends of 2.2% for a standing of 50th out of 50 which had a composite average of 5.9%; and a price earnings ratio of 7.6 for a standing of 73rd out of the top 74 industries which had a composite average of 16.6.

\* \* \* Only twice (1964 and 1966) in the period 1964-1973 did the subsidized segment of the industry appear to show an average annual return on investment greater than . . . 5% . . . . The unsubsidized portion of the industry, after several good years in the late-Sixties when the . . . companies . . . experienced returns on investment between 15-20%, has more currently fallen to returns below 5% in the 1971-1973 period.

Agman, *supra* note 14, at 42 (footnotes omitted).

<sup>130</sup> *Shipping Act Amendments of 1977: Hearings on S. 2008 Before the Subcomm. on Merchant*

service makes a long-term commitment to the trade route upon which it operates. This commitment is based upon the ability to consistently attract sufficient cargo to cover initial outlays and fixed costs. This is precisely the kind of stability that the conference system provides. That stability is necessary because shipping lines cannot simply pull up their stakes and go elsewhere, as that also involves great costs.<sup>131</sup> Thus, if the conference is undermined, so are the advantages which it was designed to secure, including the basis for entering and engaging in research and development.<sup>132</sup> Without the stability of the conference system, the risks would greatly exceed subsequent benefits.

The case law development illuminates the practical impact of the antitrust laws upon the regulatory scheme.<sup>133</sup> The *Cunard*<sup>134</sup> and *Far East*<sup>135</sup> cases established that the remedy for unapproved agreements had to be found within the provisions of the Shipping Act, not the anti-trust laws. When *Isbrandtsen*<sup>136</sup> held that carriers utilizing the dual rate system would be subject to antitrust liability because the FMC lacked the power to approve such agreements, Congress responded by legalizing dual rate contracts.<sup>137</sup> The 1961 Amendments restored the antitrust exemption.<sup>138</sup> The restoration, however, was short-lived. In *Carnation*,<sup>139</sup> the Supreme Court held that action taken under rate-making agreements not filed with or approved by the FMC was subject to antitrust liability. Although in *Cunard* and *Far East* the Court had refused to grant injunctive relief because it might create conflict between the courts and the FMC's exercise of its powers, the Court saw no such conflict in the case of retroactive treble damages.<sup>140</sup> After *Carnation*, if conference action was subsequently found to be outside the scope of an approved agreement, the antitrust exemption was inapplicable because the FMC could not approve agreements which violated the Act. Therefore, the conference would be subject to the full impact of the antitrust laws. This development subjects the conference to un-

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*Marine and Tourism of the Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 126 (1977) [hereinafter cited as *Hearings on S. 2008*].

<sup>131</sup> H.R. REP. NO. 232, *supra* note 2, at 9; D. MARX, *supra* note 9, at 14, 19; Kryvoruka, *American Ocean Shipping and the Antitrust Laws Revisited*, 11 J. MAR. L. & COM. 67, 73-74 (1979).

<sup>132</sup> See *supra* text accompanying notes 38-39.

<sup>133</sup> See *supra* notes 59-88 and accompanying text.

<sup>134</sup> *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932).

<sup>135</sup> *Far East Conference v. United States*, 342 U.S. 570 (1952).

<sup>136</sup> *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958).

<sup>137</sup> Act of October 3, 1961, Pub. L. No. 87-346, 75 Stat. 762.

<sup>138</sup> *Id.*

<sup>139</sup> *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

<sup>140</sup> *Id.* at 220; Llorca, *supra* note 66, at 296 n.64.

reasonable peril since in approving agreements the FMC is “not bound by strict *stare decisis*; [thus,] an action taken in full accord with then current pronouncements of the agency might nevertheless, through the shifting sands of the agency’s deliberations, be found to violate the Act.”<sup>141</sup>

In *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*,<sup>142</sup> the Supreme Court accepted the FMC’s interpretation of the public interest standard of section 15 as including antitrust considerations. As proof that it was not bound by precedent, the FMC’s own interpretation reversed fifty years of agency determinations.<sup>143</sup> Under this new standard, an agreement which may violate the antitrust laws is substantial evidence that the agreement is contrary to the public interest.<sup>144</sup> The conference must then “bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.”<sup>145</sup>

This standard is a contortion of the language of section 15.<sup>146</sup> In order to secure the advantages which the conference system offered over free competition,<sup>147</sup> section 15 was weighted in favor of approval. Thus, the FMC was directed to approve all agreements which were not unjustly discriminatory or unfair, detrimental to United States commerce, contrary to the public interest, or in violation of the Shipping Act. Section 15 does not speak in terms of serious transportation needs, important public benefits, or valid regulatory purposes.<sup>148</sup> Yet, by imposing this standard, the FMC regards every agreement filed as presumptively contrary to the public interest.<sup>149</sup> This is an anomalous result since the type of agreement to be approved under section 15 was found necessary to secure advantages to the public and permit the United States flag fleet to operate on a parity with foreign carriers. The effect is that conferences operate at their peril in performing the very

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<sup>141</sup> Mason, *The Relationship and Parallel Development of Economic Regulation and Antitrust Enforcement in the Ocean Common Carrier Industry*, in *LINER SHIPPING*, *supra* note 4, at 9.

<sup>142</sup> 390 U.S. 238 (1968).

<sup>143</sup> *See supra* note 86 and accompanying text.

<sup>144</sup> *Svenska*, 390 U.S. at 246.

<sup>145</sup> *Id.* at 244. *See also supra* note 87.

<sup>146</sup> *See supra* note 54 for the relevant language of section 15.

<sup>147</sup> For a discussion of the benefits, see *supra* text accompanying notes 34-42. This view was reaffirmed in the 1961 Amendments. S. REP. NO. 860, *supra* note 72, at 4-5, 10.

<sup>148</sup> *Svenska*, 390 U.S. at 244. *See also supra* note 87.

<sup>149</sup> *See Pacific Westbound Conference—Application to Extend its Exclusive Patronage Contract System to include its OCP Territory*, 18 F.M.C. 308, 319 (1975). *See also Fawcett & Nolan, supra* note 70, at 556-65; Comment, *Antitrust and the Shipping Industry, supra* note 14.

activities for which they were organized—collective action with anticompetitive effects. That this is not the result Congress intended is evidenced by the fact that attempts to infuse antitrust standards into the approval process were expressly rejected.<sup>150</sup> The legislative history of the 1961 Amendments demonstrates that Congress did not intend to narrow the conferences' antitrust exemption.<sup>151</sup>

A more curious trend is the interference of the Department of Justice (DOJ). Aside from appearing regularly before the FMC to challenge agreements proposed by United States flags, the DOJ has begun to challenge approved agreements in court. In *United States v. Federal Maritime Commission*,<sup>152</sup> the DOJ challenged a revenue pooling agreement approved by the FMC. The FMC was vindicated since its decision was supported by substantial evidence. However, the important—indeed startling—holding was that the DOJ had standing, since the FMC's order “created an injury in fact to the [DOJ] in that [FMC approval] . . . directly interferes with the [DOJ's] responsibility to enforce the antitrust laws . . .” and “that this interest [is] within the zone of interests sought to be protected by the Shipping Act, 1916.”<sup>153</sup> As the separate concurrence pointed out, Congress necessarily intended that the DOJ be ousted of any supervisory role over the FMC by providing that the FMC alone had the power to approve section 15 agreements.<sup>154</sup> The agencies operate under two very different statutory

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<sup>150</sup> SENATE COMM. ON COMMERCE, INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, *supra* note 73, at 264-66, 399-401, 476-82. The insertion of the language “is intended or will be reasonably likely to cause the exclusion of another carrier in the trade” was rejected as destructive of the very purpose of the Shipping Act. *Id.* The reason for exclusion was that the amendment “would, if included in the bill, destroy it, because by means of this bill we are authorizing a conference system; and a conference system has a tendency to eliminate and reduce competition. We know that. That is precisely what we are doing.” *Id.* at 399 (remarks of Senator Engle).

<sup>151</sup> Senator Russell Long stated the majority position:

Senators must realize that the pattern that is necessary to engage in ocean commerce does not fit into the pattern of our Antitrust Division, composed of lawyers who would like to regulate a farm cooperative as though it were the Standard Oil of New Jersey. . . .

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Now it is proposed by one of the Kefauver amendments that action cannot be taken by a conference if the total effect would be reasonably likely to cause the exclusion of any other carrier from the trade.

Yet the whole idea of the bill is to let those people get together on rates and compete with the people who are not in the agreement. If one fellow will not join and will not participate, the others are by necessity in price competition with him. He is trying to put the other fellows out of business. What is wrong with the other fellows trying to put him out of business?

*Id.* at 3.

<sup>152</sup> 655 F.2d 247 (D.C. Cir. 1980).

<sup>153</sup> *Id.* at 251.

<sup>154</sup> *Id.* at 255 (Markey, J., concurring in result only).

mandates. The DOJ, however, is trying to impose its mandate upon the FMC by injecting competition into an industry where competition will not work. Congress has affirmed and reaffirmed the necessity of anticompetitive arrangements in the shipping industry. This is precisely the reason why Congress has not chosen to incorporate antitrust considerations into the Shipping Act. And, “[u]nless it be said that the FMC’s [section] 15 agreement approvals serve no governmental interests, DOJ’s assertion of standing reduces to the absurd.”<sup>155</sup> The real issue this case presents—which agency’s view of the antitrust laws and the public interest will prevail—should be resolved by Congress, not the courts. Congress made its choice by refusing to require the FMC to include antitrust considerations when approving section 15 agreements.

In 1977, the DOJ published a report containing proposals for altering or eliminating the Shipping Act.<sup>156</sup> The first proposal called for repeal of the Shipping Act.<sup>157</sup> This would subject United States flags to the full impact of unexportable antitrust laws,<sup>158</sup> as well as discriminatory practices of foreign conferences without the ability to fight back. The DOJ recognized that this solution would be “politically unpalatable,”<sup>159</sup> but set it forth nonetheless. The increased vulnerability of United States flags from such a repeal would probably drive the already sinking industry completely under the waves. The DOJ Report further suggests the return of *Isbrandtsen* by repealing section 14b<sup>160</sup> (which legalizes dual rate contracts) or modifying it to increase the level of competition from independents,<sup>161</sup> enacting a competitive im-

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<sup>155</sup> *Id.* at 255 n.5.

<sup>156</sup> U.S. DEPARTMENT OF JUSTICE, *THE REGULATED OCEAN SHIPPING INDUSTRY (1977)* [hereinafter cited as DOJ REPORT]. The Report has been labelled factually incorrect by one commentator. Payne, *International Implications of U.S. Maritime Policy: Are We Exporting U.S. Antitrust Policy?*, in *LINER SHIPPING*, *supra* note 4, at 74.

<sup>157</sup> DOJ REPORT, *supra* note 156, at 240.

<sup>158</sup> See *supra* notes 105-06 and accompanying text.

<sup>159</sup> DOJ REPORT, *supra* note 156, at 244.

<sup>160</sup> *Id.* at 244-45.

<sup>161</sup> The modifications would take the following forms:

1. Reducing liquidated damages under 14b(5) for violation of a dual rate contract from the conference freight rate less handling to a maximum of one and one half times the difference between the conference and independent rates;
2. Reducing the notice period shippers must give before withdrawing from the contract under 14b(6) to 15 or 30 days from 90 days;
3. Reducing the rate differential in 14b(7) from the present 15% to 10%;
4. Removing the burden of proving the unreasonableness of rate differentials from opposing parties and imposing that burden upon the proponents; and,
5. Ensuring that the use of dual rate contracts does not extend to intermodal shipping (i.e., where shipping is only one leg of the goods’ journey).

*Id.* at 246-48.



pact standard to strengthen *Svenska*,<sup>162</sup> requiring approved agreements to expire periodically,<sup>163</sup> removing the conference self-policing system,<sup>164</sup> prohibiting all pooling agreements,<sup>165</sup> and repealing section 15's authorization of interconference agreements.<sup>166</sup>

It is evident that the DOJ is simply "unwilling to accept the Shipping Act as the law of the land,"<sup>167</sup> and is now endeavoring to win in the courts a role that Congress has consistently withheld from it.<sup>168</sup> Courts should not tolerate this type of overt interdepartmental squabble. Despite the DOJ's dislike of the Shipping Act, it is not justified in attempting to undermine the authority of the FMC. In a recent case where the FMC and DOJ appeared as respondents, the DOJ adopted a position directly opposed to that of the FMC. "The DOJ characterized the [FMC's] rationale as a 'product not only of incomplete analysis, but even more of self-induced myopia.'"<sup>169</sup> It is this author's view that the DOJ's own myopic views prevent it from accepting that it has no role to play in the Shipping Act's regulatory scheme. Failure to recognize this seriously impairs the ability of the FMC to carry out its statutory mandate, and, more importantly, impedes the ability of carriers to operate under some semblance of regulatory certainty.

## B. Changes in the Competitive Environment

Over the years, considerable change has taken place in the competitive environment in which United States flags must operate. Legislation has lagged behind these changes. The most important change has been increasing cooperation between foreign nations and shippers with their national flag fleets.<sup>170</sup> There are several aspects to such cooperation.

First, the principle of freedom of the seas has given way to the

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<sup>162</sup> *Id.* at 248-50.

<sup>163</sup> *Id.* at 250-51.

<sup>164</sup> *Id.* at 251-52.

<sup>165</sup> *Id.* at 252-53. Pooling agreements are agreements to pool (or share) the available traffic, gross freight monies, or net freight earnings. Each member is entitled to a percentage (based on size or number of sailings) of the pool. Some conferences require the posting of a performance bond which may be forfeited if the agreement is violated. D. MARX, *supra* note 9, at 54.

<sup>166</sup> DOJ REPORT, *supra* note 156, at 253-54. For a more detailed discussion of the DOJ Report, see Kryvoruka, *supra* note 131.

<sup>167</sup> *Hearings on S. 2008*, *supra* note 130, at 78 (testimony of Richard J. Daschback, Chairman, Federal Maritime Commission).

<sup>168</sup> H.R. REP. NO. 498, *supra* note 72, at 12-13; S. REP. NO. 860, *supra* note 72, at 2.

<sup>169</sup> *National Association of Recycling Industries v. Federal Maritime Commission*, 658 F.2d 816, 825 (D.C. Cir. 1980).

<sup>170</sup> See *supra* notes 109-12 and accompanying text. See also E. FRANKEL, REGULATION AND POLICIES OF AMERICAN SHIPPING 194-95 (1982).

practice of requiring that a certain percentage of a nation's foreign commerce be carried on its own flag ships. Cargo reservation may be required by legislation or simply be a *de facto* practice.<sup>171</sup> The fact that ninety-six percent of United States foreign trade is carried by foreign flags is especially disturbing when the percentage of other countries' foreign trade carried by their national flag fleets is considered. In 1977, for example, Canada's flag fleet carried 44.5% of its total imports and 20.7% of total exports, Japan's fleet carried 44.4% of Japanese imports and 20.9% of its exports, and the United Kingdom's fleet carried 32.9% of British imports and 40.1% of its exports. In contrast, the United States flag fleet carried 4.5% of United States imports and 5.6% of its exports.<sup>172</sup> The country closest to the United States was Germany, with 14.7% of German imports and 25.4% of its exports.<sup>173</sup>

Part of the problem may be attributable to the fact that the size of the United States flag fleet is not growing in proportion to the growth in United States foreign trade.<sup>174</sup> However, the lack of a national cargo policy also contributes to the disparity, especially in liner trades. United States operators in liner service made the most innovative, productive and safest general cargo ships in the world available to shippers.<sup>175</sup> Their freight rates were comparable with those of foreign competitors. Despite this, patronage from American shippers did not keep pace with the increasing volume of trade.<sup>176</sup> The National Maritime Council (NMC) has undertaken efforts to garner support for the United States flag fleet from American shippers.<sup>177</sup> The NMC's efforts have met with some success, but government support is also needed.

Second, foreign governments highly subsidize their flags. Industry

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<sup>171</sup> For a listing of preference laws, see MARITIME INDUSTRY, *supra* note 1, at 211-47. At least 54 nations require by law that preference and or assistance be given to their national flag fleets. *Id.* at 71.

<sup>172</sup> *Id.* at 50.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 46-47, 63, 70, 191.

<sup>175</sup> United States flag innovations revolutionized the industry. For example, the CONTAINERSHIP, RO/RO and SEABEE vessels, developed by United States flags in cooperation with the technical know-how of American shipbuilders, revolutionized the industry by bringing economies to intermodal transportation. The CONTAINERSHIP permits loading of the whole railroad car onto the ship, rather than the more costly method of unloading the railroad car and reloading the cargo onto the ship. RO/ROs (roll-on/roll-off ships) are designed to allow trucks to drive on with trailers of cargo. SEABEE (sea-barge) ships are barge carriers. Rather than unloading and reloading, the SEABEE ship loads the entire barge onto the ship by using an underwater elevator. *Id.* at 51, 58, 207-10.

<sup>176</sup> *Id.* at 191.

<sup>177</sup> The NMC was established in 1971. It has become a lobbying body in pursuit of legislation designed to promote the industry. *Id.* at 195.

members cite disparity in subsidization as a major cause of disparity in competitive ability.<sup>178</sup> In the United States, subsidization is aimed at achieving parity for United States flags; however, this is rarely accomplished.<sup>179</sup> For example, the objective of the Operating Differential Subsidy (ODS) Program is to achieve cost parity in seamen's wages, vessel insurance, and maintenance repairs not covered by insurance. This is to ensure that American shippers have regular and frequent service between the United States and overseas markets at reasonable and competitive freight rates.<sup>180</sup>

The value of government aid granted by each of the major maritime nations to their flag fleets and shipbuilding industries is greater than that of the United States when viewed in relation to the value of the American Gross National Product or to the value of United States foreign trade.<sup>181</sup> This is not to say that subsidies should be increased beyond the level of parity, for subsidization alone does not equal the ability to compete effectively, nor does it ensure profitability. This is demonstrated by the fact that the subsidized segment of the fleet is no more profitable than the non-subsidized segment.<sup>182</sup> Indeed, because of overtonnaging and the severe competition in the Pacific trades over a period of years, two long-established subsidized shipping companies were forced into bankruptcy in 1978.<sup>183</sup> While there is something to be said for subsidization, since ships in the non-subsidized segment are on average twice as old as those in the subsidized segment, the subsidized segment is also much smaller than the non-subsidized segment.<sup>184</sup> As to the interplay between subsidization and antitrust liability, one commentator maintains:

it makes no sense to spend hundreds of millions of dollars a year to promote our merchant fleet, on the one hand; if on the other hand, we regulate the most lucrative part of our international waterborne commerce—

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<sup>178</sup> Jessen, *supra* note 114, at 36.

<sup>179</sup> The subsidy program is administered by the Maritime Administration (MARAD).

<sup>180</sup> MARITIME INDUSTRY, *supra* note 1, at 33; E. FRANKEL, *supra* note 170, at 38-40, 44. For a discussion of other subsidy programs, see MARITIME INDUSTRY, *supra* note 1, at 30-38. Some United States flags choose not to accept subsidies because of the obligations which go along with them. For example, subsidized companies must operate under long-term government-industry contracts, assume fixed ship replacement obligations, operate under a 25-year ship life limitation, make predetermined mandatory deposits in capital reserve funds for ship replacement, maintain extra administrative staffs for government accountability, meet required regular sailings, and sail even with vacant cargo space. This list is not exhaustive. *Id.* at 54.

<sup>181</sup> *Id.* at 26, 71. Subsidization may come in forms other than direct monetary aid, e.g., tax advantages. *Id.* at 379.

<sup>182</sup> *Id.* at 56-58.

<sup>183</sup> *Id.* at 43, 56. The two companies were Pacific Far East Lines and States Steamship Co.

<sup>184</sup> *Id.* at 57.

the liner trades—in a manner which prevents our merchant fleet from competing fairly and effectively with foreign-flags.<sup>185</sup>

Finally, bilateralism is a developing trend in international shipping. Bilateralism can be defined as agreements between two countries to reserve carriage of specific cargoes to a designated number of participants, usually national flag lines.<sup>186</sup> These agreements are legal instruments of the participating governments and specify the commercial rights and responsibilities of each country's national flag lines in their bilateral trade.<sup>187</sup> Bilateralism is becoming popular as developing nations seek control over the routing of their exports and imports. The adoption of the Code of Conduct for Liner Conferences by the United Nations Conference on Trade and Development in 1973 stimulated the development of bilateralism.<sup>188</sup> Among other things, the Code provides that any country wishing to do so may impose 40/40/20 cargo sharing in its trades, i.e., each trading partner's national flag ships would carry forty percent of the liner cargo, leaving twenty percent for third flag ships.<sup>189</sup> The United States opposes ratification of the Code in its present form, because it would adversely affect the United States liner industry.<sup>190</sup> However, bilateralism is a force with which the United States will have to contend at some point.

### C. Recent Legislation

Although Congress should be lauded for its attempts to respond to the problems of rebating and state controlled carriers in United States trades, legislation directed at single malpractices is not the answer, for it only serves to further fragment the regulatory scheme. Both the Ocean Shipping Act of 1978<sup>191</sup> and the Anti-Rebating Bill<sup>192</sup> suffer from the same defects, and therefore will be analyzed together. This legislation contains two major flaws.

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<sup>185</sup> MARINE CONFERENCE, *supra* note 102, at 11 (address of John D. Hardy, Staff Counsel, Senate Subcomm. on Merchant Marine and Tourism). For subsidization expenses, see MARITIME INDUSTRY, *supra* note 1, at 248.

<sup>186</sup> MARITIME INDUSTRY, *supra* note 1, at 21.

<sup>187</sup> *Id.*

<sup>188</sup> Ratification was completed when more than 24 countries whose liner tonnage exceeded the 25% of world liner tonnage necessary to bring the Convention into force, ratified the Code. See MARITIME INDUSTRY, *supra* note 1, at 21-22; Farthing, *UNCTAD Code of Practice for the Regulation of Liner Conferences—Another View*, 4 J. MAR. L. & COM. 467 (1973); *Texts and Documents: Code of Practice for Conferences*, 4 J. MAR. L. & COM. 657 (1973).

<sup>189</sup> MARITIME INDUSTRY, *supra* note 1, at 21-22, 173-74.

<sup>190</sup> *Id.* at 22 n.33.

<sup>191</sup> Pub. L. No. 95-483, 92 Stat. 1607 (1978). See *supra* notes 89-93 and accompanying text.

<sup>192</sup> Shipping Act Amendments of 1979, Pub. L. No. 96-25, 93 Stat. 71. See *supra* notes 94-102 and accompanying text.

First, the legislation attacks only symptoms; it does not get at the root of the problems, which is the antitrust philosophy underlying the Shipping Act. The House Committee recognized this fact when considering the Anti-Rebating Bill, stating:

It is agreed that widespread rebating exists in the U.S. foreign trades. This condition has developed because:

1. The antitrust philosophy underlying the Shipping Act, 1916, requires open steamship conferences in the U.S. trades.
2. Freedom of entry into our open conferences can result in overtonnaging . . . .
3. Overtonnaging in a capital intensive industry, such as the ocean transportation industry, has encouraged rebates . . . .<sup>193</sup>

Congress has obviously accepted the antitrust philosophy underlying the Shipping Act. Although the promotion of free competition has advantages in other industries, it has no place in the shipping industry. It is time to reexamine these principles. Deterioration of the United States shipping industry will continue until steps are taken to strengthen the conference system in United States trades. Most of the industry's weaknesses are directly attributable to the weak conference system required by the antitrust laws. The concept of open conferences heads the list. Open conferences lead to overtonnaging because the conferences cannot control the amount of cargo space available on the trade.<sup>194</sup> Overtonnaging, in turn, leads to the rate wars and cutthroat competition which the conference system was created to eliminate.<sup>195</sup> Thus, United States conferences cannot fulfill their purpose.

Second, there is the problem of enforcing unexportable antitrust laws.<sup>196</sup> As one commentator has stated, "the issue is better viewed . . . not as one of *power* but as the *appropriateness* of the exercise of jurisdiction in light of conflicting national interests."<sup>197</sup> The question is whether it is appropriate for the United States to impose antitrust liability upon carriers whose home nations have exempted them from such liability. The United States may require foreign carriers to operate under United States laws in return for participating in United States shipping trades. However, those foreign carriers are acting in furtherance of their own national shipping policies. United States trading partners have already shown their displeasure with the balance the

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<sup>193</sup> H.R. REP. NO. 232, *supra* note 2, at 8, 30.

<sup>194</sup> See *supra* notes 27-33 and accompanying text.

<sup>195</sup> See *supra* notes 10-12 and accompanying text.

<sup>196</sup> See *supra* notes 105-08 and accompanying text.

<sup>197</sup> B. HAWK, APPLICATION OF COMPETITION LAWS IN INTERNATIONAL SEA AND AIR TRANSPORTATION 13 (speech delivered at the ICC Conference in Paris, March, 1981).

United States has reached between the competing national shipping policies through their enactment of blocking statutes. Continuing to follow this policy can only further strain these relationships. It is time for the United States to reexamine its policy balance, even if the new balance is not likely to be more acceptable to United States trading partners than the present balance.

#### IV. PROPOSALS

The United States should make a serious commitment to revitalizing the shipping industry. First, the primacy of the Shipping Act as the basic regulatory scheme must be re-established, and, second, steps must be taken toward the promotion of the industry.

##### A. Primacy of the Shipping Act

Industry problems require a comprehensive overhaul of the present regulatory scheme, not merely stop-gap measures designed to eliminate specific problems as they arise. Toward that end, Congress should pass the proposed Shipping Act of 1982 ("1982 Act").<sup>198</sup> Congress has expressed some purposes of the 1982 Act as being: 1) harmonization of United States shipping practices with those of its major trading partners; 2) cooperation among carriers and rationalization of services; 3) facilitation of efficient and timely regulation by a single federal agency of the various aspects of international liner shipping, responsive to the growth of ocean commerce and international developments affecting that commerce; and, 4) complete immunity from antitrust laws for ocean common carriers conducting international liner shipping and related intermodal activities.<sup>199</sup>

The 1982 Act re-establishes the primacy of the Shipping Act of 1916 through several substantive changes.<sup>200</sup> The most important provision is the new antitrust exemption.<sup>201</sup> Section 8 of the 1982 Act creates blanket antitrust immunity for carriers engaged in certain collective activities.<sup>202</sup> The 1982 Act is made the sole law governing international liner shipping; the standards and remedies of the Act are the only regulations applicable to regulated ocean shipping. Further-

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<sup>198</sup> S. REP. NO. 1593, 97th Cong., 2d Sess. (1982).

<sup>199</sup> *Id.* at 37.

<sup>200</sup> In fact, the Committee Report echoes much of the analysis *supra* in text accompanying notes 103-97.

<sup>201</sup> S. REP. NO. 1593, *supra* note 198, at 50-52, 55-57.

<sup>202</sup> *Id.* The Senate Committee on Finance and Transportation analysis of the bill states that the provision is "intended to be a broad exemption." S. REP. NO. 414, 97th Cong., 2d Sess. 34 (1982).

more, prior FMC approval is not required for conference activity to fall within the antitrust exemption,<sup>203</sup> expressly overruling *Carnation*.<sup>204</sup> The broad antitrust exemption of section 8 would free conferences from the shadow of unexportable antitrust laws.

As noted above, section 6 allows conference agreements to take effect without prior FMC approval. In addition, to prevent any "opportunity for the reinfusion of antitrust principles into the agreement review process,"<sup>205</sup> that section provides that "[n]either the burden of proof nor the burden of persuasion shall be shifted solely on the grounds that the agreement would, absent approval, violate the antitrust laws or have significant anticompetitive effects."<sup>206</sup> Section 6 expressly overrules *Svenska*<sup>207</sup> by placing the burden of proof on the opponent throughout the proceedings.

The 1982 Act clarifies conference power to set intermodal rates and FMC jurisdiction over such rates and services.<sup>208</sup> This provision should put an end to suits such as *United States v. Federal Maritime Commission*,<sup>209</sup> where the DOJ challenged FMC approval of a revenue pooling agreement. In combination with the broad antitrust exemption, section 4 should permanently remove interdepartmental squabbles from the courts and convince the DOJ that it has no role to play in regulating the liner shipping industry. Finally, the 1982 Act provides specific authority for shippers to form shippers' councils without the threat of antitrust liability for their activities, including consultation with carriers.<sup>210</sup>

Shippers' councils are usually used to offset increased conference power derived from the use of closed conferences. The 1982 Act, however, retains the requirement of open conferences.<sup>211</sup> This is a mistake. Closed conferences would permit control over the amount of tonnage in the trade and avoid overtonnaging. Controlling tonnage provides a stable basis upon which to base estimates of future demand. Carriers could then intelligently assess the need for new ship construction and design. The stability produced by closed conferences would create in-

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203 S. REP. NO. 1593, *supra* note 198, at 50-52, 55-57.

204 *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, *modified*, 383 U.S. 932 (1966).

205 S. REP. NO. 414, *supra* note 202, at 32.

206 *Id.*

207 390 U.S. 238 (1980).

208 S. REP. NO. 1593, *supra* note 198, at 43-44.

209 655 F.2d 880 (D.C. Cir. 1980). *See also supra* text accompanying note 151. Revenue pooling agreements are specifically authorized. S. REP. NO. 1593, *supra* note 198, at 44.

210 S. REP. NO. 1593, *supra* note 198, at 44.

211 *Id.* at 46-47.

centives to engage in research and development by assuring an adequate return on investment. The closed conference system would provide incentive for members to enforce agreements. Since the 1982 Act does not permit closed conferences, it specifically provides that conferences must employ an "independent neutral body to police fully the obligations of the conference and its members."<sup>212</sup> The 1982 Act also retains the prohibition of deferred rebates.<sup>213</sup> Under a system of closed conferences, this would be unnecessary since deferred rebates are a useful mechanism for ensuring adequate cargo for members. Despite these two inadequacies, the 1982 Act finally abandons parochial and dogmatic views of United States antitrust laws and strikes a new balance which will enable United States flags to operate on a parity with foreign competitors. The United States may finally be ready to join other maritime nations which have seen strong conference systems work to their advantage.

#### B. Promotion of the United States Merchant Marine

It has not been a simple task for the United States to live up to the mandate of the Merchant Marine Act of 1936.<sup>214</sup> Its Declaration of Policy states:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic waterborne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping services essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.<sup>215</sup>

To live up to this mandate, the industry must rebuild. Toward that

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 69.

<sup>214</sup> 46 U.S.C. § 1101 (1976).

<sup>215</sup> *Id.* Congress reaffirmed this policy by passing the Merchant Marine Act of 1970. Pub. L. No. 91-469, 84 Stat. 1018 (1970) (amending the Merchant Marine Act of 1936, *codified at* 46 U.S.C. § 1101 (1936)). See MARITIME INDUSTRY, *supra* note 1, at 15, for a discussion of progress made under the amendments.



end, the Maritime Administration (MARAD) must receive the necessary resources and support.

Over the past thirty years, the total size of the United States flag fleet has dropped to 569 ships from 4,000.<sup>216</sup> Undoubtedly, this has contributed to the United States flag fleet's inability to carry more than a minimal amount of United States trade.

Different forms of subsidization should be used.<sup>217</sup> For example, permitting accelerated depreciation of ships would encourage earlier scrapping of old ships.<sup>218</sup> Aids used by foreign countries include trade-in allowances, official low interest loans, interest subsidies, official loan guarantees, tax-free reserve funds, and duty free imports of materials needed for ship construction.<sup>219</sup> MARAD should investigate these and other methods of assisting carriers. Currently, there is no unified voice to speak for the industry as a whole. MARAD should be the voice of the government with respect to the promotion and development of the United States merchant marine. MARAD should receive authorization to speak for the government on matters including carriage of government generated cargoes by United States flags and intercourse with other agencies over policy matters and probable impact on the industry of proposed courses of action.

#### CONCLUSION

The recent spot amendments to the Shipping Act cannot remedy the problem of outdated and fragmented legislation. Congress must re-establish the supremacy of the Shipping Act over antitrust laws through appropriate legislation. The Shipping Act of 1982 is a significant step away from parochial views of the United States antitrust laws, and, therefore, it should be passed. This Act would finally bring the regulation of liner shipping under the control of a single federal agency, the FMC. Moreover, the 1982 Act provides sufficiently broad antitrust immunity to permit conferences to carry out the kind of anticompetitive activities for which they were created. However, the United States shipping industry still needs to be rebuilt. MARAD may reach this goal by receiving the support and resources necessary to investigate and implement new forms of subsidization and cooperation.

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<sup>216</sup> MARITIME INDUSTRY, *supra* note 1, at 259.

<sup>217</sup> For a discussion of current subsidization, see Caras, *U.S. Maritime Administration Financing Procedures Available for New Ship Construction*, 36 BUS. LAW. 1887 (1981).

<sup>218</sup> MARITIME INDUSTRY, *supra* note 1, at 379-80. Reinvestment in new ships must coincide with scrapping old ships to prevent a decrease in size since the thrust of this proposal is to upgrade the quality and efficiency of the current United States fleet.

<sup>219</sup> *Id.* at 26 n.42.

Only the development of a coordinated national shipping and cargo policy can rejuvenate the United States shipping industry. Such a policy would permit greater rationalization and make United States carriers more competitive with foreign carriers. Until the United States abandons its parochial regulation of the shipping industry and adopts a policy of cooperation and rationalization, as have other major maritime nations, the United States shipping industry will continue its dangerous decline.

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