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Deregulation of the Liner Conference System: The Creation of Countervailing Power in Shippers as a Means to Control Oligopoly Market Power

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ARTICLES

Deregulation of the Liner Conference System: The Creation of Countervailing Power in Shippers as a Means to Control Oligopoly Market Power

*Andrew M. Danas**

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I. INTRODUCTION

International ocean shipping is at the intersection of many nations' domestic and international economic policies. While theoretically it is one of only a few truly international industries, inasmuch as its activities occur primarily outside the boundaries of any nation state, in practice many nations consider the industry to be essential to the competitiveness of their exports in international markets and thus subject it to some domestic policy regulation. In recent years, the dual nature of the shipping

industry has become apparent to United States policy makers, as third world and certain industrialized nations have tended to enter into bilateral agreements or place certain cargo restrictions on their trade. At the same time the United States has assumed a greater dependence on international trade for its economic well-being.

The United States liner industry, both in its competitive rate structure and in the competitiveness of United States based flag companies, has been declining for at least the past decade. This decline has prompted policymakers to propose that the United States liner conference system be deregulated. Generally, two themes underlie these proposals: an elimination or weakening and streamlining of the regulatory powers of the Federal Maritime Commission (the United States is one of the few nations with a regulatory agency exclusively devoted to regulating the conference system), and a strengthening of the conferences' anti-trust immunity. Because such legislation is antithetical to traditional concepts of United States domestic competition policy, previous Congresses failed to enact reform legislation. On March 20, 1984, however, President Reagan signed the Shipping Act of 1984, which comprehensively restructured the United States maritime laws. While this Act culminates seven years of attempted maritime reform by the Congress, it is compromise legislation, merely a step toward a more fundamental rethinking of United States maritime policy. The Act authorizes the creation of a Presidential Advisory Commission at the end of this decade that will ascertain the need to further strengthen the conference system and reform the United States regulatory policy.

This article addresses one of the concerns of opponents to such reform measures: the protection of shippers' interests through the creation of shippers' councils. These councils, which would enjoy an antitrust exemption that would permit them to either consult or negotiate general service and rate issues with conferences, exist in a number of other nations. United States proponents of these councils generally perceive them as a countervailing power to strong conferences, supplanting, to a certain degree, the role of the antitrust laws in protecting the interests of shippers and ensuring economic efficiency in the conference system. After a survey of current industry conditions, this author concludes that 1) the proposals previously considered by the Congress are inadequate for the creation of these councils; 2) based upon prior experience under similar legislation, these councils would probably not form even if given antitrust immunity; and 3) reliance on the creation of export trading companies under the Export Trading Company Act of 1982, combined with the shippers' associations provisions of the Shipping Act of 1984,

will achieve essentially the same goals as the shippers' council concept, thus negating any need for additional legislation.

A. Background

Any analysis of the feasibility of shippers' councils in the United States must commence with an identification of the market in which they are to operate. Tramps, independent liners (independents), and liner conferences (conferences or shipping conferences) are the primary components of regulated ocean transportation. A tramp is an independent carrier which contracts with shippers for the individual carriage of goods. It does not confine itself to one trade and therefore does not need to offer a fixed schedule or publish tariffs. In contrast, a liner serves a fixed trade, offering scheduled services and published tariffs. Its legal status is that of a common carrier.¹

Liner service has several attributes common to regulated transportation industries, which conference advocates argue preclude the industry from operating as a classical competitive market. Foremost among these characteristics are high fixed costs and high initial capital costs.² In addition, because liners must be large, they must have a fixed capacity. This factor distinguishes them from other transportation modes.³ The requirement that liners adhere to fixed schedules often has resulted in liners having to sail without utilizing their full capacity.⁴ In a competitive market, this underutilization of capacity, coupled with an inability to reallocate resources, can lead to "cut-throat" competition and destructive price wars, with consequential bankruptcies and disrupted market service.⁵

The English developed the concept of liner conferences in the 1870s

¹ See G. SLETMO & E. WILLIAMS, *LINER CONFERENCES IN THE CONTAINER AGE: U.S. POLICY AT SEA 7-12* (1981); D. MARX, *INTERNATIONAL SHIPPING CARTELS* (1953); see generally, Agman, *Competition, Rationalization, and the United States Shipping Policy*, 8 J. MAR. L. & COM. 1 (1976); Comment, *The Sinking Shipping Industry*, 5 NW. J. INT'L L. & BUS. 99 (1983).

² SLETMO & WILLIAMS, *supra* note 1, at 136-38; SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION: *THE SHIPPING ACT OF 1983*, S. REP. NO. 3, 98th Cong., 1st Sess. 9 (1983) [hereinafter cited as S. REP. NO. 3].

³ SLETMO & WILLIAMS, *supra* note 1, at xxix; S. REP. NO. 3, *supra* note 2, at 9; HOUSE COMM. ON MERCHANT MARINE AND FISHERIES: *The Shipping Act of 1983*, H.R. REP. NO. 53, 98th Cong., 1st Sess. 14 (1983).

⁴ SLETMO & WILLIAMS, *supra* note 1, at xxix.

⁵ HOUSE COMM. ON MERCHANT MARINE AND FISHERIES: *REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE*, H.R. DOC. NO. 805, 63d Cong., 2d Sess. 416-17 (1914) [hereinafter cited as ALEXANDER REPORT]; Farthing, *UNCTAD Code of Practice for the Regulation of Liner Conferences—Another View*, 4 J. MAR. L. & COM. 467 (1973).

to compensate for the adverse effects of competition.⁶ A liner conference is a cartel of shipowners in a trade the primary purpose of which is to rationalize services and productive output by eliminating competition within the trade. Rate and service stability is achieved by group consultation on rates, service schedules, market shares, and revenue pooling. In the majority of trades, but not the United States trades, the conference will be "closed" inasmuch as it limits the number of members in the trade. To ensure that it maintains its market position, the conference also may utilize the tools of deferred rebates or dual rate contracts as tying arrangements to ensure shipper loyalty to the conference. The use of these tools will seriously limit the opportunity for a competitor to enter the trade, because many of its potential customers are already committed to the conference.⁷

B. Regulation of Liner Conferences and the Monopoly Price Problem

From the standpoint of broad economic policy, there are four important objectives which the Congress has sought to meet since the middle part of the nineteenth century. They are a logical and efficient control over entry, a resulting price that bears a relationship with cost, stimulation of efficiency, and stimulation of innovation. These four economic objectives are not particularly debatable. They are either accomplished by an effective regulation scheme or they are accomplished by competition. To think that they can be accomplished in a vacuum is naive or dangerous.⁸

Most of the tools used to achieve the liner conference goals of limiting competition and rationalizing prices would constitute per se violations of the Sherman and Clayton Acts if the industry did not enjoy an antitrust exemption for its activities.⁹ Although some segments of the

⁶ The first formally organized steamship conference was established in 1875 to serve the trade from the United Kingdom to ports in Calcutta. The English shipowner who originated the concept was said to be "quite pleased with the results." Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MAR. L. & COM. 93 (1972); Llorca, *Anti-trust Exemption of Shipping Conferences*, 6 J. MAR. L. & COM. 287 (1975); INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, 87th Cong., 2d Sess. 205 (1962).

⁷ See Hanson, *Regulation of the Shipping Industry: An Economic Analysis of the Need For Reform*, 12 J. L. & POL'Y INT'L BUS. 973 (1980).

⁸ H.R. REP. NO. 935, 96th Cong., 2d Sess. 25 (1980) (statement of Andrew Popper, Dean, American University School of Law, before the House Monopolies Subcommittee, reprinted in *Report on Omnibus Regulatory Reform, Revitalization, and Reorganization Act of 1980*) [hereinafter cited as H.R. REP. NO. 935].

⁹ 15 U.S.C. §§ 1-7 (1976). For example, under the following cases interpreting section 1 of the Sherman Act liner conference activities would be per se illegal: *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (horizontal agreements to discuss or fix prices); *United States v. Topco Assoc.*, 405 U.S. 596 (1972) (allocation of production or markets); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (revenue pooling and use of tying arrangements); *Standard Oil of Cal. v. United States*, 337 U.S. 293 (1949). *But cf.*, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (requirements contracts). See also *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911).

government and industry favor an aggressive application of the antitrust laws to the shipping industry,¹⁰ Congressional and Executive branch studies have rejected this approach repeatedly, concluding that principles of comity preclude the unilateral imposition of domestic competition laws upon an international industry.¹¹ Thus, since 1916, United States policymakers have granted liner conferences an antitrust exemption subject to government regulation by the Federal Maritime Commission in an attempt to create an alternative to competition.¹²

Unfortunately, principles of international comity also have limited the United States' ability to regulate the liner conference system. Although the original proposals suggested that the Interstate Commerce Commission regulate the conference system, both the Shipping Act of 1916 and its amendments in 1961 created a separate independent agency to exercise a pre-implementation review of conference agreements and to monitor potential industry abuses.¹³ Under a 1968 Supreme Court decision, the Federal Maritime Commission ("FMC") could grant an antitrust exemption only for those agreements that the proponents proved to be within the "public interest".¹⁴ In addition to using a regulatory agency to monitor conference activities, the United States' method of conference regulation differs from that of other nations inasmuch as it sanctions a much weaker form of conference. United States law permits only "open" conferences, which mandate that conferences cannot limit their membership or size.¹⁵ In addition, United States trade conferences could utilize only weak tools, such as dual rate contracts, to develop

¹⁰ See DEPARTMENT OF JUSTICE, *Report on the Regulated Ocean Shipping Industry* (1977) [hereinafter cited as DEPARTMENT OF JUSTICE REPORT]; cf. *Hearings on S. 1593 Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science, and Transp.*, 97th Cong., 1st Sess. 287 (1981) (testimony of Clifford M. Sayre, E.I. DuPont De Nemours & Co.) [hereinafter cited as *Gorton Hearings*].

¹¹ See ALEXANDER REPORT, *supra* note 5, at 416; Letter from Brooks Hays, Asst. Sec. of State, to Senator Engle (August 15, 1961), reprinted in INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, *supra* note 6, at 228-29; Letter from President Carter to Hon. John Murphy (July 20, 1979) (recommending an interagency task force), reprinted in H.R. REP. NO. 935, *supra* note 8, at 29; REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (Jan. 22, 1979) Ch. 13, at 280-86 [hereinafter cited as REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS]; REPORT OF THE COMPTROLLER GENERAL ON CHANGES IN FEDERAL MARITIME REGULATION, GAO/PAD-82-11 (7/2/82) 33 [hereinafter cited as GAO REPORT].

¹² See Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1982 & Supp. 1984).

¹³ ALEXANDER REPORT, *supra* note 5, at 419-20; REPORT ON SHIPPING ACT OF 1916, H.R. REP. NO. 659, 64th Cong., 1st Sess. 27, 27-32 (1916).

¹⁴ Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968); see also Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968).

¹⁵ Shipping Act of 1916, 46 U.S.C. § 814.

shipper loyalties.¹⁶ Stronger methods of market foreclosure, such as deferred rebates and fighting ships, are illegal in the United States trades.¹⁷ Despite these limitations on conference market power, other methods of encouraging economies of scale in the liner industry, including revenue pooling agreements, service coordination, and rate agreements, were permitted under the Shipping Act of 1916.¹⁸ Thus, the Act struck a balance between promoting conference efficiencies and preventing conference discrimination against competitors, shippers, and ports.

Although there have been radical differences in the proposed solutions, a general consensus that the United States regulatory scheme has failed exists.¹⁹ The United States trades suffer from overtonnaging. This overtonnaging impedes attempts to rationalize services and costs.²⁰ Recent studies estimate that rate differentials between United States imports and exports may be as great as thirty-two percent.²¹ Perhaps more alarming is a finding that transportation rates from the United States to a third country are often 100 percent higher than comparable rates from a competitor country to the same destination.²² Some exporters have cited

¹⁶ Under a dual rate contract a conference will establish tariffs consisting of rates at two levels. The lower rate is charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher rate is charged to merchants who do not so agree. Shipping Act, 46 U.S.C. § 813a. This practice is ostensibly illegal under the Shipping Act of 1984, 46 U.S.C. § 10(b)(5), (6) (Supp. 1984) having been replaced by service and loyalty contracts. *See infra* note 61.

¹⁷ Section 814 of the Shipping Act renders the following tools of predatory market foreclosure illegal: deferred rebates, fighting ships, retaliation against shippers by concerted refusals to deal, and charging unjustly discriminatory rates against any shippers. 46 U.S.C. § 813. In addition, sections 16 and 17 of the Shipping Act prohibit activity that would discriminate against shippers or ports. 46 U.S.C. §§ 815-16. These activities are now prohibited in U.S. foreign commerce under section 10 of the Shipping Act of 1984. 46 U.S.C. § 809 (Supp. 1984).

¹⁸ Shipping Act of 1916, 46 U.S.C. § 814 (1982).

¹⁹ *See*, DEPARTMENT OF JUSTICE REPORT, *supra* note 10; Fawcett & Nolan, *United States Ocean Shipping: The History, Development, and Decline of the Conference Antitrust Exemption*, 1 NW. J. INT'L L. & BUS. 537 (1979). *But see* GAO REPORT, *supra* note 11.

²⁰ *Gorton Hearings*, *supra* note 10, at 120-21 (testimony of C. Jonathan Benner, General Counsel, Federal Maritime Commission); Great Britain, *Committee of Inquiry into Shipping: Report, Chmn, The Rt. Hon. The Viscount Rochdale, HMSO* ((MND 4337), London, 1970) 125-26, par. 436 [hereinafter cited as *Rochdale Report*].

²¹ Rate differentials between the United States and European inbound and outbound rates were 32 percent higher for United States outbound rates and 302 percent higher for freight rates for the export of competing commodities, as compared with Japan. BOOZ, ALLEN & HAMILTON, INC., A STUDY OF OCEAN RATE DISPARITIES, FINAL REPORT, JUNE 1978 I-3 (prepared for the Department of Transportation) [hereinafter cited as the BOOZ ALLEN REPORT], excerpts *reprinted in Omnibus Maritime Bill: Hearings of H.R. 4769 Before the Subcomm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess., part II, 447-48 (1979) [hereinafter cited as *Omnibus Hearings*]. Floor Debate, 128 CONG. REC. H6910 (daily ed., Sept. 13, 1982) (statement of Rep. McCloskey).

²² BOOZ ALLEN REPORT, *Omnibus Hearings*, *supra* note 21, at 447-48; *see also Study by the University of Wales Institute of Science and Technology Hearings on H.R. 11422 before the Subcomm. on Merchant Marine, House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 297

these rate differentials to justify shipping their Latin American destined goods through Europe first, because the overall cost is less than shipping directly to Latin America.²³ Similarly, a recent survey of small and medium sized manufacturers ranked high transportation freight rates as one of the greatest impediments to the export of their goods.²⁴

A decline in the role of United States flag ships in the liner trades has accompanied this problem of surplus capacity and higher rates. The number of United States firms involved in liner shipping during the past decade declined from nineteen in 1970 to nine in 1981.²⁵ In addition, the percentage volume of United States liner import and export trade carried in United States bottoms is 27.5 to 30 percent, while the total percentage of United States exports moving by United States flag ships is 5 percent.²⁶ (For comparison purposes, the United Nations recommends a 40 percent market share for flag carriers in any given trade.)²⁷ This decline has national defense as well as economic ramifications, as the need for a strong merchant marine during the 1982 Falkland Islands War well

(1978) [hereinafter cited as *Closed Conference Hearings*] which suggested that rationalization of the United States trades could result in a reduction of costs by 28 percent.

²³ *Closed Conference Hearings*, *supra* note 22, at 218 (testimony of Edgar Vierengel, Ingersoll-Rand Co.).

²⁴ DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, *Report on U.S. Exports: Hearings on S. 2520 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 251-53 (1978).

²⁵ GAO REPORT, *supra* note 11, at iii (Executive Summary).

²⁶ *Hearings on H.R. 4374 Before the Subcomm. on Merchant Marine of the Merchant Marine and Fisheries Comm.*, 97th Cong., 2d Sess. 1 (1982) (opening statement of Rep. Biaggi) [hereinafter cited as *Regulatory Reform Hearings*]; *Gorton Hearings*, *supra* note 10, at 167 (statement of Council of Flag Ship Operators) (citing 1979 MARAD statistics). For comparison purposes, the Industry and Trade Administration of the Department of Commerce found that between 1960 and 1977, U.S. market shares among 14 major free world trading nations dropped from 21 percent to 14.2 percent for a 32 percent decline. Shares of world exports by manufacturers, the segment of the market carried primarily in liner ships, declined over 18 percent from 23 percent to 18.6 percent. See *Closed Conference Hearings*, *supra* note 22, at 211 (statement of New York Chamber of Commerce).

The GAO Report, however, disputes conclusions that the liner industry has declined. Instead, it argues that the decline in United States flag vessels and ranking of the United States fleet reflects significant changes in ship technology. It argues that the decline of United States companies has corresponded with a rise of the United States position as the leading containership country in the world. In addition, it disputes the figures cited above and argues that the average annual United States flag share of ocean liner cargoes, whether measured by dollar value or average annual tons, is currently a 30 percent share. This would constitute only a 5 percent market share decline since 1956, the year containerships were introduced. GAO REPORT, *supra* note 11, at 11-17.

²⁷ U.N. Conference on Trade and Development, U.N. Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, Final Act and Annexes, at 27, U.N. Doc. TD/Code/11/Rev. 1 (May 9, 1974) [hereinafter cited as UNCTAD Code of Conduct]. Previous legislative investigations have attempted to develop alternative methods for the United States to achieve a 40% market share in its trades. See *Omnibus Hearings*, *supra* note 21, at 109; see also H.R. 4519, 97th Cong., 1st Sess. (1981); H.R. 3447, 98th Cong., 1st Sess. (1983). But see Maritime Agreements Act of 1983, S.1617, 98th Cong., 1st Sess. (1983).

demonstrated.²⁸

Analysts differ as to why the United States regulatory scheme has failed.²⁹ Neutral observers cite the radical technological changes experienced by the industry since the 1960s and the emergence of a strong Communist Bloc fleet which is able to engage in price cutting through state subsidization of its operating costs as reasons for this failure.³⁰ These problems, however, have afflicted the industry world-wide and, although they perhaps have aggravated the situation, they cannot account for the fundamental problems the United States trades face.

Competition advocates, primarily the Department of Justice, contend that the conference system has caused the industry's problems. They argue that the conferences abuse their antitrust exemption by using it to restrict market entry, discourage innovation, and price at the cost level of their least efficient members.³¹ Conference proponents respond

²⁸ See GAO REPORT, *supra* note 11, at 32-33. See also 129 Cong. Rec. S1680 (daily ed., Feb. 24, 1983) (statement of Sen. Inouye); *Hearings on H.R. 11878, Before the Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary*, 98th Cong., 1st Sess. 2 (1983) (statement of Albert E. May, Council of American Flag Ship Operators) [hereinafter cited as *House Judiciary Hearings*]. But see *id.* at 7 (statement of John H. Shenefield).

²⁹ See *supra* nn.19 & 26.

³⁰ The technological changes in the industry consist of "containerization", which has affected all modes of transportation and has contributed to the increasing use of intermodal transportation. Prior to the 1960s, most goods were shipped as breakbulk, cargo which is loaded as single discrete units aboard a carrier. Each transshipment required an individual handling of the goods. Containerization is a process where discrete units are consolidated into one container which can then be loaded and unloaded as a single unit. Prior to the advent of containerization, as many as three days of a ship's time could be spent in port loading and unloading. The containership, in contrast, spends only eight hours time in port, the rest being used more productively in actual transit. The disadvantage of containers is their greater capital costs, which conference proponents cite as a justification of rationalization. Unlike these commentators, the General Accounting Office argues that the current nature of the United States shipping trade merely reflects the industry changes which follow naturally from the new technology. GAO REPORT, *supra* note 11, at 12; see *supra* note 26. See also Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203 (1970); Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311 (1979); Agman, *supra* note 1, at 42.

Several legislative proposals have been introduced and enacted addressing the problem of Soviet Bloc "controlled carriers". The most recent legislation was the Ocean Shipping Act of 1978, Pub. L. No. 95-483, which gave the Federal Maritime Commission authority to review and disapprove tariffs of controlled carriers if they cannot cost justify their rates. See *Remarks of Comm. Leslie Kanuk before the Propeller Club, Port of Baltimore, Jan. 10, 1979*, 10 J. MAR. L. & COM. 601, 603-07 (1979); Zerby, Ellsworth, & Schmitt, *Dumping of Non-factor Services: Some Implications of Recent Experiences With Controlled Economy Shipping*, 4 Nw. J. INT'L L. & BUS. 37 (1982). This authority is continued in the Shipping Act of 1984. See 46 U.S.C. § 808 (Supp. 1984). Additional legislation aimed at alleviating some industry problems include the Shipping Act Amendments of 1979, Pub. L. No. 96-25, 93 Stat. 71 (1979). See generally Comment, *The Sinking Shipping Industry*, *supra* note 1, at 112-13.

³¹ See *House Judiciary Hearings*, *supra* note 28, at 3 (statement of James C. Miller III, Chairman, Federal Trade Commission); *Regulatory Reform Hearings*, *supra* note 26, at 187 (statement of

that the industry's high fixed costs and the open conference system have created the industry's problems, because this system allows other trades to "dump" their surplus capacity into the United States trade, thus causing overtonnaging and inefficiency. Rationalization through strong conference cohesion is difficult to achieve because limited member conferences are not permitted. In addition, conference proponents argue that the shipper loyalty and conference cohesion practices permitted by the Shipping Act are insufficient for true rationalization.³²

Despite this inability to consistently attribute root causes, commentators have uniformly cited the performance of the Federal Maritime Commission as a major factor contributing to the industry's decline. Pro-competition advocates criticized the agency for inadequate supervision of the industry for anticompetitive abuses and for what they claim

John R. Arwood); see DEPARTMENT OF JUSTICE REPORT, *supra* note 10, which argued that the United States North Atlantic trade consisted not of different conferences but of one superconference acting in a collusive manner. This allegation was reinforced by a plea of *nolo contendere* by several major liner corporations in June of 1979. *United States v. Atlantic Container Lines*, Crim. No. 79-00271 (D.D.C. file 1979). A copy of the grand jury indictment is reprinted in *Hearing on S.47 and S.504 Before the Comm. on the Judiciary*, 98th Cong., 1st Sess. 70-87 (1983) [hereinafter cited as *Senate Judiciary Hearing*] (attachment to testimony of Thomas E. O'Neill, National Association of Beverage Importers). See also *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 (S.D.N.Y. 1980). However, the attitude of the Department of Justice may be different under the Reagan Administration. See *Regulatory Reform Hearings*, *supra* note 26, at 49 (statement of Rep. McCloskey). *But see* 129 CONG. REC. S1576 (daily ed., Feb. 23, 1983) (statement of Sen. Metzbaum). See also *House Judiciary Hearings*, *supra* note 28, at 6 (statement of John H. Shenefield); *House Judiciary Hearings*, *supra* note 28 (statement of the National Association of Beverage Importers).

³² GAO REPORT, *supra* note 11, at 8-9. For example, the BOOZ ALLEN REPORT's explanation for the difference in shipping rates was that marginal revenue costs had to be compensated for by higher rates because liner trade ships must sail at a 50-60 percent capacity rather than the 80 percent capacity achieved in most other trades. This lack of efficiency arguably was a result of the ocean conference system, which inhibited rate setting practices utilized in other trades and the existence of shippers' councils in other countries. (Currently, there are 360 conferences world-wide with 120 in the U.S. trades.) BOOZ ALLEN REPORT, *supra* note 21, at I-1, I-3. There are, however, opposing viewpoints as to the reasons for rate differentials. For example, the Department of Justice disputed the BOOZ ALLEN REPORT conclusion that the rate differential was based on an open conference system. Instead, the report attributed the differential to the differences in the value/density characteristics of the cargo in the United States export trade as opposed to the import trade. DEPARTMENT OF JUSTICE, STAFF STUDY OF BOOZ, ALLEN, & HAMILTON STUDY ON OCEAN RATE DISPARITY, reprinted in *Omnibus Hearings*, Vol. I, *supra* note 21, at 195-208 [hereinafter cited as DEPARTMENT OF JUSTICE STUDY]. Similarly, an argument has been made that rate differentials reflect an overall different conceptual approach to export trading by competitors, not a difference in the operating characteristics of the United States industry. *Regulatory Reform Hearings*, *supra* note 26, at 480 (statement of Richard A. French, Proctor and Gamble). See also Bennathan & Walters, *supra* note 6; Ellsworth, *Competition or Rationalization in the Liner Industry?*, 10 J. MAR. L. & COM. 497 (1979); *Gorton Hearings*, *supra* note 10, at 1-6 (statement of Sen. Gorton); H.R. REP. NO. 53, Pt. I, *supra* note 3, at 7.

was its pro-approval posture in reviewing conference agreements.³³ Some of these criticisms may be structural, however, inasmuch as the Commission's statutory powers are weak compared to those of domestic regulatory agencies. Moreover, the Commission has been frustrated in its investigatory functions by the enactment of blocking statutes by other countries, which, among other things, have limited the Commission's ability to exercise its subpoena powers.³⁴ Indeed, pro-conference advocates argued that these limits on the FMC's powers resulted in a disproportionate enforcement of United States laws against United States flag carriers by both the FMC and the Department of Justice. This discriminatory enforcement, coupled with an inefficient and lengthy FMC approval process, allegedly inhibited United States flag carriers from implementing rationalization agreements because they feared that they might violate United States antitrust laws and thus weaken their ability to compete with other members of the trade who might be protected by favorable legislation in their home countries. As would be expected, conference advocates suggested that a strengthened antitrust exemption for conference activities might resolve this problem.³⁵

An additional external event which will have a continued influence on United States policy in regulating the conference systems is the worldwide trend toward either closed conferences or bilateral trade agreements

³³ DEPARTMENT OF JUSTICE REPORT, *supra* note 10; REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS, Ch. 13, *supra* note 11, at 278; *Hearings on S.47 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 31 (1983) (statement of Prof. George Garvey) [hereinafter cited as *Senate Hearings*]. See *House Judiciary Hearings*, *supra* note 28, at 8-9 (statement of National Association of Beverage Importers).

³⁴ The FMC has experienced most of its enforcement problems in subpoena and discovery actions against foreign based liners. This has not been limited merely to shipping matters, but applies to related antitrust activities as well. For example, the British have enacted the "Clawback Act of 1980". To date, twelve countries have enacted blocking statutes against FMC subpoenas. *Omnibus Hearings*, vol. I, *supra* note 21, at 404 (statement of National Maritime Council). Also see *Regulatory Reform Hearings*, *supra* note 26, at 14 (statement of Peter Luciano, Executive Director, Transportation Institute); 129 CONG. REC. S1676-77 (daily ed., Feb. 24, 1983) (statement of Sen. Gorton); S. REP. NO. 3, *supra* note 2, at 7-9; Gordon, *Extraterritorial Application of U.S. Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980); Note, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 268-72 (1982); Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 208-09 (1982).

³⁵ S. REP. NO. 3 *supra* note 2, at 6-11; 129 CONG. REC. S1487 (daily ed., Feb. 22, 1983) (statement of Sen. Gorton); SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, THE SHIPPING ACT OF 1982, S. REP. NO. 414, 97th Cong., 2nd Sess. 7 (1982) [hereinafter cited as S. REP. NO. 414]; See James, *Rebating on the High Seas*, 47 I.C.C. PRAC. J. 174 (1974); Fitzsimmons, *Antitrust and the Shipping Industry: Interpretation of the Shipping Act of 1916*, 12 N.Y.U. J. OF INT'L L. & POL. 115 (1979). But see GAO REPORT, *supra* note 11, at iv, 16; *House Judiciary Hearings*, *supra* note 28, at 10 (statement of Prof. George Garvey).

which impose a cargo preference scheme on a trade.³⁶ Developing nations have adopted the UNCTAD Code of Conduct for Liner Conferences, which became effective on October 6, 1983 and contains a 40-40-20 cargo allocation scheme.³⁷ Under the UNCTAD Code, each trading partner may reserve 40 percent of the trade's cargo to its flag carriers.³⁸ The remaining 20 percent is allocated to third flag and independent carriers.³⁹ The United States has refused to endorse the Code under the doctrine of free competition, but third world nations consider the control of transportation costs to be crucial to the development of their export based domestic industries. The EEC, which initially opposed the agreement, ratified it in 1982, thus implementing the document on a world wide basis.⁴⁰ One potential effect of the implementation of the UNCTAD Code may be that the surplus tonnage precluded from a 40-40-20 trade will gravitate primarily toward the United States and the remaining open conference trades. Thus, the overtonnaging situation which currently exists may be aggravated while the potential markets for United States flag carriers may become more limited.⁴¹

The Shipping Act of 1984 responds to these varied pressures. The Act is procedural in nature and does not represent a major shift in regulatory philosophy. Rather, the Act is a compromise between conferences, shippers, and pro-competition advocates.⁴² The Act retains the open competition system, but eliminates the 1968 *Svenska* presumption against conference agreements.⁴³ Under the new Act, (modelled upon

³⁶ *Gorton Hearings*, *supra* note 10, at 312 (statement of Peter Luciano, Executive Director, Transportation Institute); H.R. REP. NO. 53, *supra* note 3, at 6-8; Lopatin, *The UNCTAD Code of Conduct for Liner Conferences: Time for a United States Response*, 22 HARV. INT'L L.J. 355, 356 (1981).

³⁷ *See* note 27.

³⁸ UNCTAD, A Code of Conduct for the Liner Conference System, at 23, TD/104/Rev. 1 (1972).

³⁹ *Id.*

⁴⁰ *See* Council Regulation E.E.C. No. 954/79 of May 15, 1979. "When a sufficient number of EEC member states have signed and ratified the convention, the criteria of 25 percent of world liner tonnage as of 1973 will be satisfied, so as to bring the Code into effect." McIntosh, *Antitrust Implications of Liner Conferences: Alternatives to the Regulation of Liner Trades with Emphasis on the European Approach*, 1980 LLOYDS M.L.J. 139, 143; Bredimas, *The Common Shipping Policy of the EEC*, 18 COMMON MKT. L. REV. 9, 29-30 (1981); Rose, *New Lines for Conference Lines*, 1982 LLOYD'S M. & COMM. L.Q. 636 (1982); *See supra* note 36, and *House Judiciary Hearings*, *supra* note 28, at 8 (statement of Peter Klein, Sea-Land Industries).

⁴¹ Lopatin, *supra* note 26; *Regulatory Reform Hearings*, *supra* note 26, at 169 (testimony of Peter Finnerty, Sea-land Industries).

⁴² 130 CONG. REC. H1292 (daily ed. Mar. 6 1984) (remarks of Rep. Biaggi).

⁴³ 130 CONG. REC. S1571 (daily ed. Feb. 23, 1984) (remarks of Sen. Gorton).

the pre-merger notification provisions of the Hart-Scott-Rodino Act),⁴⁴ conference agreements are effective forty-five days after filing with the FMC, unless the Commission determines that the agreement is “likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.”⁴⁵ In addition, the Commission may no longer disapprove of such agreements but must instead seek injunctive relief in federal court.⁴⁶ Such authority rests exclusively with the FMC. Third parties, including the Department of Justice, are not entitled to intervene in the initial procedural process without Commission approval.⁴⁷

These procedural changes create a presumption in favor of conference agreements.⁴⁸ The activities permitted under such agreements, such as price fixing, revenue pooling, and deciding to “control, regulate, or prevent competition,” remain substantially the same as those permitted under the Shipping Act of 1916.⁴⁹ Such activities are immunized from the antitrust laws if they are specifically authorized by an agreement or undertaken or entered into with “a reasonable basis to conclude” that (a) they are entered into pursuant to an agreement on file with the FMC and in effect when the activity took place, or (b) they are within the class of agreements exempted by the FMC from the filing requirements of the Act.⁵⁰ Certain enumerated activities, however, are prohibited by the Act. The prohibited activities include: engaging in group boycotts and predatory practices;⁵¹ engaging in certain forms of rebating and unjust

⁴⁴ CONFERENCE REPORT, SHIPPING ACT OF 1984, H.R. REP. NO. 600, 98th Cong., 2d Sess. 30 (1984) [hereinafter cited as H.R. REP. NO. 600].

⁴⁵ Shipping Act of 1984, 46 U.S.C.S. § 6(g) (Supp. 1984).

⁴⁶ *Id.* § 6(h); see, H.R. REP. NO. 600, *supra* note 44, at 31-37.

⁴⁷ H.R. REP. NO. 600, *supra* note 44, at 32. *Id.* at 32.

⁴⁸ This is accomplished by putting the burden of proving unreasonableness on the Commission. In determining whether conference agreements have anticompetitive effects, the Commission is instructed to give limited weight to the market shares of the parties participating in the concerted action, to consider competition from other transportation modes, and to balance anticompetitive effects against any benefits resulting from the contested action, such as an increased trade advantage for the United States. The Conference Committee noted that anticompetitive effects will exist only if the net result of the agreement “will be an unreasonable increase in costs to shippers, or an unreasonable reduction in the frequency or quality of service available to shippers.” Although the Committee Report states that “unreasonable” is to be regarded in a “commercial context,” it does not impose a *per se* condemnation of any proposed conference activity, nor does it authorize the FMC to engage in a type of public utility rate making analysis. Included in possible benefits of such agreements are such factors as the carriers’ ability to meet competition, problems of rate instability and over-capacity, issues of United States foreign policy and comity, and any efficiency-creating aspects of the agreement. *Id.* at 33-37; see also 130 CONG. REC. S1572 (daily ed. Feb. 23, 1984) (remarks of Sen. Gorton).

⁴⁹ 46 U.S.C.S. § 4(a)(6) (Supp. 1984).

⁵⁰ *Id.* § 7(a)(2).

⁵¹ *Id.* § 10(c)(1)-(4).

and unfair discrimination;⁵² giving unreasonable or undue preference or advantage to particular persons, localities, or description of traffic or subjecting them to any unreasonable refusals to deal;⁵³ and retaliating against any shipper because the shipper has patronized another carrier or filed a complaint.⁵⁴

Technically, the Sherman Act could be invoked if a prohibition against a concerted boycott or predatory action were violated. The Shipping Act of 1984, however, gives the Federal Maritime Commission primary jurisdiction to enforce all of its provisions.⁵⁵ Consequently, the Department of Justice or the Federal Trade Commission may not investigate or prosecute antitrust violations that are prohibited by the Shipping Act without first clearing their action with the FMC. The Conference Committee's report clearly states that "antitrust agencies would become involved only in cases where an enforcement vacuum has occurred."⁵⁶ In addition, private parties are precluded from bringing antitrust actions for conduct prohibited by the Act. Instead, complaints for a violation of the Act may be filed with the Commission, which will investigate the complaint and may award reparations for actual injury and, in some instances, may award double damages.⁵⁷ The Commission also may assess civil penalties for violations of the Act.⁵⁸

Several new provisions were added to the Shipping Act of 1984 in an effort to compensate shippers for the greater certainty and immunity from the antitrust laws which the Act conferred on the conferences.⁵⁹ First, the Act provides that the conference system will remain open and that conference members are entitled to a right of independent action on filed conference rates. This right of independent action will allow conference members to remain flexible.⁶⁰ Second, the act permits conferences

⁵² *Id.* § 10(b)(1)-(4).

⁵³ *Id.* § 10(b)(1)-(14).

⁵⁴ *Id.* § 10(b)(12).

⁵⁵ 130 CONG. REC. S1574(daily ed. Feb. 23, 1984) (remarks of Sen. Gorton).

⁵⁶ H.R. REP. NO. 600, *supra* note 44, at 28-29.

⁵⁷ *Id.* 46 U.S.C.S. § 11 (Supp. 1984).

⁵⁸ Penalties for violations of the Act may not exceed \$5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed \$25,000 for each violation. Each day of a continuing violation constitutes a separate offense. In addition, for violations of certain provisions of the Act, the Commission may suspend a common carrier's tariffs, or right to use tariffs, for up to twelve months. A common carrier acting under a suspended tariff is subject to an additional penalty of up to \$50,000 for each shipment. *Id.* § 13(c).

⁵⁹ 130 CONG. REC. S1573-74 (daily ed., Feb. 23, 1984) (remarks of Sen. Gorton).

⁶⁰ 46 U.S.C.S. § 5(b)(8) (Supp. 1984) provides that all conference agreements must allow members of the conference to take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than ten calendar day's notice to the conference. Under the Shipping Act of 1916, there was no right of independent action for members of confer-

and shippers to enter into service contracts, which must be filed with, but need not be approved by, the Federal Maritime Commission.⁶¹ Third, the Act entitles shippers to form and participate in shippers' associations.⁶²

These shippers' protections were designed so that shippers might utilize service contracts to obtain rate and service stability from the conferences. The Act, by ensuring a right of independent action in tariff rates, arguably permits shippers to force conference members to deviate from established tariff rates. Whether this right will be exercised remains to be seen, but it is interesting to note that Congress did not confer a similar right to shippers in regard to service contracts. Instead, conferences can prohibit their members from entering into individual service contracts with shippers.⁶³ Thus, the 1984 Act gives conferences ultimate control over the one major tool given to shippers to negotiate more favorable shipping terms. This is a major defect in the Act.

Ultimately, the Shipping Act of 1984 must be viewed as an interim measure. It has addressed two of the major concerns of the conferences: uncertainty of their status under the antitrust laws and regulatory delay at the FMC. The Act does not, however, fully address the fundamental issues in United States liner conference policy: whether open or closed conferences should be authorized in the U.S. trades and the prevention of overcapacity of the trades in a world governed by the UNCTAD Code of Conduct and bilateral national cargo reservation agreements. The Shipping Act of 1984 has recognized that these basic policy issues have not been resolved and has authorized the creation of a Presidential Advisory Commission on Conferences in Ocean Shipping which, in conjunction

ences, but there was a right of independent action for conferences participating in interconference agreements. 46 U.S.C. § 814. The right of independent action has long existed for members of domestic transportation rate bureaus. Generally, it is perceived as a cartel-destabilizing tool. See 49 U.S.C. § 10706(a).

⁶¹ 46 U.S.C.S. § 8(c) (Supp. 1984). A service contract is defined as "a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as defined service level—such as, assured space, transmit time, port rotation, or similar service features." *Id.* § 3(21). It should be distinguished from the dual rate contracts permitted under section 14(b) of the Shipping Act of 1916 (46 U.S.C. § 813(b), now repealed) and loyalty contracts (contracts by which a shipper obtains lower rates by committing all or a fixed part of its cargo to a carrier or conference) which are permitted only to the extent allowed by the antitrust laws. *Id.* § 3(14), § 10(b)(9), § 20(a).

The Federal Maritime Commission has proposed that service contracts include time-volume and time-revenue contracts, but has taken the interesting position that loyalty contracts should be rejected as per se violations of the new Shipping Act unless the parties also file a Department of Justice Business Review Letter of approval when filing the loyalty contract with the Commission.

⁶² 46 U.S.C.S. § 3(24) (Supp. 1984); see *infra* nn.179-89 and accompanying text.

⁶³ 46 U.S.C.S. § 4(c)(7) (Supp. 1984); H.R. REP. NO. 600, *supra* note 44, at 29-30.

with the Federal Maritime Commission, the Department of Justice, the Federal Trade Commission, and the Department of Transportation, will provide recommendations to the Congress in 1990 for further regulatory reform of the industry.⁶⁴ This Commission will study two fundamental issues: whether the liner conference system should be strengthened even further and whether the protections afforded shippers by the new regulatory scheme are adequate.⁶⁵ This latter topic is the subject of the rest of this article.

II. STRENGTHENED CONFERENCES AND THE PROTECTION OF SHIPPERS' INTERESTS: THE CONCEPT OF SHIPPERS' COUNCILS

The current condition of the United States shipping trades and the recent decline in United States exports, made it imperative that changes be made in United States regulation of liner shipping. Recently, Congress considered proposals which tended to strengthen the conferences' antitrust exemption, allow closed conferences, or both.⁶⁶ These bills,

⁶⁴ 46 U.S.C.S. § 18 (Supp. 1984). The Advisory Commission itself will be created in 1989. The federal agencies involved in the Commission's report are authorized to collect data as of the date of enactment of the 1984 Act.

⁶⁵ H.R. REP. NO. 600, *supra* note 44, at 42-44.

⁶⁶ The 95th through 98th Congresses saw the introduction of proposed legislation which would authorize closed conferences and shippers' councils. None of the proposals passed both Houses of Congress, although S.2585 passed the Senate during the 96th Congress, an H.R. 4374 passed the House during the 97th Congress.

Extensive reference is made to legislative materials related to these earlier bills. This information remains relevant because the earlier bills also addressed the same issues that S.1593 and H.R. 4374 were designed to resolve. Indeed, H.R. 4374 had its genesis in the provisions of H.R. 11422 and H.R. 4769. The latter was reintroduced as H.R. 6899. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON H.R. 4374, H.R. REP. NO. 611, 97th Cong., 2d Sess. 15-16 (1982) [hereinafter cited as H.R. REP. NO. 611]. Similarly, S. 1593 arose from S.1460, S.1462, and S.1463, which had been revised as S.2585, which passed the Senate but failed to pass the House (as H.R. 4769, H.R. 6899). Senator Inouye subsequently introduced an essentially identical bill, S.125, built upon the same principles. See S. REP. NO. 3, *supra* note 2, at 13-14; 130 CONG. REC. H1291 (daily ed., Mar. 6, 1984) (remarks of Rep. Biaggi).

The chronology of the bills is as follows:

Senate Bills:

S.1460, S.1462, S.1463, 96th Cong., 1st Sess. (1979);
S.2585, 96th Cong., 2d Sess. (1980);
S.125, 96th Cong., 2d Sess. (1980) [hereinafter cited as the Inouye Bill];
S.1593, 97th Cong., 1st Sess. (1981) [hereinafter cited as the Gorton Bill];
S.47, S.504, 98th Cong., 1st Sess (1983).

House Bills:

H.R. 11422, 95th Cong., 2nd Sess. (1978) [hereinafter cited as the Closed Conference Bill];
H.R. 4769, 96th Cong., 1st Sess. (1979) [hereinafter cited as the Omnibus Bill];
H.R. 6899, 96th Cong., 2d Sess. (1980);
H.R. 4374, 97th Cong., 1st Sess. (1981) [hereinafter cited as the Regulatory Reform Bill].

save for the Shipping Act of 1984, failed to pass both houses of the Congress, primarily because of the traditional American anathema to concentrated power and because of the accompanying fear that conferences may abuse their oligopoly power to injure competitors and discriminate against small shippers.⁶⁷

Shippers' councils have been proposed as a means of restricting conference power in the United States.⁶⁸ These councils, which already exist in over 50 countries, are generally associated with the closed conference system of regulation, although there has been some recent discussion of creating them in order to assist in the rationalization of open conferences.⁶⁹ Essentially, shippers' councils are composed of a group of shippers who deal with liner conferences on a collective basis. The British Royal Shipping Commission of 1911 first recommended using shippers' councils as a method of offsetting the power of liner conferences.⁷⁰ More

⁶⁷ 128 CONG. REC. H6905 (daily ed. Sept. 13, 1982) (statement of Rep. Edwards); *Id.* at H6908 (editorials of the Washington Post, New York Times, and Wall Street Journal); *See* H.R. REP. NO. 53, *supra* note 3, at 76 (additional views of Congressmen Hughes and Sawyer).

⁶⁸ *See* S.47, sec. 7(d); 129 CONG. REC. S1779, (daily ed., Feb. 28, 1983) (comments of Sen. Gorton); Comment, *The Sinking Shipping Industry*, *supra* note 1, at 116, 128-29.

⁶⁹ *Regulatory Reform Hearings*, *supra* note 26, at 52 (statement of Rep. McCloskey).

⁷⁰ United Kingdom Commission on Shipping Rings, No. 4668, 4685 (1909). *See Closed Conference Hearings*, *supra* note 22, at 233 (statement of Bengt Jobin, European National Shippers' Council); Fawcett and Nolan, *supra* note 19, at 541 n.13. Other methods of countering conference power include central booking agencies, government agencies, bilateral trade agreements, and export trading companies. United Nations Conference on Trade and Development, Protection of Shipper Interests, U.N. Doc. TD/B/C.4/174 (1978) [hereinafter cited as UNCTAD, Protection of Shipper Interests].

A central booking agency is an agency which exclusively consolidates and allocates export shipments as a sole national or regional exporters. It has apparently been successful in Sri Lanka but has obvious inherent problems for an application in a country like the United States.

Government agencies could play three effective roles in increasing shippers' powers. First they could continue to act under the current United States regulatory system, where the Federal Maritime Commission is authorized to review all conference agreements for potential abuses or injuries to the United States economy and shippers. 46 U.S.C.S. §§ 5-6 (Supp. 1984). Second, the FMC could act as a shipping investigation unit. The UNCTAD shippers' council proposals contemplate a strong government unit which would investigate rates, trades, and general shipping conditions, and provide shippers with this information to aid them in their shipping decisions. In a more radical form this proposal contemplates a government agency which will actively intervene, negotiate, and perhaps even dictate rate levels. *See* UNCTAD, Protection of Shipper Interests, *supra* at Part III.

Bilateral trade agreements between two countries are used to allocate market shares of a trade to the flag carriers of the countries served by the trade. These agreements are an especially attractive device for developing nations, some of whom, in the past, have unilaterally enacted cargo preference laws, thus forcing the country at the other end of the trade to negotiate a reciprocal agreement. Although critics of these agreements have opposed them on the grounds that they restrict free competition, some studies have suggested that bilateral trade agreements result in more stable rates, slower rate increases, and up to 25 percent lower rate increases than non-bilateral trades. With the advent of the UNCTAD Code, the attractiveness of bilateral trade agreements may increase. *See Closed Conference Hearings*, *supra* note 22, at 8 (Daschbach statement); Daschbach, Remarks

recent proponents of the concept include the European Common Market Nations and the United Nations Conference on Trade and Development.⁷¹ Although UNCTAD has been particularly active in advocating the creation of shippers' councils in developing countries, as part of a comprehensive scheme to regulate conference power and develop export industries, it has also been one of the most critical commentators on existing shipper council systems.⁷²

The successful creation of a shippers' council will depend on both the economic system in which it functions and the characteristics of the country in which it has been formed. In theory, a council may be composed of all exporters, or merely of those from a particular geographic region or those dealing in a particular commodity.⁷³ Similarly, these councils may serve two possible functions. First, these councils may consult with and inform liner conferences concerning shippers' service needs and desired general rate levels. This model is best exemplified by the European National Shippers Council ("ESC") and basically is an information exchange system designed to aid conferences in their rationalization efforts.⁷⁴ Second, shippers' councils may serve to consult and negotiate rates and services with the conferences. This model, predicated on legal and economic theories similar to those of collective bargaining in the area of labor relations and exemplified by a series of reports issued by UNCTAD, recognizes and contemplates methods to offset abuses inherent in a strong conference system.⁷⁵

Before the Caribbean Shipping Association, Santo Domingo, Dominican Republic, (Oct. 23, 1979), reprinted in 11 J. MAR. L. & COM. 387, 393 (1980) (citing Department of Justice Report). See generally MANALYTICS, INC., THE IMPACT OF BILATERAL SHIPPING AGREEMENTS IN THE U.S. LINER TRADES (May 1979) (Report prepared for the Maritime Administration).

For a discussion of the role of export trading companies as a substitute for shippers' councils, see section IV, *infra*. See also Letter from Alan Green, Chairman of the Federal Maritime Commission, to Hon. Slade Gorton (Dec. 1, 1981), reprinted in *Gorton Hearings*, *supra* note 10, at 152 n.3.

⁷¹ *Gorton Hearings*, *supra* note 10, at 258 (statement of J.F. Muheim, European National Shippers' Council); UNCTAD, Protection of Shipper Interests, *supra* note 70; UNCTAD, Consultation in Shipping, U.N. Doc. TD/B/C.4/20/Rev. 1 (1967). In addition, similar concepts have been proposed in the domestic transportation industries. See Popper, *The Antitrust System: An Impediment to the Development of Negotiation Models*, 32 AM. U.L. REV. 283 (1983).

⁷² See UNCTAD Secretariat, The Effectiveness of Shippers' Organizations, U.N. Doc. TD/B/C.4/154 (1976) [hereinafter cited as Effectiveness of Shippers' Organizations].

⁷³ UNCTAD Protection of Shipper Interests, *supra* note 70, at 16.

⁷⁴ *Gorton Hearings*, *supra* note 10, at 252 (testimony of J.F. Muheim, European National Shippers' Council).

⁷⁵ Effectiveness of Shippers' Organizations, *supra* note 72, at 17. Analogous organizations enjoying similar regulatory or antitrust exemptions exist in the domestic transportation industries. For example, shippers who own rail cars which are leased to railroads may obtain an antitrust exemption from the Interstate Commerce Commission to jointly establish and negotiate car hire rates with the railroads. 49 U.S.C. § 10706(a)(5)(A) (1984); *Shippers Equitable Compensation Action Committee*, 365 I.C.C. 939 (1982). Shippers also may participate as "other persons" in truck and railroad rate

A. The Strengthened Conference System

Deregulation in the liner industry means a reduced role for the Federal Maritime Commission, which until now has been primarily responsible for protecting shippers' interests.⁷⁶ Unlike other transportation industries, however, where deregulation means that application of the antitrust laws will replace some of the functions previously performed by regulatory agencies, in the liner industry deregulation means that there will be a less active application of the antitrust laws. Although shippers' councils ultimately were not included in the Shipping Act of 1984, recent legislative proposals contemplated using them to substitute for the role that the antitrust laws perform in the deregulated transportation industries.⁷⁷ In order to understand how this substitution would occur, it is necessary to examine the economic theory underlying the conference system.

Proponents of a strengthened antitrust exemption for liner conferences, especially advocates of a closed conference system, contend that the nature of the industry is such that efficiency (or "rationalization"),

bureau discussions. Although not allowed to vote, they are permitted to have input concerning rates. Similarly, shippers' associations may consolidate and arrange for joint shipments in order to obtain volume discount rates without being subject to I.C.C. licensing regulations for freight forwarders. See Popper, *supra* note 71. See also Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 YALE L.J. 268 (1974); *infra* note 159; *infra* notes 169-179 and accompanying text.

⁷⁶ While the Federal Maritime Commission may protect shippers' interests in a general manner, its effectiveness in protecting shippers in particular circumstances is uncertain. Although the Commission is empowered to hear shippers' protests in specific cases, between 1975 and 1977, only 77 complaints were filed. Of these, the shippers' interests were upheld in 55 of these cases. Shippers' fears of retaliation may explain why there has been only limited recourse to the FMC may be shippers' fears of retaliation by the conferences. See 46 C.F.R. §§ 527; Letter from Richard Daschbach, Chairman of the Federal Maritime Commission, to John Murphy, Chairman of the House Merchant Marine and Fisheries Comm., *Omnibus Hearings, supra* note 21, at 125. (Some commentators have expressed concern that enactment of the streamlined provisions of the Shipping Act of 1984 will aggravate this problem. See *House Judiciary Hearings, supra* note 28, at 12 (statement of Prof. George Garvey)).

⁷⁷ *House Judiciary Hearings, supra* note 28, at 14-5 (statement of John H. Shenefield). Particular emphasis should be placed on the reimplementing of the antitrust laws in the domestic surface transportation industries. Concepts of economic competition have been embodied in recent deregulation acts which promote individual contracts as opposed to tariffs and rate bureau agreements. See DEPARTMENT OF TRANSPORTATION: A PROSPECTUS FOR CHANGE IN THE REGULATED RAILROAD FREIGHT INDUSTRY, (1978); Staggers Railroad Deregulation Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); Motor Carrier Deregulation Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). Nevertheless, recent Congressional proposals, in spite of the domestic emphasis on competition as a means of achieving transportation efficiency, have stressed regulatory reform in the shipping industry and have suggested strengthening the conferences' antitrust immunity. H.R. REP. NO. 611, *supra* note 66, at 20, Pt. 2; S. REP. NO. 414, *supra* note 35, at 9; See *House Judiciary Hearings, supra* note 28, at 2-3.

including the reduction of surplus tonnage and lowered operating costs, cannot be obtained without the coordination of efforts that only a limited membership conference can achieve.⁷⁸ They argue that due to the existence of actual or potential competition by independent liners the achievement of rationalization may occur without an accompanying danger of monopoly concentration or pricing. Although liner capital costs are sufficiently high so as to inhibit market exit, potential competition always will exist because the liner capital costs are not so high as to preclude market entry.⁷⁹ Therefore, conference efficiency will have to be passed on to the consumer, in this case importers and exporters, because a degree of surplus capacity and potential and actual competition created by the possibility of market entry will require conference rates to remain at competitive levels.⁸⁰ Similarly, competition from independents will ensure that conferences price at the level of their most efficient members and will prevent the conferences from stifling technological innovation, since such service innovation will be a major method of competition in a cohesive conference system.⁸¹

⁷⁸ Essentially, rationalization is an euphemism for permitting cartel behavior. See *House Judiciary Hearings*, *supra* note 28 (statement of the National Association of Beverage Importers); see also *infra* note 87. However rationalization of the United States North Atlantic trades has resulted in a reduction of average vessels from 36 to 16, improved vessel utilization from 68 to 85 percent, a corresponding cost saving of 200 million dollars, and a concomitant rate reduction of 28 percent. UNIVERSITY OF WALES INSTITUTE OF SCIENCE AND TECHNOLOGY, LINER SHIPPING IN THE U.S. TRADES 268 (1978). See also *Gorton Hearings*, *supra* note 10, at 202, 205 (statement of Dr. Henry De La Trobe, Council of European and Japanese Shipowners Association). Some advocates of rationalization predict that it could result in a 25 to 45 percent rate reduction. Devanney, Livanos, & Stewart, *Conference Rate Making and the West Coast of South America*, 9 J. TRANSP. ECON. 154 (1975). An earlier version of this study was cited in the DEPARTMENT OF JUSTICE REPORT, *supra* note 10, at 230-31. (See M.I.T. COMMODITY TRANSP. AND ECON. DEVELOPMENT LABORATORY, 72-1 TECH. REP. 67-69 (1972).) Other commentators cite opposing statistics which indicate that conference routes may be responsible for rates which may be up to fifteen percent higher than rates in equivalent non-conference routes. These commentators estimate that rationalization, as contemplated by S.47 and H.R.1878, may result in a twenty percent increase in rates, equivalent to a three billion dollar a year increase in shipping expenses. 129 CONG. REC. S1489, (daily ed. Feb. 22, 1983) (comments of Sen. Metzenbaum, citing testimony of Alan Ferguson, Chairman of the National Institute of Economics and Law). See *House Judiciary Hearings*, *supra* note 28, at 4 (statement of James C. Miller, III, Chairman of the Federal Trade Commission).

⁷⁹ Some conference proponents have cited these high exit costs as one reason for the destructive price wars and state that they preclude conferences from achieving true monopoly power, since the industry experiences an inelastic price demand for its services. Ellsworth, *supra* note 32, at 503-04; see also Summary of UWIST Study Appendix D, *Regulatory Reform Hearings*, *supra* note 26, at 396-97 (statement of Albert E. May, Council of American Flag Ship Operators).

⁸⁰ Ellsworth *supra*, note 32, at 514-16; *Regulatory Reform Hearings*, *supra* note 26, at 401-03 (statement of Albert E. May, Council of American Flag Ship Operators). In addition to independents, it may also be argued that conferences face competition from tramps, other conferences serving alternative routes, and from industrial carriers. See Comment, *supra* note 1, at 102.

⁸¹ See *Closed Conference Hearings*, *supra* note 22, at 277 (statement of John Evans, University of Wales Institute of Science and Technology); *But see id.* at 30 (Department of Justice testimony).

Congress and UNCTAD in its Code of Conduct for liner conferences have recognized the crucial role independent liners play in preventing monopoly pricing by conferences.⁸² Both houses of Congress amended shipper loyalty contract provisions in the deregulation bills preceding the Shipping Act of 1984 to permit a greater percentage of goods to be shipped by independents, while UNCTAD's 40-40-20 cargo reservation scheme reserves 20 percent of each trade to independent, third flag competitors.⁸³ UNCTAD has expressed some hesitancy as to the effectiveness of an exclusive reliance on independents as a check on conference power, however, and it has therefore actively endorsed the formation of shippers' councils as complementing the use of independents.⁸⁴ This hesitancy exists because there is evidence that competition from independent liners may not provide an effective check on a strong conference system. First, independents might set prices that are only slightly below the rate levels of conferences.⁸⁵ If this occurs, then shippers will not benefit from conference efficiency because the conferences will exercise price leadership for the independents at a near monopoly pricing level. Similarly, if independents do follow conference rate levels, then the conferences will have no incentive to set rates at the level of its most efficient members, because the more efficient conference members could utilize other tools to obtain market share and profits which reflect their efficiency. Second, independents usually remain independent for only a short period of time. Experience indicates that once an independent has obtained a share of the market, it will apply for and be granted conference membership.⁸⁶ Thus, independent liner competition may provide only short term benefits.

The major problem with utilizing independent liners to ensure com-

⁸² See e.g., H.R. REP. NO. 53, *supra* note 3, at 15-16 (independent action and loyalty contract provisions of H.R. 1878); see also *supra* note 73.

⁸³ For example, both S.47 and H.R. 1878 permitted the creation of loyalty contracts as part of the proposals to deregulate and promote the rationalization of the shipping industry. In essence, loyalty contracts are long term requirements contracts designed to tie a shipper to a particular carrier. S.47 passed by the Senate permitted these contracts to provide that 95 percent of all goods shipped by a shipper tied to a loyalty contract had to be shipped through a particular carrier, or else the contract was breached. 129 CONG. REC. S1830 § 7(a)(10) (daily ed. Mar. 1, 1983). § 6 of H.R. 1878 was a similar provision. Several commentators have suggested that this figure is too high, citing the recommendation of the British Shippers' Council that a 70 percent tying rate volume would create greater assurances of independent carrier competition. *House Judiciary Hearings*, *supra* note 28, at 6 (statement of James C. Miller, III); *id.* at 8 (statement of Prof. George Garvey); see also *supra* note 73. The loyalty contract provisions (as contemplated by these bills) ultimately were not incorporated into the Shipping Act of 1984.

⁸⁴ See UNCTAD, Protection of Shipper Interests, *supra* note 70, at 7-8.

⁸⁵ *Id.* at 33; Bennathan & Walters, *supra* note 6, at 111.

⁸⁶ UNCTAD, Protection of Shipper Interests, *supra* note 70, at 33.

petitive pricing by a conference system, however, is that the tools necessary to ensure the level of conference strength required for rationalization purposes may also give the conferences the ability to erect market entry barriers, thus eliminating both potential and actual competition. According to the economic model currently favored by most nations, conference stability and rationalization can be achieved only through strong anticompetitive agreements which will bind members to the conference and permit them to enter into strong ties with shippers.⁸⁷ Whether conferences bind shippers to them through service contracts, loyalty contracts, or deferred rebates, strong shipper-conference ties may effectively deter trade entry by independents. Accordingly, the argument that strong conference power will not be subject to abuse because of competition from independent liners may not be correct.

B. Consultative and Negotiating Shippers' Councils

Any legislation which strengthens liner conference powers must contain a method for protecting shippers and conference competitors from the concentrated oligopoly power of the conferences. However, any system of protection will be primarily for small and medium sized shippers⁸⁸ because the conference proponents claim that rationalization of the liner system can only be achieved through a system of price discrimination based on the volume and value of goods carried.⁸⁹ It is generally agreed that large shippers can effectively offset conference power on their own, often to the detriment of weaker shippers to whom the conferences charge higher rates in order to compensate for their contractual conces-

⁸⁷ S. REP. NO. 414, *supra* note 35, at 11. The provisions of S.47 and H.R. 1878 provided the most recent examples of rationalization tools. S.47, although not authorizing closed conferences, has allowed conferences to fix rates, pool earnings, allocate market shares, limit volume, and engage in preferential working arrangements. S.47, sec. 4. Conference agreements would have been automatically effective forty-five days after filing, subject to suspension, review, and disapproval by the FMC within 180 days of implementation. Disapproval would have occurred only if the Commission found that the agreement failed to meet the membership and self policing requirements of the Act. S.47, sec. 5(b). Section 7 would have allowed long term shipper loyalty contracts to within a 15 percent differential of other rates. *See supra* note 78 and *infra* notes 198-211 and accompanying text. With the exception of the loyalty contract provisions of section 7 of S.47, these provisions basically were adopted by the Shipping Act of 1984. *See* 46 U.S.C.S. §§ 5-6 (Supp. 1984).

⁸⁸ SLETMO & WILLIAMS, *supra* note 1, at 10; UWIST Study, *supra* note 79, at 399-401; H.R. REP. NO. 611, *supra* note 66, at pt. 1, 26, 28-29; *House Judiciary Hearings*, *supra* note 28, at 13 (statement of Prof. Garvey); *see* Bennathan & Walters, *supra* note 6, at 104, 110-15.

⁸⁹ H.R. REP. NO. 611, *supra* note 66, at pt. 1; *see also* *Senate Hearings*, *supra* note 33, at 3-4 (statement of Alan Ferguson, National Institute of Economics and Law); *Id.* (statement of J. Patrick Boyle, United Fresh Fruit & Vegetable Association). *Cf.* Peippo, *Developments in American Antitrust Law: Deregulation Under the Staggers Rail Act and the Implications for Canadian Railroad Ratemaking*, 27 MCGILL L. 504, 521-522.

sions to the large shippers.⁹⁰ The protection of small shippers through collective action of shippers' councils has been considered as a means of offsetting this aspect of conference pricing.⁹¹ As previously mentioned, these councils may either consult or negotiate with conferences in order to protect their constituent shippers.

Negotiating and consultative shippers' councils may share certain basic structural and functional characteristics. First, membership in the council may have to be limited to exporters, because conferences have demonstrated a tendency to refuse to deal with importers and there is a greater risk of antitrust collusion if both the import and export trade is under the control of one group.⁹² Second, a primary function of any council will be to discuss service issues, including the frequency of sailings, liner capacity, and surcharges, because stability of service and rates may be more important to shippers than lower rates.⁹³ To accomplish this function some legal mechanism for the exchange of information must be created. Third, a council must provide for both cohesion and autonomy among its constituents. This cohesion would be reflected by the topics discussed by the council and by the size of its constituency, i.e., whether it is organized on a national, local, or regional basis, as well as whether the council is limited to a particular commodity or number of exporters.⁹⁴ In addition, a policy decision must be made as to whether restriction on member size and on independent action by members will be permitted. Finally, a council should operate under legal guidelines which will protect non-members and members from discrimination by

⁹⁰ *Senate Hearings*, *supra* note 33, at 3-4 (statement of J. Peter Boyle, United Fresh Fruit & Vegetable Association); *but see* DEPARTMENT OF JUSTICE STUDY, *supra* note 32, at 204 (suggests that large shippers do not exercise countervailing power against conference rate setting). *See also infra* note 235.

⁹¹ H.R. REP. NO. 611, *supra* note 66, at 26-27; S. REP. NO. 3, *supra* note 2, at 11-12; *contra*, *Senate Judiciary Hearings*, *supra* note 31, at 39-40 (statement of Jay Angoff, Public Citizen's Congress Watch).

⁹² Effectiveness of Shippers Organizations, *supra* note 72, at I, ¶ 7, 3. Although some shippers have expressed their interest in a shippers organization which would deal with both the import and export trades, *Closed Conference Hearings*, *supra* note 22, at 187-88 (testimony of Edwin A. Elbert, American Importers Association), this same goal arguably can be accomplished by permitting national shippers at either end of a trade to meet and discuss shipping in that trade, thus leading to true rationalization. *Cf. Gorton Hearings*, *supra* note 10, at 256 (testimony of J.F. Muheim, European National Shippers Council). In the past however, the Department of Justice has opposed similar suggestions as being highly prone to anticompetitive abuses. *Closed Conference Hearings*, *supra* note 22, at 41 (testimony of Ky D. Ewing, Department of Justice).

⁹³ S. REP. NO. 3, *supra* note 2, at 22-23; S. REP. NO. 414, *supra* note 35, at 9; *Closed Conference Hearings*, *supra* note 22, at 195 (testimony of American Importers Association).

⁹⁴ This would be facilitated by such provisions as section 5(f) of S.47 (as introduced) and sec. 5(f) of S.1593. *See* S. REP. NO. 3, *supra* note 2, at 25; S. REP. NO. 414, *supra* note 35, at 30.

council-conference activities.⁹⁵

These basic characteristics are reflected in existing shippers' councils but are not reflected in all of the recent proposals considered by the Congress. Instead, congressional proposals which would create United States shippers' councils have vacillated between the consultative and negotiating models.⁹⁶ However, most proposals eventually reflect the more limited powers of the European Shippers Council consultative model because of the political difficulties inherent in the creation of a strong domestic shippers cartel.

1. *The European Consultative Model*

The European National Shippers Council ("ESC") is a consultative group of fourteen regional (national) shippers' councils which meets to discuss service and general rate issues.⁹⁷ It consults as a single collective group with three different types of organizations: with ports, with individual liner conferences, and with the Council of European and Japanese Shipowner Association ("CENSA").⁹⁸ The ESC activities are non-binding on individual shippers. It permits individual shippers and regional shippers' councils to negotiate their own specific rate levels. The ESC's industry-wide effectiveness is reflected in the nineteen joint recommendations with conferences that the ESC has entered into over the past decade.⁹⁹ Common topics of agreement have included the creation of a Code of Conduct; general service issues, including energy and port surcharges; general rate levels; and methods of dispute resolution.¹⁰⁰ However, the ESC has been most successful at exchanging information with conferences on cost data and financial conditions related to shippers' service needs.¹⁰¹

The European Shippers Council has been less successful in obtaining

⁹⁵ UNCTAD, Protection of Shipper Interests, *supra* note 70, at 33. See S. REP. NO. 3, *supra* note 2, at 35.

⁹⁶ See S.47 as introduced (January 26, 1983) and as passed by the Senate (March 1, 1983), S. REP. NO. 3, *supra* note 2; S.1593 as introduced and reported, *Gorton Hearings*, *supra* note 10, at 7; S. REP. NO. 414, *supra* note 35; H.R. 4374 as introduced and as reported, *Regulatory Reform Hearings*, *supra* note 26, at 4; H. REP. NO. 611, *supra* note 66, at 1.

⁹⁷ *Gorton Hearings*, *supra* note 10, at 252 (statement of J.F. Muheim). See generally, UNCTAD, Consultation in Shipping, *supra* note 71, at 29-72.

⁹⁸ Effectiveness of Shippers Organizations, *supra* note 72, at 8; see *Omnibus Hearings*, *supra* note 21, at 470-74 (statement of Robert Leggett, Joint Maritime Congress).

⁹⁹ *Closed Conference Hearings*, *supra* note 22, at 237 (statement of Bengt Jobin, European National Shippers Council); but see *infra* note 101.

¹⁰⁰ *Id.* *Gorton Hearings*, *supra* note 10, at 256-58 (statement of J.F. Muheim).

¹⁰¹ *Gorton Hearings*, *supra* note 110, at 263 (statement of J.F. Muheim). However, even the success of the ESC in this function should be questioned. Despite the 19 joint recommendations entered into, only one half of the conferences have officially embraced the Joint ESC/CENSA Code

a reduction in rates. Although a Booz, Allen, & Hamilton study suggests that the ESC may be responsible for the rate differentials in the United States trades,¹⁰² a suggestion denied by the ESC itself,¹⁰³ a primary criticism of the ESC has been that it can not and does not perform a primary shippers' council function and does not offset conference rate setting power.¹⁰⁴ One report has concluded that the ESC has had no effect on rate levels at all, attributing the rate differentials in the United States trades to the different value of goods shipped in the import and export trades.¹⁰⁵ Although part of this ineffectiveness may be attributed to the fact that, until recently, the ESC concentrated on service issues, there is also the possibility that the ESC cannot offset conference rates because it is a broad based organization which has a non-binding relationship with its members.¹⁰⁶ In order to obtain the size and the diversity of views necessary to provide a broad basis of information to aid in conference decision making, the ESC sacrificed both the group cohesion and narrowness of interest necessary to negotiate rates effectively. Theoretically, the ESC creates a situation whereby conferences will set rates in a realistic manner which will ensure that ocean transportation rates will not contribute to the decline of export competitiveness by providing a forum for a full and mutual exchange of financial and cost needs. Nevertheless, the fact still remains that some conferences refuse to consult with the ESC and that in only one case in thirty nine, between 1975 and 1977, did the ESC successfully oppose a general rate increase.¹⁰⁷

and Joint Recommendations. *Closed Conference Hearings*, *supra* note 22, at 238 (statement of Bengt Jobin, European National Shippers Council).

¹⁰² BOOZ ALLEN REPORT, cited in *Omnibus Hearings*, *supra* note 21, at 199-200.

¹⁰³ *Closed Conference Hearings*, *supra* note 22, at 243 (statement of Bengt Jobin); *see also infra* note 105.

¹⁰⁴ *Cf.* Effectiveness of Shippers Organizations, *supra* note 72, at 9, 12-13.

¹⁰⁵ Department of Justice Staff Study, *Analysis of the Booz, Allen, and Hamilton Study of Ocean Rate Disparity*, reprinted in *Omnibus Hearings*, *supra* note 21, at 195, 204.

¹⁰⁶ *Gorton Hearings*, *supra* note 10, at 263 (statement of J.F. Muheim); *Closed Conference Hearings*, *supra* note 22, at 237, 239; *cf.* Effectiveness of Shippers Organizations, *supra* note 72, at 9, 12-13.

¹⁰⁷ *Closed Conference Hearings*, *supra* note 22, at 297 (statement of the Council of European and Japanese National Shipowners Associations [CENSA]). CENSA cited this figure as a general support for the proposition that shippers' council are successful in negotiating rates. It argued that it is now a generally accepted practice that conferences will substantiate claims for rate increases by certified statements on cost increases supplied by independent accountants. In the same 1975-1977 period, 21 of the 38 other general rate increase requests made by the 26 conferences operating in the non-United States trades were accepted in full. The remaining 17 requests were compromised, the compromises ranging generally from 8 percent to 48 percent with an average of a 30 percent reduction in the requested increases. *Id.*

2. *The UNCTAD Negotiating Council Model*

Consultative shippers' councils have been criticized for failing to recognize the role that liner conferences play in inhibiting export development.¹⁰⁸ Although some of the recommendations for the negotiating models were developed to assist developing countries in promoting their export trade, the general provisions of a negotiating shippers' council would appear to be relevant to a United States economy which is currently experiencing a trade deficit.¹⁰⁹

The negotiating model of shippers' councils recognizes that although large firms may not be inhibited by the fact that ten to twenty percent of the total cost of a product marketed overseas is transportation related,¹¹⁰ smaller firms may be inhibited from entering into the export trade because of high transportation costs. Its purpose therefore is to assist small and medium sized shippers in achieving the economies of scale necessary to negotiate specific rate agreements or to charter alternative modes of transportation in order to exercise bargaining strength with conferences and to obtain lower rates.¹¹¹ This negotiating strength will be achieved through the consolidation of small volumes of shipments.¹¹² The aggregation of goods would give the councils the option of utilizing conference volume discounts or independents and could be accomplished either through the use of a single export brokerage house or through the use of a strong governmental negotiating shipping agency. Both of these approaches entail a governmental role, however, whereas the UNCTAD council model contemplates the private formation of councils which might be aided by a strong governmental investigatory agency which would collect and disseminate industry information to councils and conferences and would intervene in an effective manner when council-conference negotiations become stalemated.¹¹³

¹⁰⁸ See *supra* note 104.

¹⁰⁹ The deficit for 1983 was \$69 billion. The United States merchandise trade deficit for the first four months of 1984 stood at an annual rate of \$126 billion. *Washington Post*, June 17, 1984, § G, at 1, col. 4.

¹¹⁰ *Closed Conference Hearings*, *supra* note 22, at 171 (statement of George F. Avery, National Industrial Traffic League); *House Judiciary Hearings*, *supra* note 28, at 8 (statement of John H. Shenefield). Others have estimated ocean transportation rates as being eight percent of total export costs, *House Judiciary Hearings*, *supra* note 28, at 3-4 (statement of Prof. George Garvey), and between twenty to forty percent of the price of goods delivered overseas. *Senate Hearings*, *supra* note 33, at 1-2 (statement of J. Peter Boyle).

¹¹¹ UNCTAD, *Protection of Shipper Interests*, *supra* note 70, at 11-12.

¹¹² *Id.*, at 25-34.

¹¹³ *Id.* at 11-12. It may be that the shippers' council concept will not be successful without a strong government intervention. One of the most successful councils, the Australian Council, is predicated upon strong commodity based associations and an active government intervention in negotiations. UNCTAD, *Consultation in Shipping*, *supra* note 71, at 73-90; *Closed Conference Hear-*

The negotiating councils model addresses two problems of closed and strong open conference systems. First, the captive shippers issue is resolved because economies of scale are created for the small shippers. Second, the potential for monopoly pricing is reduced because the effective use of chartering independents by a shippers' council counters part of the entry barrier problems inherent in a closed conference system. To achieve these goals, however, a negotiating council must be composed of a strong cohesive group of shippers. UNCTAD studies have concluded that shippers' councils might have to be formed along commodity or regional lines because group cohesiveness requires price adherence and no independent action.¹¹⁴ Opponents of negotiating shippers' councils object to this limitation on the composition of shippers' councils because an economic requirement that a successful shippers' council organize only where a strong mutual interest exists transforms the concept from an information exchange to a cartel and presents a number of anticompetitive dangers which may distort non-shipping markets. For example, a shippers' council may be dominated by large shippers who act in a manner similar to those carriers who serve as conference price leaders in a trade, thus precluding any advantage of economies of scale to the small shipper, since the negotiating power of the council may be dependent on the leverage of the large shipper, who would act independently if the council did not act in accordance with its needs.¹¹⁵ Similarly, a strong negotiating council could utilize its power to discriminate against non-members or utilize its anticompetitive powers against non-exporting competitors in the domestic market. In addition, a shippers' council might collude with conferences, and not negotiate rate reductions with them. If this collusion arises, interconference agreements, third party discrimination, rate rigidity, and the inhibition of technological innovation will occur.¹¹⁶

ings, supra note 22, at 215, 223-24; *Omnibus Hearings, supra* note 21, at 126. See S.47, sec. 9(c) for a Senate provision similar to this proposed provision, S. REP. NO. 3, *supra* note 2. See also *infra* notes 388-99; Davidow, *supra* note 75, at 287-91.

¹¹⁴ UNCTAD, Protection of Shipper Interests, *supra* note 70, at 7-8, 16-17; see also *infra* nn.157-59 and accompanying text; *infra* nn.330-42 and accompanying text.

¹¹⁵ UNCTAD, Protection of Shipper Interests, *supra* note 70, at 22; H.R. REP. NO. 611, *supra* note 66, at 28; H.R. REP. NO. 53, *supra* note 3, at 20; *Closed Conference Hearings, supra* note 22, at 249 (statement of Bengt Jobin, European National Shippers Council); 129 CONG. REC. S1779-80 (daily ed. Feb. 28, 1983) (remarks of Sen. Gorton); *House Judiciary Hearings, supra* note 28, at 8 (statement of James C. Miller, III, Federal Trade Commission); *House Judiciary Hearings, supra* note 28, at 14-15 (statement of John H. Shenefield).

¹¹⁶ See *Closed Conference Hearings, supra* note 22, at 30-31 (testimony of Ky Ewing, Dpt. Assist. Atty. Gen., Antitrust Div., Dept. of Justice); *Omnibus Hearings, supra* note 21, at 147-48 (testimony of Donald Flexner, Dept. of Justice); cf. Davidow, *supra* note 75, at 276-78. See also *infra* notes 276-338 and accompanying text.

C. Past Legislative Proposals

Past legislative proposals have reflected these concerns about cohesion and abuse,¹¹⁷ as well as the confusion as to whether negotiating or consulting shippers' councils should be authorized.¹¹⁸ In addition, the potential for abuse has led to recommendations by the General Accounting Office that councils be authorized only in the context of a strengthened closed conference system and not in conjunction with an open conference system.¹¹⁹ In the midst of this confusion, it is generally agreed that councils will require an antitrust exemption in order to be created and negotiate with conferences.¹²⁰ This conclusion comes in response to a uniform shipper complaint that the potential threat of antitrust enforcement has inhibited the development of shippers' councils.¹²¹ Although the validity of this argument is addressed *infra*, in section III B, Congressional proponents of councils have adopted this as a fundamental aspect of their proposals.

The 95th through 98th Congresses have considered four basic forms of shippers' councils. These proposals may be categorized as consultative,¹²² negotiating,¹²³ small shipper joint venture,¹²⁴ and export trading company modelled¹²⁵ shippers' councils. With the exception of the amended proposals considered in the first session of the 98th Congress, each version of the shippers' councils concept considered by the Congress has revealed a uniformity of structure based upon a consultative ship-

¹¹⁷ See S. REP. NO. 3, *supra* note 2, at 22-23; H.R. REP. NO. 611, *supra* note 66, at 33-34; S. REP. NO. 414, *supra* note 35, at §§ 12(a)(6), 12(b)-12(c); H.R. 6899, § 207(c) 96th Cong., 2d Sess. (1980); H.R. REP. NO. 935, *supra* note 11, at 7.

¹¹⁸ See S.47, § 4(c), as introduced, January 25, 1983, and as passed, March 1st, 1983; H.R. 4374 as introduced, August 4, 1981; reported from the House Merchant Marine Committee, May 10, 1982; and with House Judiciary Committee Amendments. H.R. REP. NO. 611, *supra* note 66, at 27-28; See S.1593 as introduced, August, 1981 and Staff Working Draft Changes, January 28, 1982. S. REP. 414, *supra* note 35, at 30.

¹¹⁹ GAO REPORT, *supra* note 11, at 27; *see also supra* note 69.

¹²⁰ H.R. REP. NO. 53, *supra* note 3, at 20; S. REP. NO. 3, *supra* note 2, at 22; H.R. REP. NO. 611, *supra* note 66, at 26; S. REP. NO. 414, *supra* note 35, at 29.

¹²¹ H.R. REP. NO. 611, *supra* note 66, at 26; *see also Gorton Hearings, supra* note 10, at 26 (testimony of Peter Ortiz, American Importers Association).

¹²² See H.R. 6899, §§ 206, 207(c), *reprinted in* H.R. REP. NO. 935, at 7, 24; See H.R. 4374, § 3 (as introduced) S.1593, §§ 4(c), 5(f) (as reported May 25, 1982); S.47, §§ 4(c), 5(f) (as reported February 17, 1983), *reprinted in Regulatory Reform Hearings, supra* note 26, at 8-10.

¹²³ See H.R. 11422, § 2, *reprinted in Closed Conference Hearings, supra* note 22, at 1; H.R. 4679, §§ 203, 206-207, *reprinted in Omnibus Hearings, supra* note 21, at 13, 17-20; S.125, §§ 102(23), 309, *reprinted in Gorton Hearings, supra* note 10, at 42-112; S.1593, §§ 4(c), 5(d) (as introduced), *reprinted in Gorton Hearings, supra* note 10, at 14, 16-17; H.R.1878, § 7(d) (as introduced, Mar. 3, 1983).

¹²⁴ S.47, § 8(a)(9) (as passed), *reprinted in* 149 CONG. REC. S1830 (daily ed. Mar. 1, 1983).

¹²⁵ H.R.4374, § 7(d) (as passed), *reprinted in* 128 CONG. REC. H6894-95 (daily ed. Sep. 13, 1982); H.R.1878, § 7(d) (as introduced Mar. 3, 1983, and reported Apr. 12, 1983).

pers' council model, but a hesitancy over the authorization of activities which would be necessary tools for a negotiating shippers' council. This hesitancy ultimately led the Congress to reject the shippers' council approach in favor of the more limited concept of shippers' associations.

1. The Consultative Shippers' Council Proposals

The consultative shippers' council proposals are criticized primarily because they provide weak antitrust immunity and because they permit limited activity. The basic consultative shippers' council model considered by the past four Congresses is illustrated by certain provisions of S.47 as introduced before the 98th Congress. S.47 would have permitted shippers' councils to "(1) mutually consult and exchange information or views regarding rates, charges, classifications, rules, practices, or services; (2) agree upon common positions; and (3) consult and confer with any ocean common carrier regarding general rate levels, charges, classifications, rules, practices, or services."¹²⁶

This authorization, while clearly contemplating that consultative shippers' councils will provide a method of information dissemination among shippers and conference members in order to permit a more informed procedure for conferences to achieve a system of rationalization which accounts for shipper input,¹²⁷ fails to provide shippers' councils with the legal tools needed for them to act upon the information obtained by the councils.¹²⁸ Instead, the shippers' councils members are apparently left to act individually upon the mutually obtained information when negotiating general or specific rates.¹²⁹ There is a legal and economic incongruity to this form of consultative shippers' council authorization. While encouraging the development of common positions and the exchange of information by shippers' council members through the

¹²⁶ S.47, 98th Cong., 1st Sess. § 4(c) (1983).

¹²⁷ S. REP. NO. 3, *supra* note 2, at 22; S. REP. NO. 414, *supra* note 35, at 29-30; H.R. REP. NO. 935, *supra* note 11, at 70.

¹²⁸ See *Gorton Hearings*, *supra* note 10, at 247, 248, 250 (testimony of Peter Finnerty, Sea Transportation Committee of the U.S. Council of the International Chamber of Commerce on S.1593).

¹²⁹ Perhaps because of this potential exposure, the National Industrial Traffic League ("NITL") has proposed the following alternative to a shippers' council mechanism. They have proposed that an antitrust exemption be conferred on individual or collective groups of shippers to permit them to participate in conference discussions. This exemption would be similar to the authority for shippers and "other persons" to participate in domestic transportation rate bureau discussions under 49 U.S.C. § 10706(b)(2). Although the NITL's proposal would provide a forum in which shippers could express their needs (and would arguably remove a need for federal regulation of shippers activities), it would not provide the separate organizational structure whereby shippers could first determine, on a collective basis, the position that they would present to the conferences. See *Gorton Hearings*, *supra* note 10, at 233 (statement of Ralph N. Thayer, National Industrial Traffic League); Popper, *supra* note 71; *cf.* *United States v. Sugar Inst.*, 15 F. Supp. 817, 857-60 (S.D.N.Y. 1934).

existence of an antitrust exemption, the consultative council legislation refuses to permit council members to act on a collective basis to achieve a negotiated basis for their common goals on conference rates and services. Instead, individual council members are left in an uncertain legal position as to whether they could act upon the information obtained from the shippers' council in order to negotiate rate reductions and service charges. The structural aspects of the consultative councils reinforce this uncertainty. For example, most shippers' councils proposals have limited council participation to those shippers who have a direct financial interest in the goods they ship.¹³⁰ In addition, these proposals provide that membership must be voluntary and that members might act independently.¹³¹ Although the purpose of these provisions is to ensure that shippers' councils do not abuse their antitrust exemption (these provisions also arguably strengthen the councils' credibility with conferences by ensuring that shipping concerns predominate the discussions),¹³² they also clearly undercut the economic bargaining power that the councils could achieve even on a consultative basis. Furthermore these councils probably would not enhance the ability of individual shippers to achieve countervailing power in their individual dealings with conference members.¹³³ Given the voluntary nature of such councils, any shipper seeking to utilize information obtained from a consultative shippers' council would surely be inhibited by potential antitrust exposure arising from allegations of collective group boycotts or conspiracies to restrain competition by those shippers who elected to not (or could not) participate in shippers' councils, since the antitrust immunity of these councils merely extends to the opportunity to "consult and confer."¹³⁴ Thus, consultative shippers' councils created upon the authority contained in the consultative council proposals would appear to be limited to exchanging only the most general types of information, and there is a distinct possibility that individual shippers would perceive the potential antitrust ex-

¹³⁰ See S.1593, 97th Cong., 1st Sess. § 5(d)(1) (1981).

¹³¹ See proposed § 15(c)(2)-(3), H.R. 4374, 97th Cong., 1st Sess. § 3 (1981).

¹³² This prohibition also is intended to prohibit the participation of freight forwarders and other middlemen in shippers' councils activities. See S. REP. NO. 414, *supra* note 35, at 28. By law, these consolidators and forwarders of goods are not permitted to have a beneficial interest in the goods they ship. The Shipping Act of 1984 changed the beneficial interest rule and permits these parties to have a beneficial interest in the goods they ship. See *infra* notes 350-51 and accompanying text.

¹³³ See *Gorton Hearings*, *supra* note 10, at 233 (testimony of National Industrial Traffic League).

¹³⁴ See Letter, Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Honorable Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary (June 7, 1983), reprinted in REPORT ON H.R. 1878, HOUSE JUDICIARY COMM. H.R. REP. NO. 53, 98th Cong., 1st Sess. 41 (1983) [hereinafter cited as McConnell letter]; cf. *Senate Judiciary Hearings*, *supra* note 31, at 38-39 (statement of Jay Angoff, Public Citizen's Congress Watch); *id.* at 16 (statement of Sen. Metzenbaum).

posure connected with these councils as sufficient justification for their nonparticipation.¹³⁵

The membership inhibiting aspects of the consultative shippers' councils proposals are further illustrated by the standards for Federal Maritime Commission approval imposed on the councils by these bills. For example, proposed section 15(c) of H.R. 4374 (as introduced) permitted the FMC to confer an antitrust exemption on councils if those councils, among other items,

- (1) provide[d] a consultation process for the regular and orderly communication and exchange of information with conferences, for the resolution of disputes, and for cooperation in curbing malpractices; (2) provide[d] reasonable and equal conditions for admission and readmission; (3) provide[d] that shippers [could] resign and rejoin the council without restriction or penalty; . . . (6) prohibit[ed] members of a council from engaging in any collective refusal to deal with any person; (7) prohibit[ed] discussion, agreement, or concerted action by members of a council with regard to their specific commodity rates, output, or marketing; and (8) prohibit[ed] the council from routing or arranging for the transportation of traffic on behalf of its members or from entering into any exclusive loyalty contracting dual rate contract.¹³⁶

Indeed, even an individual with only a passing knowledge of the concept of shippers' councils must question what purpose an antitrust exemption could serve for the activity of a shippers' council organized along the lines of H.R. 4374, as introduced, inasmuch as any activity by the members of these councils would have to be of an extremely general nature in order to avoid the prohibitions on collective group boycotts and the "discussion, agreement, or concerted action in regard to specific commodity rates, output, and marketing."¹³⁷ Aside from establishing a general set of procedural rules (for example, perhaps a uniform bill of lading) and providing an umbrella under which shippers and conferences could exchange information that, in the domestic economy, only trade associations could exchange, it is difficult to anticipate how such a council's activities would escape an antitrust challenge.¹³⁸ Even the provi-

¹³⁵ See *Gorton Hearings*, *supra* note 10, at 262-64 (answers of European National Shippers Council to questions of Sen. Inouye).

¹³⁶ H.R. 4374, § 3 (as introduced), *reprinted in Regulatory Reform Hearings*, *supra* note 26, at 8-10.

¹³⁷ *Id.* See *Regulatory Reform Hearings*, *supra* note 26, at 175-80 (testimony of Thomas E. O'Neill, General Counsel, National Association of Beverage Importers).

¹³⁸ See *generally supra* note 14. For example, of the four activities (discussion of general rate levels, classes of rates, the influence of surcharges on rate levels, and the simplification of freight bills) cited by the European National Shippers Council (ESC) as being ongoing topics of discussion with conferences in the fall of 1982, *Gorton Hearings*, *supra* note 10, at 257 (testimony of J.F. Muheim, ESC), only the simplification of freight bills would appear to present no potential antitrust challenge, because although the ESC has advocated that specific rates be left to negotiations by

sions which permit these councils to establish procedures to curb malpractices (a device which proponents contemplated would create a forum for initial shipper-conference arbitration of conference discriminatory practices) would conceivably be open to challenge by noncouncil members under a group boycott challenge.¹³⁹ Finally, it is difficult to contemplate how members of a shippers' council could consult with conferences over such a basic rationalization tool as establishing needed regional service levels without potentially violating the prohibitions on marketing and output discussions contained in the consultative council proposals.¹⁴⁰

2. *The Negotiating Shippers' Council Proposals*

The negotiating shippers' council proposals also conflict with United States antitrust doctrine.¹⁴¹ Although the provisions of most negotiating council proposals avoid (by definition) the inherent conflicts of the limited consultative council proposals, these proposals in general have suffered from a lack of specificity. The simplest form of negotiating council is embodied in proposals which contain the same provisions as the consultative shippers' council proposals previously examined, but which permit councils to "consult and negotiate" as opposed to "consult and confer."¹⁴² Some proposals discuss the concept in terms of "bargaining with ocean common carriers,"¹⁴³ but all sanction agreements approved by the FMC which would allow the negotiation of general rate and service levels.¹⁴⁴

individual shippers on commodity groups, it will be difficult to clearly delineate what constitutes a general rate negotiation versus a specific rate negotiation. Even a general rate negotiation which arguably could result in discrimination in regard to an individual shipper's specific rates would be subject to the allegation of a violation of the antitrust laws.

¹³⁹ The commercial resolution of disputes or industry malpractices is a major function of the European Shippers Council model. One of the proposals of this function would be to eliminate government intervention in the conference-shipper relationship, although the ESC advocates an ultimate appeal and resolution of controversial decisions by the government. *Gorton Hearings, supra* note 10, at 257 (testimony of J.F. Muheim). However, without this right of government appeal, it would appear that shippers' councils would still be subject to allegations of discrimination. *See supra* note 17; *See also Closed Conference Hearings, supra* note 22, at 287-89 (testimony of John Evans and Bernard Gardner, University of Wales Institute of Science and Technology).

¹⁴⁰ *See generally, Omnibus Hearings, supra* note 21, pt. I, at 536 (statement of Edgar A. Vierengel, New York Chamber of Commerce and Industry).

¹⁴¹ *See supra* note 123.

¹⁴² S.1593, § 4(c) (as introduced), *reprinted in Gorton Hearings, supra* note 10, at 14.

¹⁴³ H.R. 4374, § 7(d) (Judiciary Committee version), *reprinted in H.R. REP. NO. 611, supra* note 66, pt. 2, at 6.

¹⁴⁴ H.R.11422, 95th Cong., 2d Sess. § 2 (1978) ("negotiate"); H.R.4769, 96th Cong., 1st Sess. § 206(1) (1979) ("negotiate"); S.125, 97th Cong., 1st Sess. § 102(23) (1980) ("negotiation"); S.1593, 97th Cong., 1st Sess. § 4(c) (1981) ("negotiate"); S.47, 98th Cong., 1st Sess. § 4(c) (1983) ("negotiate")

These proposals, however, while resolving the economic issue as to whether shippers will be permitted to develop a form of group countervailing power, have often lacked the specificity as to the permissible activity that would define the parameters of the shippers' council antitrust immunity. While the proponents of these council provisions justify the lack of specificity as being necessary to encourage a "free market" development of different types of councils,¹⁴⁵ this deficiency has been perceived by critics of councils as a broad umbrella which could potentially justify anticompetitive activities.¹⁴⁶ Furthermore, council advocates appear to argue that the lack of specificity would inhibit council formation.¹⁴⁷

While it must be admitted that some negotiating shippers' council proposals have specified the types of issues that councils could negotiate (for example, S.47, as introduced, authorized councils to negotiate and enter into loyalty and service contracts with carriers,¹⁴⁸ and S.125, a proposal before the 96th Congress, conferred a presumption in favor of approval by the FMC on any conference agreements approved by a shippers' council),¹⁴⁹ generally they do not reflect a total concept of the regulatory scheme in which such councils will function.¹⁵⁰ In particular, these proposals lack a concept of what the permissible parameters of ne-

time volume and service contracts"). None of these proposals, with the exception of S.47, as introduced, would have permitted the councils to aggregate and enter into contracts for the shipment of specific commodities. *Supra* S.47, § 4(c); *see generally* S. REP. NO. 414, *supra* note 35, at 29. Similarly, the proposals would not permit the negotiation of specific rate levels for specific commodities, although some proposals, such as S.1593, did appear to contemplate the formation of councils on a regional or commodity basis. Councils formed on a commodity basis, given the authority to "negotiate general rate levels", arguably would have the authority to negotiate specific rate levels. *Cf.* S. REP. NO. 414, *supra* note 35, at 30. *Contra id.* at 29.

¹⁴⁵ *Closed Conference Hearings*, *supra* note 22, at 158 (testimony of W.J. Amoss, Jr., Council of American Flag Ship Operators); *cf.* S. REP. NO. 414, *supra* note 35, at 30.

¹⁴⁶ *Omnibus Hearings*, *supra* note 21, pt. I, at 417-18 (statement of W. James Amoss, National Maritime Council); *Omnibus Hearings*, *supra* note 21, pt. I, at 535-36 (statement of Edgar A. Vierengel, International Traffic Committee, New York Chamber of Commerce and Industry, Inc.); *see also Gorton Hearings*, *supra* note 10, at 248 (statement of Peter Finnerty, Sea-Land Industries); *cf.* McConnell letter, *supra* note 134.

¹⁴⁷ *See generally Omnibus Hearings*, *supra* note 21, pt. II, at 455-75 (testimony of George F. Avery and Frederic L. Wood, National Industrial Traffic League); *Closed Conference Hearings*, *supra* note 22, at 173-74 (statement of George F. Avery, Jr., Export, Import, and Maritime Committee of the National Industrial Traffic League); H.R. 11422, 95th Cong., 2d Sess. 215 (1978) (testimony of Edgar A. Vierengel, International Traffic Committee, New York Chamber of Commerce and Industry, Inc.); *Gorton Hearings*, *supra* note 10, at 271 (statement of American Importers Association).

¹⁴⁸ S.47, 98th Cong., 1st Sess. § 4(c)(4) (1983).

¹⁴⁹ S.125, § 305(3), *reprinted in Gorton Hearings*, *supra* note 10, at 59.

¹⁵⁰ This failure, while reflecting an uncertainty as to how shippers' councils will function in the United States, also reflects an uncertainty as to the type of conference system the United States desires to authorize. As stated in the General Accounting Office report, the closer the United States

gotiating power are and what the government's role in regulating this power will be.¹⁵¹ While these bills appear to contemplate a system whereby the Federal Maritime Commission would certify the areas of negotiation where collective group action would be acceptable, the negotiating council proposals have not clearly delineated a role for the Commission outside that of what could be termed a certifier of shipper "bargaining units," similar to the role of the National Labor Relations Board in the labor law area.¹⁵²

One commentator has suggested that a truly comprehensive negotiating shippers' council proposal would be modelled on the system of labor collective bargaining laws in this country, inasmuch as the concept of shippers' councils is predicated upon a theory of countervailing power which, in the United States, has only been sanctioned in the labor laws.¹⁵³ For example, a system which consisted of conferences and negotiating shippers' councils could impose a duty on conferences to submit proposed rate and service charges to shippers' councils as mandatory topics of negotiation, including a right of mandatory commercial arbitration by the FMC if a negotiating impasse were reached (recent proposals merely required conference agreements to contain provisions to provide for "consultation process" with shippers and with councils).¹⁵⁴ Simi-

moves toward adopting a closed conference system, the greater the need for shippers' councils becomes. GAO REPORT, *supra* note 11, at 34-35.

¹⁵¹ See *Gorton Hearings*, *supra* note 10, at 264-74 (statement of American Importers Association).

¹⁵² See H.R. 1878, 98th Cong., 1st Sess. § 7(d) (1983); *supra* notes 110-13 and accompanying text; see also McConnell letter, *supra* note 134, at 42; *Senate Judiciary Hearings*, *supra* note 31, at 96 (statement of American Association of Exporters and Importers).

¹⁵³ See National Labor Relations Act, 29 U.S.C. §§ 151-157; see also *infra* nn.155-99 and accompanying text; Letter from Donald L. Flexner, Assistant Attorney General, Antitrust Division, Department of Justice, to Rep. John Murphy, Chairman of the House Comm. on Merchant Marine and Fisheries (Sep. 17, 1979), reprinted in *Omnibus Hearings*, *supra* note 21, at 189, 192. But see *Omnibus Hearings*, *supra* note 21, at 455-56 (statement of Robert Leggett, Joint Maritime Council).

¹⁵⁴ See S.47, 98th Cong., 1st Sess. §§ (5)(c)(4)-(6) (1983). Other proposals have contemplated a mandatory right of final commercial arbitration by the Federal Maritime Commission, although some shippers' council proponents, primarily those who contemplate councils as replacing the FMC as the primary protector of shippers interests, have objected to these proposals. See H.R. 11422, 95th Cong., 2d Sess. § 6 (1978); cf. *Closed Conference Hearings*, *supra* note 22, at 194 (testimony of Edwin A. Elbert, American Importers Association). Other council proponents have opposed any form of binding arbitration. See, Amoss, testimony, *supra* note 145, at 159. Although the labor laws do not impose a right to final federal arbitration by a federal agency, they do strongly encourage ultimate recourse to final, binding arbitration. In this context a statutory provision requiring mandatory binding arbitration by a private source could accomplish the same goal. This arbitration could be subject to FMC final review in order to ensure that all aspects of third party public interests had been protected. See Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1947); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

larly, as under labor law case law, any authorizing statute could contain provisions requiring conferences to reveal cost and financial data to shippers' councils.¹⁵⁵ In time, the Federal Maritime Commission could develop a body of case law in the role of final arbiter and certifier of shipper council-conference negotiating issues similar to that developed by the National Labor Relations Board.¹⁵⁶

Under this labor law analogy, a negotiating shippers' council would need a mechanism to ensure group cohesion and membership adherence to uniform bargaining positions. This could be accomplished by eliminating some of the discretionary aspects of membership in a shippers' council in a manner similar to compulsory participation in a union. An example would be legislation that would permit council agreements which contain no right of independent action or provide for a minimum conference recognition time period before another council could be established in a particular region or along certain commodity lines.¹⁵⁷ Provisions such as these are several steps removed from the concepts of shippers' councils that are embodied in even the strongest of negotiating

¹⁵⁵ See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

¹⁵⁶ The labor laws also have developed a tripartite classification of bargaining topics: mandatory, permissible, and forbidden. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The Federal Maritime Commission similarly could develop a body of case law designating mandatory, permissible, and forbidden topics of discussion between conferences and shippers' councils, with the initial foundation for categorizing the negotiability of a topic being the authorized and prohibited activities of the authorizing legislation.

¹⁵⁷ This concept is similar to the National Labor Relations Board's three year contract bar and one year certification rules, whereby a certified representative bargaining unit union cannot have its jurisdiction challenged by a rival union for at least one year (or three years in the case of an existing contract) in order to allow the consolidation of union power and the strengthening of union bargaining power. See 29 U.S.C. § 159(e)(2) (1951); *Reed Roller Bit Co.*, 72 NLRB 927 (1947); NLRB, THIRTY SEVENTH ANNUAL REPORT 50-52 (1972). *But cf.* Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1547-48 (1982) for the view that similar organizations should be allowed to exist only for a short time period in order to avoid potential anticompetitive abuses. This cohesion could be achieved if the Federal Maritime Commission were to establish criteria for "bargaining units" on a geographical or commodity basis, but with the units represented on a hierarchical basis with local, regional, and national (either one or several) shippers' councils. Presumably, as the councils progressed from the local to the national level, the negotiating aspects of the shippers' council would decrease while the consultative, information exchange aspects of the councils would increase. This approach would not only facilitate the curtailment of possible antitrust abuses, but also would enhance the power of regional or local councils to negotiate with conferences on the basis of multiple trade conditions. See *Closed Conference Hearings*, *supra* note 22, at 223-224 (testimony of Edgar A. Vierengel). This approach also would accommodate the views of a broad spectrum of shippers. For example, in a survey of 130 shippers (48 responding), the National Maritime Council found that 17% favored national shippers' councils, 35% favored regional councils, 17% favored conference by conference councils, and 10% favored commodity based councils. Letter to Rep. Paul McCloskey from C. William Neuhauser, National Maritime Council (Nov. 30, 1979), *reprinted in Omnibus Hearings*, *supra* note 21, vol. 2, at 139-42.

shippers' councils proposals, such as H.R. 4769 of the 96th Congress.¹⁵⁸ Similarly, although all shippers' council proposals have been accompanied by statutory requirements that conference agreements provide for consultation with such councils, the proposals have fallen short of the legal specifications needed to ensure rate negotiations, such as the mandatory divulgence of relevant conference financial and cost data. Nevertheless the Shipping Act of 1984, which will be discussed does make it a prohibited act for conferences to refuse to negotiate with shippers' associations.¹⁵⁹

3. *Protection From Abuse of Power*

Both the consultative and negotiating shippers' council proposals do not contain adequate provisions for protecting against council abuses in the domestic economy in a manner which would not inhibit council formation.¹⁶⁰ Aside from limiting council membership to those shippers who have a direct financial interest in the goods shipped and erecting vague prohibitions based upon traditional antitrust doctrines, few shippers' council proposals have stipulated the type of antitrust scrutiny to which the councils should be subjected.¹⁶¹ There are two approaches to creating these safeguards. First, the anticompetitive activities that the councils could not engage in could be defined and then an antitrust immunity for any other activity a council may engage in may be authorized by

¹⁵⁸ H.R. 4769, as introduced, conferred an antitrust exemption on any shippers' council to "meet, confer, and (1) negotiate with any ocean common carrier or conference regarding rates, practices, and terms and conditions of service affecting ocean transportation; (2) exchange information with ocean common carriers or conferences concerning traffic and transportation data; and (3) provide for the analysis and distribution of (information)." H.R. 4769 §§ 201(15), 203, 206, 207(c), *reprinted in Omnibus Hearings*, *supra* note 21, pt. I, at 4-20.

¹⁵⁹ See *Senate Judiciary Hearings*, *supra* note 31, at 96 (statement of American Association of Exporters and Importers). Some shippers' council advocates who have espoused the concept of binding commercial arbitration of council-conference disputes have proposed a system of mandatory council approval of proposed changes in conference tariffs and agreements. Proposed changes would have to be submitted to councils accompanied with supporting data. Failure to reach an accord would result either in binding commercial arbitration or in recourse to the Federal Maritime Commission. See *Closed Conference Hearings*, *supra* note 22, at 174 (statement of George F. Avery, National Industrial Traffic League); *Gorton Hearings*, *supra* note 10, at 265 (statement of Peter Ortiz, American Importers Association). Cf. Kintner, Romano, & Filippini, *Cooperative Buying and Antitrust Policy: The Search for Competitive Equality*, 41 GEO. WASH. L. REV. 971, 983 (1973). The Interstate Commerce Commission has similar authority to act as the final arbiter of car hire compensation rates between shippers and railroads. 49 U.S.C. § 10706(a)(5)(B) (1984). See *supra* note 75. Section 305 of S.125 presents the opposite side of this issue. Section 305 which would have conferred a presumption in favor of Federal Maritime Commission approval of liner conference agreements which had been favorably endorsed by all the shippers' councils operating in the affected trades. S.125, § 305(3), *reprinted in Gorton Hearings*, *supra* note 10, at 59.

¹⁶⁰ See generally Brodley, *supra* note 157, at 1538-52; *infra* notes 242-73 and accompanying text.

¹⁶¹ See *infra* notes 242-73 and accompanying text.

statute. This approach reflects the approach of the consultative shippers' council proposals, discussed above, which contained explicit prohibitions on council activities and would arguably inhibit council formation under a threat of antitrust litigation.¹⁶² Second, those activities that a shippers' council could engage in could be defined by statute and then a broad antitrust exemption for any ancillary anticompetitive effects which were merely incidental to the primary council function in utilizing conference ocean carriage could be granted.¹⁶³ The acceptance of these domestic ancillary effects would have to be universal, inasmuch as an effective council, under a labor law analogy, would have to be able to represent both importers as well as exporters, and be able to engage in group boycotts, the aggregation of goods for volume shipments, and other activities as an import-export broker.¹⁶⁴ Despite an authorization of such ancillary domestic anticompetitive effects, protection against anticompetitive collusion not incidental to legitimate shipper council activities (either among council members or between councils and conferences) could be facilitated by legislative provisions that provide for tape recordings and verbatim transcripts of all council meetings and provide for mandatory arbitration and independent accounting procedures for all conference-shippers' councils disputes.¹⁶⁵

¹⁶² *Id.*

¹⁶³ See McConnell letter, *supra* note 134, at 42; *Omnibus Hearings*, *supra* note 21, vol. I, at 157-58 (statement of Rep. McClosky).

¹⁶⁴ Again, a shippers' council system modelled upon the domestic labor laws can provide a basis for the development of this antitrust immunity. Under the labor law exemption, collective bargaining activities are insulated from the antitrust laws in two ways. First, a statutory exemption in the antitrust laws (sections 6 and 20 of the Clayton Act at 15 U.S.C. § 17 & 29 U.S.C. § 52) excludes labor from the definition of "articles of commerce." Second, a judicially fashioned antitrust exemption stipulates, in essence, that anticompetitive effects that are an ancillary result of the legitimate primary activity of the negotiation of a mandatory bargaining topic will be excused from a finding of an antitrust violation. See *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Home Box Office, Inc. v. Directors' Guild*, 531 F. Supp. 578 (S.D.N.Y. 1982). But see *Handler, Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, at 1349-52 (1982). A related judicially fashioned antitrust exemption of this type is the *Noerr-Pennington* doctrine. *Eastern Railroad President Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). A recent regulatory statement of the general principle is contained in the Department of Commerce guidelines for antitrust certification under the Export Trading Company Act of 1982. Department of Commerce, International Trade Administration, Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15937 (April 13, 1983) (to be codified at 15 C.F.R. § 325) (1984) [hereinafter cited as Certification Guidelines]. See Popper, *supra* note 71, at 318-24.

¹⁶⁵ Provisions for mandatory arbitration, independent accounting procedures, and verbatim transcripts of all council meetings have been proposed in previous shippers' council proposals. See H.R. 4769, 96th Cong., 1st Sess. § 207(c) (as introduced); H.R. 6899, 96th Cong., 2d Sess. § 207(c); see

D. Recent Legislative Proposals

The proposals considered by the 98th Congress prior to the adoption of the Shipping Act of 1984 represent the small shipper joint venture and export trading company based concepts of shippers' councils (although it could be argued that the small shipper joint ventures do not truly represent the concepts underlying the shippers' council concept).¹⁶⁶ Basically reactions to the conflict between the negotiating and consultative council concepts, these proposals also had their genesis in a perceived ambivalence on the part of shippers as to their desire to form shippers' councils. (For example, the House Merchant Marine Committee reported H.R. 4374 (97th Congress) without its shippers' councils provisions, because it found that there was a greater shipper interest in the creation of methods to strengthen individual conference-shipper ties, such as loyalty and service contracts, than in the creation of shippers' councils, which are essentially unknown entities that potentially may be dominated by large shippers.)¹⁶⁷

also H.R. 11422, 95th Cong., 2d Sess.; *Omnibus Hearings*, *supra* note 21, vol I, at 147-48 (testimony of Donald Flexner, Department of Justice).

Similar self policing requirements also exist for conference agreements, 46 C.F.R. pt. 528; *cf.* Shipping Act of 1984, 46 U.S.C.S. § 5(b)(4) (Supp. 1984), and, in the case of tape recorded transcripts, the self-policing requirements are mandated by statute for the activities of antitrust exempt rate bureaus in the domestic surface transportation industry (but not for the antitrust exempt activities of shippers in private car hire negotiations). 49 U.S.C. § 10706(a)(3)(D) (1982). *See generally* Note, *Self Policing of Ocean Shipping Conferences*, 20 STAN. L. REV. 724 (1968).

¹⁶⁶ S.47, 98th Cong., 1st Sess. § 4(d); H.R. 1878, 98th Cong., 1st Sess. § 7(d) (as reported from the House Merchant Marine Committee).

¹⁶⁷ H.R. REP. NO. 611, *supra* note 66, pt. I, at 28-29; McConnell letter, *supra* note 134, at 43. *Contra* GAO REPORT, *supra* note 11, at 26-27. The Justice Department has noted that this perceived lack of interest also is reflected by the results of a recent survey of Canadian shippers' attitudes towards their experience with the Canadian Shippers' council. According to this survey, "13.3 percent of the shippers interviewed indicated that they believed that the Canadian Shippers' council had enabled them to obtain satisfactory cooperation from the conferences or conduct negotiations more effectively. In contrast, 22.1 percent of the shippers reported that the shippers' council had not helped them." (64.6 percent had no opinion.) *Id.*, *citing* E.M. LUDWICK & ASSOCIATES, INC., SHIPPING CONFERENCES: SURVEY OF USERS' VIEWS, table 4.5 (1983). However, the Justice Department's conclusion that there is a lack of shipper support for shippers' councils may be somewhat ingenuous. First, Professor Garvey cites the same report to the effect that while 85% of the respondents in the Canadian survey were dissatisfied with shipping services, 20% (half of those favoring the continuation of the conference system) favored a strengthening of the shippers' councils. *House Judiciary Hearings*, *supra* note 28, at 9 (testimony of Prof. George Garvey). Second, it is difficult to reconcile the conclusion that there is limited shipper interest in the council concept with the fact that the Justice Department recently issued a Business Review Letter for the creation of such a council in the domestic economy. *See* Letter from William F. Baxter, Assist. Atty. Gen., Antitrust Division, Department of Justice, to Daniel J. Sweeney (Jul. 19, 1983) (request of National Small Shipments Traffic Conference for a Business Review Letter on a proposal to form a shippers' council in the domestic transportation industry) [hereinafter cited as NASSTRAC letter.]. *But see infra* notes 293-357 and accompanying text.

1. *S.47: Small Shippers Joint Ventures*

The Senate response to these concerns, S.47, proposed that small shippers (defined as those shipping thirty five, forty foot containers or less a month) be permitted to form joint ventures in order to obtain the same benefits that large shippers would receive in the use of the strengthened individual shipper-conference ties, e.g., the use of loyalty and service contracts.¹⁶⁸ Although this proposal created joint ventures which would be similar to the shippers associations recognized by the Shipping Act of 1984, this proposal, even though it protected the interest of the small shipper (which may arguably be one of the primary purposes of the concept of shippers' councils), cannot be categorized as creating shippers' councils, if such councils are defined as a system in which shippers and conferences exchange information in accordance with a formal procedure in order to accomplish the rationalization of a particular liner trade.¹⁶⁹ Furthermore, the S.47 proposal did not facilitate the exercise of countervailing power that a negotiating shippers' council could achieve, because under S.47 conferences still would interact only with discrete shipping units, which would act without the benefit of mutual information (on an industry or trade wide basis) necessary to properly evaluate markets and conference bargaining power.¹⁷⁰ Accordingly, S.47 preserved the current system of competitive buyers dealing with a selling cartel. Although small shipper joint ventures might have protected certain small shipper's interests from large shippers' and conference market power, they would not have accomplished the goal of using shippers' councils to achieve conference efficiency.¹⁷¹

2. *H.R. 1878: Export Trading Company Based Models*

A recent shippers' council proposal considered by the House of Representatives opted for what may be described as the export trading company model of shippers' councils. This proposal contemplated a "free market" development of councils, whereby the Attorney General would

¹⁶⁸ S.47 § 8(a)(9), reprinted in 129 CONG. REC. S1830 (daily ed. Mar. 1, 1983). Non-discrimination is what underlies this provision. Small shippers often do not ship a sufficient volume to take advantage of volume discounts represented by the long term tying agreements, such as service and loyalty contracts. Although such contracts must be offered on an equal basis to all similarly situated shippers, conferences would probably engage in price discrimination against small shippers in order to give the large volume discount. Thus, the aggregation of small shipments protects the small shippers from undue discrimination. See S. REP. NO. 3, *supra* note 2, at 22-24; 129 CONG. REC. S1779-80 (daily ed. Feb. 28, 1983) (remarks of Sen. Hatch).

¹⁶⁹ See *supra* notes 75-96 and accompanying text; see also *infra* note 384.

¹⁷⁰ *Id.*

¹⁷¹ See notes *infra* 198-211 and accompanying text.

have certified shippers' council activities, utilizing as certification standards the criteria of the Export Trading Company Act of 1982 and the Department of Commerce Guidelines promulgated to implement that Act.¹⁷² In essence, the proposal grafted the certification provisions of the Export Trading Company Act onto the Shipping Act of 1916. Although the concept of using export trading companies in lieu of shippers' councils as a method of achieving conference efficiency is discussed extensively in section IV, *infra*, the export trading company-shippers' councils proposals of such bills as H.R. 1878 (98th Congress) and H.R. 4734 (97th Congress) must be criticized briefly here, because the proposals were essentially superfluous and misconceived.¹⁷³ First, this proposal did not embody a well conceived regulatory scheme for the liner conference system because it did not establish criteria for the creation of shippers' councils in the context of specifically dealing with liner conferences, but instead adopted by reference, a certification procedure which was developed in the context of the entire export trade. This proposal conceded that certain small shippers had an interest in participating in shippers' councils and not in export trading companies and that such participation would require a separate certification procedure or guidelines within the Shipping Act.¹⁷⁴ Second, by placing this certification authority in the Department of Justice, the House proposal would have transferred the traditional duties of overseeing the liner conference system, and of protecting shippers' interests, from the Federal Maritime Commission to an agency which historically has been opposed to antitrust exemptions in the shipping industry and whose past activities in regard to liner conferences were largely responsible for the new legislation weakening its role in regulating the liner industry. It was for very similar reasons that Congress placed the Export Trading Company Act certification responsibilities primarily in the Department of Commerce, and it should therefore be expected that the Department of Justice would inhibit the formation of such councils.¹⁷⁵ Finally, H.R. 1878 limited shippers' council certifi-

¹⁷² H.R. 1878, 98th Cong., 1st Sess. § 7(d).

¹⁷³ See McConnell letter, *supra* note 134.

¹⁷⁴ *Id.*

¹⁷⁵ Cf. EXPORT TRADING COMPANIES, TRADE ASSOCIATIONS, AND TRADE SERVICES, SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS S. REP. NO. 27, 97th Cong., 2d. Sess. 18-19, 22 (1981) [hereinafter cited as S. REP. NO. 27]. This expectation is buttressed by the Department of Justice's refusal to make favorable conclusions in regard to three requests for Business Review Letters for shippers' councils activities in both the domestic and foreign economies. See Department of Justice Business Review Letters 77-9 (North African Western Freight Association—American Beverage Importers); *Id.* at 77-13 (American Importers Association, Inc.); and NASSTRAC I letter, *supra* note 167. See also *Omnibus Hearings*, *supra* note 21, vol I, at 157 (statement of Rep. McCloskey); text accompanying notes 253-63.

cation to the export of goods, and excluded activities related to imports. As a matter of bargaining power, this would have inhibited shippers' councils' powers greatly (a fact recognized by the compromise provisions of the Export Trading Company Act of 1982, which permits certification of both import and export activities).¹⁷⁶

The problems created by the Export Trading Company Act-based proposed model of shippers' councils could be solved by transferring the certification authority from the Department of Justice to the FMC and by establishing some approval standards for council activities.¹⁷⁷ An alternative would have been to rely exclusively on the export trading companies certified by the Department of Commerce to achieve the same goal. A more comprehensive analysis of this second alternative occurs in the second half of this article.¹⁷⁸

3. *Shippers' Associations: The Shipping Act of 1984 Approach*

Ultimately, Congress decided to look to the domestic transportation industries to approach the shippers' councils issue. Under section 10562 of Title 49, shippers can join non-profit cooperative associations for the purpose of consolidating and aggregating small shipments into large shipments in order to obtain volume discounts in shipping their goods.¹⁷⁹ While these organizations have been recognized in the domestic transportation industry for a number of years, no corresponding right existed for the international shipment of goods. Under the Shipping Act of 1916, shippers' associations were regarded by the Federal Maritime Commission as a "stepchild" with little or no rights, and certainly no recognition, of their non-profit membership status. In the past, the Com-

¹⁷⁶ See H.R. REP. NO. 924, 97th Cong., 2d Sess. 22, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2501, 2506 [hereinafter cited as H.R. REP. NO. 924]. For these reasons, the House has received testimony that it should allow export trading companies to assume the role of shippers' councils. *House Judiciary Hearings*, supra note 28, at 21 (testimony of Prof. George Garvey). Some shippers have stated that the provisions of H.R. 1878 are totally unacceptable to them because they do not create a new authorization of countervailing power. Accordingly, they prefer S.47 as a shippers' council bill, even though it embodies a very weak form of the concept. *Hearings on H.R.1878 Before the Merchant Marine Subcomm. of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 2-4 (1983) (statement of National Association of Beverage Importers) [hereinafter cited as *Merchant Marine Hearings*]; *id.* at 2-4 (statement of American Association of Exporters and Importers). See *infra* notes 168-209 and 358-89 and accompanying text.

¹⁷⁷ See *supra* notes 160-65 and accompanying text.

¹⁷⁸ See *infra* notes 358-402 and accompanying text.

¹⁷⁹ The associations are not common carriers, so, unlike freight forwarders, they are not subject to the jurisdiction of the Interstate Commerce Commission. They do not have to accept freight from the general public, and they do not publish and file tariffs. See *Senate Hearings*, supra note 33, at 70 (testimony of Ronald N. Cobert, American Institute for Shippers' Associations, Inc.); *Southern Pacific Transportation Company v. Continental Shippers Ass'n*, 642 F.2d 236 (8th Cir. 1981); *Metro Shippers v. Life Savers, Inc.*, 509 F. Supp. 606 (D.N.J. 1980).

mission required shippers' associations to file tariffs and act as if they were non-vessel operating common carriers.¹⁸⁰ The Shipping Act of 1984 changed this status by specifically recognizing the legal status of such organizations, although the Conference Committee was careful to note that shippers' associations would continue to be subject to laws other than the Shipping Act of 1984.¹⁸¹

By definition, under the Act, a shippers' association is "a group of shippers that consolidates or distributes freight on a non-profit basis for the membership of the group in order to secure carload, truckload, or other volume rates or service contracts."¹⁸² A shippers' association therefore can negotiate service contracts and rates on behalf of its members.¹⁸³ The Act also prohibits any common carrier from refusing to negotiate with such an association, although this does not necessarily mean that the Act dictates that conferences and carriers must enter into agreements with the shippers' associations.¹⁸⁴ This prohibition, however, when read in conjunction with the Act's prohibitions against group boycotts and unreasonable refusals to deal, makes it clear that the Congress intended to put shippers' associations on an equal footing with all other shippers and that any carrier or conference pattern or practice of refusing to deal or negotiate in good faith with a shippers' association would violate the Act.¹⁸⁵ This provision alone assures the associations of some bargaining power.

However, because the Congress failed to confer an antitrust immunity upon shippers' associations, it is doubtful that it seriously intended that such associations would assume the role of shippers' councils in ex-

¹⁸⁰ *Senate Hearings supra* note 33, at 10 (testimony of Ronald N. Cobert, American Institute for Shippers' Associations, Inc.) A non-vessel operating common carrier under the new Shipping Act is "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 317 (Supp. 1984). Under the Act, "common carriers" are people who hold themselves out to the general public to provide transportation by water for compensation. Common carriers also assume responsibility for the transportation from the points of receipt to destination and utilize vessels operating on the high seas or the Great Lakes. *Id.* § 1702(6).

¹⁸¹ H.R. REP. NO. 600, *supra* note 44, at 27-28.

¹⁸² 46 U.S.C.S. § 3(24) (Supp. 1984). A "shipper" under the Act is "an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made." *Id.* at § 3(23). While a literal reading of this definition would permit NVOCCs and other middlemen entities to participate in shippers' associations activities, an examination of the small shipper joint venture provisions of S.47 and ICC decisions concerning domestic shipper associations clearly indicates that this result was not intended by the Congress. *See supra* notes 168-71 and accompanying text; Sunshine State Shippers and Receivers Ass'n—Investigation of Operations, 350 I.C.C. 391 (1975).

¹⁸³ H.R. REP. NO. 600, *supra* note 44, at 28.

¹⁸⁴ *Id.*; 46 U.S.C.S. § 10(b)(3) (Supp. 1984).

¹⁸⁵ *Cf.* H.R. REP. NO. 600, *supra* note 44, at 38-39.

exercising countervailing power against conferences.¹⁸⁶ Although the Conference Committee did note that associations desiring antitrust clarification of their activities could obtain Department of Justice Business Review Letters and Federal Trade Commission Advisory Opinions, there are serious problems with using this approach, especially in the shippers' association context, as a means of developing countervailing power exclusively in shippers.¹⁸⁷ Nevertheless, the conferees also recognized the availability of export trading company certificates of review for shippers' associations, and, as discussed in section IV, *infra*, this approach, combined with the mandatory negotiating provisions of the Shipping Act of 1984, creates interesting possibilities regarding the creation of countervailing power in shippers in a manner similar to that of shippers' councils.¹⁸⁸ Accordingly, while it is likely that these associations were intended as protection for the small and medium sized shippers who would otherwise have no means by which to obtain volume discounts, the shippers' association approach to protecting shippers' interests may have created a mechanism which, if used, will facilitate the development of shipper countervailing power.¹⁸⁹

III. WILL SHIPPERS' COUNCILS WORK?

On a purely theoretical basis, the goals of shippers' councils—offsetting conference rate power—would appear to be more easily achieved under the negotiating council system. While politically it is difficult to favor negotiating shippers' councils because of the possible domestic anticompetitive effects that they may entail, many people understand that efficiency in the conference system will require some price discrimination and there is evidence that consultative shippers' councils do not address this problem. Price discrimination can be controlled effectively either by government imposed sanctions or by free market pressures. Since United States policy in liner shipping is to reject the former approach, the question arises as to whether the ancillary anticompetitive effects of negotiating shippers' councils are worth the potential benefit of such councils, or whether consultative councils or other market mechanisms which will

¹⁸⁶ See H.R. REP. NO. 600, *supra* note 44, at 38. While the record suggests that Congress was interested in allowing small shippers in the international trades to obtain the 20 to 50 percent savings in transportation costs enjoyed by members of domestic shippers' associations, the mandatory negotiating provisions may indicate an unarticulated interest that the associations develop into more than mere shipper-owned consolidating organizations. See *Senate Hearings*, *supra* note 33, at 70-73 (testimony of Ronald N. Cobert, American Institute for Shippers' Associations, Inc.).

¹⁸⁷ H.R. REP. NO. 600, *supra* note 44, at 38.

¹⁸⁸ *Id.*

¹⁸⁹ See *infra* notes 358-59 and accompanying text.

disseminate information and pressure conference pricing powers will effectively counter conference market power. An even more basic question is whether shippers' councils will develop in the United States even if they are authorized.

A. The Theoretical Predicates of Shippers' Councils

The empirical and theoretical basis for the creation and success of shippers' councils in the United States is limited.¹⁹⁰ As previously noted,¹⁹¹ studies of foreign shippers' councils have concluded that these councils have had a limited effect in countering conference pricing activities. Furthermore, the United States' domestic economy has had only a limited experience with sanctioned countervailing bargaining and joint buying groups, the major examples being labor unions¹⁹² and agricultural cooperatives.¹⁹³ Given this weak background, the theoretical question arises as to whether shippers' councils can counter liner conference oligopoly power; i.e., if shippers' councils form, will they have equal economic strength with liner conferences therefore allowing them to negotiate lower rates? Furthermore one must question whether the structure of the United States economy is such that shippers will form these groups. Additionally, if such councils are theoretically feasible, will the United States export industry be amenable to the development of these organizations? Finally, would the potential benefits of the councils outweigh the danger of the strong antitrust exemption necessary to further their formation?

There is some theoretical and empirical support for a theory of countervailing bargaining power. The most influential exposition of the theory can be found in a 1952 book by John Kenneth Galbraith.¹⁹⁴

¹⁹⁰ See *infra* notes 221-34 and accompanying text.

¹⁹¹ See *supra* note 105. See also *Senate Hearings, supra* note 33, at 3 (statement of Allen Ferguson, Chairman of the National Institute of Economics and Law).

¹⁹² Clayton Act § 6, 15 U.S.C. § 17 (1982); see J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 108-34 (Rev. ed. 1956) [hereinafter cited as GALBRAITH].

¹⁹³ *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380 (5th Cir. 1977); *Capper-Volstead Act*, 7 U.S.C. §§ 291-292 (1982); *Fisherman's Collective Bargaining Act*, 15 U.S.C. §§ 521-522 (1982). See GALBRAITH, *supra* note 192, at 154. See also *supra* note 75; Kintner, *supra* note 159, at 974. *But cf.*, *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). It should be noted that there have been numerous legislative attempts to protect small firms from the concentrated power of larger entities which may exercise a form of buying power. These Acts, in particular the Robinson-Patman Act, 15 U.S.C. § 13 (1982), have been criticized for penalizing efficient firms that use their economies of scale while protecting the inefficiencies of the smaller firms. See *infra* note 216. The theory of countervailing power attempts to promote efficiencies among those entities that enjoy concentrated power. See also, Davidow, *supra* note 75, at 279-80; Note, *The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 *YALE L.J.* 765, 769 n.18.

¹⁹⁴ See *supra* note 192; See also John Hazard, *A Competitive United States Maritime Policy*, 22

Although until the 1970s very little empirical work was performed to test his theories,¹⁹⁵ results of recent studies have given some support to the proposition that the liner conference and export trade systems may be amenable to a form of countervailing power.¹⁹⁶ These and other studies also demonstrate that the nature of the export industry is such that any form of countervailing power which may develop will not necessarily benefit small and medium sized exporters.¹⁹⁷

Galbraith asserts that concentrated economic power inevitably leads to the creation of a countervailing economic power.¹⁹⁸ He elaborates upon this thesis with two main arguments. First, he states, in oligopolistic industries sellers conform to consumer needs not through interseller competition but through countervailing power exercised by strong buyers.¹⁹⁹ Second, powerful buyers do not offset the power of concentrated sellers occasionally or haphazardly. Instead, a systematic propensity for power on the buyers' side emerges whenever power exists on the sellers' side.²⁰⁰

Galbraith's theory of countervailing power is particularly important in the context of independent competition and closed conferences in the liner conference system. In an argument similar to UNCTAD's which holds that independent liners may not provide effective actual and potential competition to preclude monopoly pricing, Galbraith argues that the theory that monopoly power will generate market entry is undercut by high market entry barriers.²⁰¹ He argues that countervailing power must arise as a matter of self preservation, but that the conditions which foster its creation will occur only when the oligopoly has monopoly profits and the industry is not price competitive.²⁰² These conditions will exist especially where sellers experience a strong demand in their acquisition market and buyers have a weak demand in their end market and are the only

TRANSP. J. 32, 45 (1982). *But see, Senate Hearings, supra* note 33, at 3 (statement of Allen Ferguson, Chairman of the National Institute of Economics and Law).

¹⁹⁵ F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 239 (1st ed. 1970). O.E.C.D., *BUYING POWER: THE EXERCISE OF MARKET POWER BY DOMINANT BUYERS* 29 (1981) [hereinafter cited as *BUYING POWER*].

¹⁹⁶ *See infra* notes 221-34 and accompanying text.

¹⁹⁷ *See infra* text accompanying notes 308-25.

¹⁹⁸ GALBRAITH, *supra* note 192, at 110-14; *see also* Davidow, *supra* note 75, at 278-81.

¹⁹⁹ GALBRAITH, *supra* note 192, at 113; SCHERER, *supra* note 195, at 241.

²⁰⁰ GALBRAITH, *supra* note 192, at 114; SCHERER, *supra* note 195, at 241.

²⁰¹ GALBRAITH, *supra* note 192, at 112-13. However, some opponents of the conference system have cited the opposite argument as justification for elimination of the conference system's antitrust immunity. They claim that the shipping industry will never achieve monopoly power because its entry costs are not so high in relation to demand as to preclude new competitor entry. *See* 1979 REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS, *supra* note 11, at 281-82.

²⁰² GALBRAITH, *supra* note 192, at 118, 128.

customers of the sellers.²⁰³ In such a situation, buyers can obtain price concessions by utilizing alternative suppliers, conferring exclusive patronage on one supplier, and in general by maintaining a degree of uncertainty as to buyer activity.²⁰⁴

Galbraith's theory does not contemplate perfect equilibrium between buyers and sellers. Usually, a greater degree of power will exist on one side or the other. This power distribution will depend on what inflationary pressures exist that will permit one side to pass on increased costs to consumers.²⁰⁵ Therefore, it is possible that countervailing power would only be a temporary phenomenon, arising only when a depression or price competitiveness makes it necessary for one group to offset the monopoly power of another.²⁰⁶ Some economists cite this potentially temporary nature of countervailing power when criticizing Galbraith's assertions that such power arises systematically,²⁰⁷ but some admit that there is one situation where concentrated countervailing power may arise systematically. That situation will arise when bilateral monopoly or oligopoly exists where a few end product sellers have sufficient power as buyers to hold prices of products at or near competitive levels, while at the same time being unable to depart from competitive pricing in the end product market. In this situation, countervailing power could lead to an allocation of resources that approximates the competitive norm.²⁰⁸

The fundamentals of the countervailing power theory appear to be particularly applicable to the liner conference industry. A condition of strong demand on the part of corporations which are also weak sellers in their end product market will always exist in the liner system, since almost all exports and imports move by ocean vessel.²⁰⁹ Exporters and importers have a strong buyer demand for ocean transportation but the must price competitively with other exporters and domestic manufacturers in their end markets. Thus, although the conferences are in a strong position because they may control the supply of shipping, they are also in

²⁰³ *Id.* at 130-31.

²⁰⁴ *Id.* at 121. This is very similar to the shippers' councils proposals. See S.1593, 97th Cong., 1st Sess., 127 CONG. REC. S9221 (daily ed. Aug. 3, 1981), S.47, 98th Cong., 1st Sess. (1981), 129 CONG. REC. S89 (daily ed. Jan. 26, 1983); UNCTAD, Protection of Shipper Interests, *supra* note 70, at 8, 19-24.

²⁰⁵ GALBRAITH, *supra* note 192, at 130-31.

²⁰⁶ *Id.*; BUYING POWER, *supra* note 195, at 22.

²⁰⁷ SCHERER, *supra* note 195, at 241-48.

²⁰⁸ SCHERER, *supra* note 195, at 245; F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 307 (2d ed. 1980) [hereinafter cited as SCHERER, 2d ed.]. Cf., Brodley, *supra* note 157, at 1569 n.155.

²⁰⁹ Approximately 90 to 98% of all foreign exports and imports move by ocean vessel. *Omnibus Hearings*, *supra*, note 21, at 183 (statement of Hon. John Murphy); *Id.* at 250 (statement of Hon. Samuel Nemirow, Maritime Administration).

a weak position inasmuch as all of their business is derived from export demand.²¹⁰ Theoretically, exporters have the potential power to offset conference activities by utilizing the tools advocated by Galbraith that are contained in the shippers' council proposals to create market uncertainty. Nevertheless, the end market for exporters is still a price competitive market, because the exporters' competitors include both domestic producers and other foreign exporters. Thus, the reduction of transportation costs should provide an important vehicle for obtaining a reduction in export costs and an increased competitiveness of goods abroad, thereby leading to an increase in exports and a systematic creation of countervailing power.²¹¹

As conceptually attractive as the theory of countervailing power may be as a regulatory policy for the liner conference system, the theory's proponents also recognize that it contains some danger of misuse.²¹² Galbraith admits that the theory sanctions the creation of economic concentration in the economy.²¹³ He reconciles this with the contemporary bias against concentration by postulating that economic power may be inherent in capitalism and that it is better to control the abuses of economic concentration than to inhibit its development, where that development may have beneficial effects for the economy.²¹⁴ Nevertheless, Galbraith's analysis fails to address the regulatory problems which might occur if countervailing power becomes a force in its own right or if such power serves as a cooperative, as opposed to countervailing, force.²¹⁵ Examples of the legal difficulties which may be encountered in establishing a standard to curb potential cooperative activity between two countervailing oligopolies are contained in the buyers price discrimination provisions of the Robinson-Patman Act. This Act prohibits differences in the prices of a goods sold to two different purchasers unless the price difference is either cost justified or necessary to meet a

²¹⁰ Ellsworth, *supra* note 32, at 509.

²¹¹ See, e.g., *House Judiciary Hearings*, *supra* note 28, at 4 (statement of Prof. George Garvey) to the effect that the eight percent of total export costs represented by ocean transportation can adversely affect the competitive posture of exporters in a market where a one percent variable in the price of goods makes prices more competitive.

²¹² See SCHERER, *supra* note 195, at 242; BUYING POWER, *supra* note 195, at 31, 34.

²¹³ GALBRAITH, *supra* note 192, at 152.

²¹⁴ *Id.* at 147. Examples of such authorization are the Webb-Pomerene, 15 U.S.C. §§ 61-66 (1976), and Export Trading Company Acts, 15 U.S.C. §§ 4001-4003 (1982). Cf. *Gorton Hearings*, *supra* note 10, at 176 (answers of CASO to questions of Sen. Inouye); Davidow, *Cartels, Competition Laws, and the Regulation of International Trade*, 15 N.Y.U.J. INT'L L. & POL'Y 351, 361 (1983) [hereinafter cited as Davidow, *Cartels*]; Brodley, *supra* note 157.

²¹⁵ *Gorton Hearings*, *supra* note 10, at 152; SCHERER, *supra* note 195, at 242, 244-45; *Omnibus Hearings*, *supra* note 21, at 159 (testimony of Donald Flexner, Department of Justice); SULLIVAN, ANTITRUST LAW 288-89 (1977).

competitor's price. The Act also makes it unlawful for any person to knowingly induce or receive a discrimination in price.²¹⁶

Enforcement of this Act by the Justice Department (as opposed to the Federal Trade Commission) has been limited, because the provisions of the act tend to deter certain beneficial activities based on economies of scale because it is very difficult to provide evidence supporting the affirmative defenses contained in the Act.²¹⁷ For example, a powerful countervailing buyer may obtain price reductions because he consumes large volumes or a predictable quantity of goods which enables his entrance into a long term contract. Whether this will result in higher prices to small buyers depends on the degree of their market power. If the concession was a result of economies of scale or large buyer bargaining power, the price concessions should not spread throughout the industry.²¹⁸ A legal problem arises if the concessions were a result of collusion or other preferential treatment that discriminated against small buyers.²¹⁹ It is very difficult to establish precise legal standards for a burden of proof in such cases, yet anything less than a precise standard may serve to inhibit attempts to obtain the benefits of economies of scale.²²⁰

1. *Empirical Support*

Early studies dismissed the validity of the theory of countervailing power because little empirical support for the concept could be found in existing industries. For example, an early Kaysen and Turner study found that in only twenty out of the sixty five Type I industries which they surveyed did buyers' concentration approach that of the sellers' industry.²²¹ More recent studies, however, provide greater empirical sup-

²¹⁶ Robinson-Patman Act, § 2(b), (f), 15 U.S.C. § 13 (1982). See, R. POSNER, *ANTITRUST LAW* 180 (1976); *Fed. Trade Comm'n v. Morton Salt*, 334 U.S. 37 (1948); *Great Atlantic & Pacific Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69 (1979); Kintner, *supra* note 159; Mezines, *Group Buying—When is it Permitted Under the Robinson-Patman Act?*, 44 N.Y.U. L. REV. 729 (1969); Selden, *An Analysis of Cooperative Buying Associations—Including New Concerns For Franchise Systems*, 37 BUS. LAW. 1569 (1982). Price discrimination is a major concern of federal regulatory activity in all types of transportation. However, the Robinson-Patman Act prohibitions apply to the sales of goods, not services, and therefore could not be applied to shippers' councils activities. See Popper, *supra* note 71, at 308, 318.

²¹⁷ See DEPARTMENT OF JUSTICE, *REPORT ON THE ROBINSON-PATMAN ACT* (1977); BAUM, *THE ROBINSON-PATMAN ACT: SUMMARY AND COMMENT* 112 (1964).

²¹⁸ SCHERER, 2d ed., *supra* note 208, at 310.

²¹⁹ Scherer argues that this may not occur because price concessions on intermediate goods to strong buyers in oligopolistic markets invariably will be discovered by small buyers and other industry members. Unless oligopolistic cohesion is strong, notes Scherer, such price concessions may benefit the ultimate consumer because they will have to spread throughout the industry. *Id.*

²²⁰ R. BORK, *THE ANTITRUST PARADOX* 398-401 (1978). See generally Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439 (1982).

²²¹ A Type I oligopoly is an industry where eight firms account for at least 50% of the industry's

port for Galbraith's theories.²²² For example, a 1975 analysis found that high buyer concentration is a factor which offsets the ability of sellers in concentrated markets to obtain prices in excess of direct costs. In addition, the study found that buyer and order size had a similar impact on sellers' prices and cost margins.²²³

One reason why there may have been so little empirical support for Galbraith's theory of countervailing power is that there may be no need for countervailing power in most industries.²²⁴ Galbraith postulated that in inflationary periods there is little incentive for buyers to attempt to offset oligopoly prices, since higher costs could be passed onto the consumers.²²⁵ Indeed, the Organization for Economic Cooperation and Development ("OECD") has concluded that since the competitive process would work to the advantage of the large buyer only when demand falls short of capacity, the exercise of buying power may prove to be a temporary phenomenon.²²⁶ This would be so especially if industries which have a concentrated economic power hesitate to exercise that power. For example, a concentrated industry may price competitively in anticipation of potential competition, to avoid retaliation by concentrated power on the purchasing side during an economic reversal, or to avoid potential government intervention or antitrust liabilities.²²⁷ Such behavior also ex-

sales, or twenty firms account for at least 75% of market sales. C. KAYSER & D. TURNER, ANTI-TRUST POLICY 27-37, 275-313 (1959).

²²² SCHERER, 2d ed., *supra* note 208, at 311. *But see Senate Hearings, supra* note 33, at 3 (statement of Allen Ferguson).

²²³ Lustgarten, *The Impact of Buyer Concentration in Manufacturing Industries*, 57 REV. ECON. & STATISTICS 125, 128 (1975). In addition, the Baba study found that a high and increasing sellers concentration was associated with an increase in buyer concentration. Baba, *Buying Structure and Market Performance*, 64 ECON. ANALYSIS MAG. (1977). However, Guth, Schwarz, and Whitcomb found weak support for the countervailing power theory in their survey of 53 industries. Guth, Schwarz, & Whitcomb, *Buyer Concentration Ratios*, 25 J. INDUS. ECON. 241, 251 (1977). *See also*, BUYING POWER, *supra* note 195, at 29-30.

Although these studies provide mixed empirical support for a countervailing power policy, several factors must be considered in applying their results to the concept of shippers' councils. Most of the studies have focused on the natural creation of oligopolies in markets where dominant or oligopolistic firms already exist. The natural creation of countervailing power may be inhibited by the prohibition embodied in the antitrust laws. Moreover, since the purpose of the shippers' councils proposal to promote collective action by groups of small exporters and not to facilitate the creation of countervailing oligopolies, the focus of the empirical studies may differ from the needs of shippers' councils. *See id.* at 28-29; *supra* text accompanying notes 88, 116. *But see infra* note 235.

²²⁴ Judicial antitrust doctrine supports this concept. The section 2 prohibitions on monopoly power go to its exercise, not to its existence. Therefore, countervailing power should not develop among customers of an industry whose members have market power but do not exercise such power. *See generally* *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

²²⁵ GALBRAITH, *supra* note 192, at 128.

²²⁶ BUYING POWER, *supra* note 195, at 22.

²²⁷ SCHERER, 2d ed., *supra* note 208, at 308.

plains why countervailing power fails to develop at all, since buyers would fail to perceive the need for it.²²⁸

There are two other factors that may explain why countervailing monopsony power fails to arise. First, industry conditions may be such that no firm could achieve the economies of scale necessary to successfully counteract the power of the opposing group.²²⁹ Second, in the same manner in which they may inhibit the exercise of countervailing power by a buyers' group possessing such power, the antitrust laws may be an inhibiting factor to any single firm's achieving sufficient size to develop power or for any group of firms to act collectively.²³⁰ Advocates of the countervailing power theory address these problems by arguing that if industry conditions favorable to countervailing power exist,²³¹ a legal analysis of the exercise of market power should favor a suspension of the antitrust laws if the ultimate consumer is not harmed and if the countervailing power has been exerted as a reaction to a strong market concentration.²³² Since countervailing power may aid in promoting efficiency, technological innovation, and lower prices, any group tendency to develop countervailing power should be facilitated by the government, even if the exercise of this power results in price discrimination.²³³ This analysis by the advocates of the countervailing power theory perceives governmental strengthening of countervailing power as a step similar to the strengthening of competition because the capacity of the industry for autonomous self regulation is increased.

Despite his support for antitrust exemptions for countervailing bargaining groups even in those situations where the only result would be a redistribution of profits between industries, with no pass-on to consumers, Galbraith emphasizes that official policy should not authorize an exemption or facilitate a creation of countervailing power until the industry has demonstrated an independent interest or ability to do so.²³⁴ Therefore, the issue of what tendency the export industry has demonstrated towards developing countervailing power must be addressed before legislation conferring an antitrust immunity on shippers' councils as countervailing power groups is adopted.

²²⁸ *Id.*

²²⁹ POSNER, *supra* note 216, at 51-54.

²³⁰ GALBRAITH, *supra* note 192, at 140-41.

²³¹ *Id.* at 143.

²³² *Id.*

²³³ *Id.* at 146-47.

²³⁴ *Id.* at 150.

B. The Practical Predicates for Shippers' Councils

Although some may argue that countervailing power already exists in the shipping industry because eighty percent of all exports are made by the one hundred largest exporting firms, thus negating the need for shippers' councils, there is little indication that small exporters have an inherent tendency to develop countervailing power.²³⁵ Small shippers and policy makers attribute this failure to develop countervailing power to a lack of interest in forming such power and to the fact that the antitrust laws inhibit the development of such councils.²³⁶ Both arguments contain some merit.

Small shippers claim that the antitrust laws inhibit both their decision to export and their formation of shippers' councils.²³⁷ They argue that the antitrust laws are vague and that many shippers do not have the financial resources to rely on expensive antitrust counsel to advise them in their activities. The possibility of criminal and civil convictions under the antitrust laws is sufficiently real that many small firms claim that it discourages their entry into the export trade altogether, because it increases the risk of conducting business overseas to an unacceptable level.²³⁸

This argument should be analyzed in the broader context of the general argument that the antitrust laws inhibit the conduct of all United States originated business overseas.²³⁹ American companies frequently allege that they experience a discriminatory application of these laws whereas their foreign competitors enjoy a less restrictive legal environ-

²³⁵ See *supra* note 223. The Justice Department implicitly rejected the concept of countervailing power in the liner industry when it concluded that the European National Shippers Council was not responsible for the rate differentials in the United States-Europe trades. The Department noted that if countervailing power was a correct economic theory, the dominant United States exporting manufacturers should have been able to exercise their monopsony power to eliminate the rate differentials. *Omnibus Hearings*, *supra* note 21, at 204. See also Kintner, *supra* note 159, at 983.

²³⁶ Letter from Drew Lewis, Secretary of Transportation, to Sen. Slade Gorton (February 5, 1982) reprinted in S. REP. NO. 414, *supra* note 35, at 19; *Gorton Hearings*, *supra* note 10, at 411 (statement of National Association of Beverage Importers); see also *Merchant Marine Hearings*, *supra* note 176 (statement of Eugene Milosh, American Association of Exporters and Importers).

²³⁷ *Gorton Hearings*, *supra* note 10, at 411 (statement of National Association of Beverage Importers).

²³⁸ *Export Policy, Part 6—U.S. Programs and Facilities Designed to Support Exports: Hearing Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, & Urban Affairs*, 95th Cong., 2d Sess., 17-18 (1978) (statement of Prof. Frederick W. Huszagh).

²³⁹ See generally Ongman, *Is Someone Crying "Wolf"? An Assessment of Whether Antitrust Impedes Export Trade*, 1 N.W. J. INT'L L. & BUS. 163 (1979); Davidow, *Cartels*, *supra* note 214; Baker, *Market Definition and International Competition*, 15 N.Y.U. J. INT'L L. & POL. 377 (1983); Goldsweig, Enborg & Walton, *The Impact of United States Antitrust Law on the Balance of Trade*, 15 VAND. J. TRANSNAT'L L. 751 (1982); Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography*, 15 VAND. J. TRANSNAT'L L. 765 (1982).

ment.²⁴⁰ (Indeed, as discussed in section I A., *supra*, this same argument has been made by United States liner companies in the context of shipping conference activities and provides one of the primary justifications for the Shipping Act of 1984.)²⁴¹

Although the frequency of this argument may merely reflect a private industry anathema to the antitrust laws which does not merit serious consideration, it may also reflect an underlying problem. In the context of the formation of shippers' councils, the issue presented is really two-fold. First, do the antitrust laws inhibit the collective action of shippers in dealing with shipping conferences, if such activity is viewed as a portion of domestic competition? Second, if shippers' council activities are considered part of export activity, do the antitrust laws still inhibit shippers' council activities? Finally, would either analysis differ if the council engages in consultative as opposed to negotiating activity?

1. *Shippers' Councils as a Domestic Economic Activity*

Although any shippers' council's dealings with liner conferences clearly will affect the United States' foreign commerce, an analysis of shippers' councils activities under traditional domestic antitrust law,²⁴² without an initial consideration of additional factors unique to international trade, is the proper place to commence an analysis of the legality of shippers' councils as a form of joint organizational activity. Utilizing this approach, two different types of activities should be considered: that of trade association activities on the part of a consultative form of shippers' council and that of collective buying groups for negotiating shippers' councils.

²⁴⁰ Goldsweig, *supra* note 239, at 752-53.

²⁴¹ See *supra* text accompanying notes 33-35; see also S. REP. NO. 3, *supra* note 2, at 6-8. A similar argument has been made in the area of railroad rate bureaus. Prior to the deregulation Acts of 1980, some shippers argued that the antitrust laws prohibited their collective discussion of railroad freight rates with railroad rate bureaus. The reduction of rate bureau power under section 219 of the Staggers Act renders this argument moot. See, 49 U.S.C.A. § 10706 (Supp. 1984). See Keenan, *Shipper Antitrust Immunity When Dealing with Interstate Common Carriers*, 47 I.C.C. PRAC. J. 522 (1980). *But see*, Popper, *supra* note 71.

²⁴² The Sherman Act applies to activity occurring in the domestic or foreign commerce of the United States. 15 U.S.C. §§ 1-7 (1982). The activities of shippers' councils could, in a technical sense, be considered solely domestic since such activities would, in a technical sense, be finalized in the United States. However, since the subject matter of councils' activities also affect foreign commerce, the activities would probably fall within the definition of foreign commerce activity as well. Thus, given the existence of certain antitrust exemptions for foreign commerce activity, the classification of shippers' councils activities as part of domestic or foreign trade is important. As the discussion in this section indicates, perception often accounts for more than reality in the context of the effects of the antitrust laws. See generally Davidow, *supra* note 75, at 268-70; cf. Baker, *supra* note 239, at 389.

Antitrust doctrines applicable to trade associations may provide a basis for the formation of consultative shippers' councils organized to exchange production and service information with shipping conferences and to aid in the rationalization of services. The cases that form the basis for this doctrine provide that activities of trade associations which result in a wide spread exchange and dissemination of information in an unconcentrated market are perceived as aiding efficiency and are thus permitted under a rule of reason analysis, provided that collusive activity which facilitates predatory acts or market foreclosure is avoided.²⁴³ Under this analysis, the answer to the question of whether the activity is illegal will often depend on the membership and market power of the group and the degree to which the activity is related to price stabilization or price fixing as opposed to information dissemination. Recent Department of Justice Business Review Letters support this analysis.²⁴⁴

The membership and non-discrimination provisions of the council agreement will be crucial to a determination of the legality of a consultative shippers' council. Because a shippers' council will affect the economics of at least two industries—both the industry or industries represented by the council members and the liner conference industry—the consultative council, by definition, differs from that of a traditional trade association, which is usually composed of members of only one industry dealing with that industry's mutual problems. Recognizing that trade associations experience a greater exposure to antitrust liability when they are either overly exclusive as to participation or when their activities affect a diversity of related markets or industries, a consultative shippers' council may have to analogize its functions to those of a stock exchange or a railroad terminal and provide for membership across a broad spectrum of industries on a national or trade by trade basis in order to comply with the antitrust laws prohibiting competitive discrimination.²⁴⁵ Without open membership, competitors of the conference, a limited member shippers' council, or the council members, could argue that in exchanging and acting upon information as to service (and cost)

²⁴³ See *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). See *Selden*, *supra* note 216, at 1580.

²⁴⁴ See SULLIVAN, *supra* note 215 at 265-311.

²⁴⁵ See *Silver v. NYSE*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); See generally *Davidow*, *supra* note 75, at 284-85. Cf. *Popper*, *supra* note 71, at 319 n.226; *Selden*, *supra* note 216, at 1582; *Brodley*, *supra* note 157, at 1551-52, 1563-66; *United States v. Sugar Inst.*, 15 F. Supp. 817, at 839-60 (S.D.N.Y. 1934), *aff'd* 297 U.S. 553 (1936).

needs, the conference, council, or some combination thereof, are engaging in competitive market foreclosure activities, perhaps through the vehicle of exclusive or preferential treatment constituting a group boycott, price or service discrimination, horizontal market or customer allocations, or even through the establishment of a de facto vertical integration between shippers and conferences for the provision of export shipping services.²⁴⁶

Accordingly, even if a standard antitrust analysis under trade association doctrine leads to the conclusion that consultative councils can organize in the domestic economy, the presence of the antitrust laws may still inhibit the small and medium sized shipper from forming such groups, because the activities of such groups, especially in the exchange of information with liner conferences, are susceptible to expensive litigation initiated by non-council shippers.²⁴⁷ It is the possibility of liability, not the success of the arguments, that may inhibit the formation of shippers' councils.

Case law and commentary applicable to the antitrust authorization of negotiating shippers' councils is limited. The few commentators who have addressed the issue of group buying power generally have condemned it as being highly prone to anticompetitive collusive activity while providing only speculative potential benefits. In general, these commentators have stated that, because they involve combinations of horizontal competitors exchanging cost data and making arrangements concerning prices and marketing, such groups should be found to have violated the antitrust laws unless they lack market power, provide for independent action and price competition, and are economically justified as a method of achieving economies of scale necessary to meet the competitive advantage of large buyers.²⁴⁸

Case law and the enforcement policies of the Department of Justice and the Federal Trade Commission reinforce this conclusion. Whereas the courts and the Federal Trade Commission have left undisturbed pos-

²⁴⁶ Letter from Charles A. Bowsher, Comptroller General of the United States, to Rep. Peter W. Rodino (June 1, 1983) reprinted in H.R. REP. NO. 53, *supra* note 3, at 49. Cf. Carr, *Railroad-Shipper Contracts Under Section 208 of the Staggers Rail Act of 1980: An Antitrust Perspective*, 50 I.C.C. PRAC. J. 29, 39 (1982); Popper, *supra* note 71, at 293-97; Peippo, *supra* note 89, at 517, 521; Selden, *supra* note 216, at 1579; Mezines, *supra* note 181, at 751; Brodley, *supra* note 157, at 1530-34.

²⁴⁷ Cf. Carr, *supra* note 246, at 38-41.

²⁴⁸ Popper, *supra* note 71, at 298-300; Selden, *supra* note 216; Mezines, *supra* note 216; Brodley, *supra* note 157, at 1534, 1569-73. Brodley recommends that the membership of such groups be limited to permit their achievement of economies of scale but not of monopsony power. See also Davidow, *supra* note 75, at 272-74, 284. Market power has been defined at 10 to 15% market share. *Id.* at 273 n.27; Brodley, *supra* note 157, at 1553 n.102.

sible group buying activities where the group lacked market power and merely aggregated purchases in order to obtain the benefits of a quantity discount, the courts have been quick to condemn any activity approximating collective negotiation of such discounts on the grounds that the activity constitutes both a group boycott and an attempt to fix prices in restraint of trade.²⁴⁹ The fact that such activity is engaged in by purchasers as opposed to sellers in order to lower, rather than stabilize or raise, prices has been deemed irrelevant by the courts.²⁵⁰

While the pro-competition considerations reflected in the group buying cases and the commentators' analysis (and also contained in the Congressional proposals to authorize shippers' councils) may protect against any potential ancillary anticompetitive effects of such joint activity, they also mitigate against the very purpose of negotiating shippers' councils, which require market power and group cohesion as tools for establishing countervailing power.²⁵¹ Nevertheless, even assuming that a rule of reason analysis would apply to negotiating shippers' councils lacking market power and providing for open membership and independent action, it is still uncertain whether such a council could effectively negotiate transportation rates and contracts without potential antitrust exposure.²⁵²

Recent Business Review Letters issued by the Department of Justice, however, have stated that the Department will not object to joint ventures between shippers in the domestic transportation industry to disseminate price information, cost information, or to negotiate volume discount rates on behalf of members of the joint venture, but only if specific, cohesion-defeating safeguards exist.²⁵³ In one such letter, the Depart-

²⁴⁹ *Live Poultry Dealers Protective Ass'n v. United States*, 4 F.2d 840 (2d Cir. 1924); *Brodley*, *supra* note 157, at 1569; *Fugate, The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANSNAT'L L. 673, 694 nn.121-22 (1982); *Mezines*, *supra* note 216, at 746-47; *Cf. United States v. Topco Assocs.*, 405 U.S. 596, 598-99, 605 (1972); *National Macaroni Mfrs. Ass'n v. Federal Trade Comm'n*, 345 F.2d 421 (7th Cir. 1965); *United States v. Sugar Inst.*, 15 F. Supp. 817 (S.D.N.Y. 1934), *aff'd*, 297 U.S. 553 (1936). *But see*, *Kintner*, *supra* note 159; *Selden*, *supra* note 216, at 1570-71. *See generally* *Klors, Inc. v. Broadway Hale Stores*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941); *Davidow*, *supra* note 75, at 285-87.

²⁵⁰ *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *Live Poultry Dealers Protective Ass'n*, 4 F.2d at 842-43.

²⁵¹ *Cf. S. REP. NO. 27*, *supra* note 175, at 19, 29; *Brodley*, *supra* note 157, at 1552.

²⁵² *Cf. Broadcast Music, Inc. v. United States*, 441 U.S. 1 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Topco Assocs.*, 405 U.S. at 606; *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). *But see* *Catalano Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *Medical Arts Pharmacy v. Blue Cross & Blue Shield*, 518 F. Supp. 1100, 1106 (D. Conn. 1981); *Selden*, *supra* note 216, at 1580.

²⁵³ *See* Letter from J. Paul McGrath, Assistant Attorney General, Antitrust Division, Depart-

ment sanctioned the creation of a "shippers' council" in the domestic trucking industry whereby a representative of the council contacts individual carriers to negotiate, on behalf of all council members, across-the-board discounts from existing less-than-truckload rates. The council attempts to obtain discounted rates on a broad territorial basis and does not negotiate freight rates on specific commodities. (In this context it functions much like an automobile rental group discount for professional organizations.) Each council member is advised by mail of the resulting discounts, and no member is required to use a discount or a particular carrier, nor is any member prohibited from individually negotiating its own freight rate with any carrier. Similarly, neither the council nor its members may collectively agree to tender a particular volume of traffic to any carrier.²⁵⁴

In a similar proposal, the Department has stated that it will not challenge a joint venture by shippers' associations whereby the venture, acting independently, seeks additional freight from non-members in order to facilitate the member shippers' associations' ability to obtain volume discounts. The joint venture for this group, however, would not negotiate freight rates, each member would be individually responsible for the rates charged to non-members.²⁵⁵

ment of Justice, to Joe G. Fender, Esq. (February 15, 1984) [hereinafter cited as Freightcon letter]; Letter from William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice to Daniel J. Sweeney, Esq. (November 28, 1983) [hereinafter cited as NASSTRAC II letter]; Letter from William F. Baxter to Herbert O. Whitten (November 30, 1983) [hereinafter cited as Whitten letter]; Letter from William F. Baxter to Mark M. Levin, Esq. (October 23, 1983) [hereinafter cited as Western Railroad Traffic Association (WRTA) letter]; Letter from Ronald G. Carr, Acting Assistant Attorney General, Antitrust Division, to Patrick M. Byrne, (February 4, 1983) [hereinafter cited as National Tank Truck Carriers (NTCC) letter]; Letter from Helmut F. Furth, Acting Assistant Attorney General, Antitrust Division to J.N. Baker and Bruce B. Wilson, (May 22, 1984) [hereinafter cited as Inflation Cost Recovery Railroad Rate Adjustments (or RCCR) letter]. *But see* NASSTRAC I letter, *supra* note 167. (Business Review Letters available upon request from the Department of Justice, Antitrust Division Offices.)

²⁵⁴ NASSTRAC II letter, *supra* note 253. The NASSTRAC members are diverse companies that ship less-than-truckload cargo. Some members compete directly with each other in the goods they ship. Members ship about 15% of the less-than-truckload traffic carried by general freight motor carries. Such traffic generates over \$10 billion in freight revenues yearly. To a large degree, the NASSTRAC II letter creates a shippers' association. Whereas domestic shippers' associations have functioned more on the basis of consolidating freight to secure generally available volume discounts, the NASSTRAC II letter will permit NASSTRAC to negotiate discounts for non-aggregated goods as well as aggregated volume shipments. Given the service contract and shippers' associations provisions of the Shipping Act of 1984, it can be anticipated that this approach will be utilized in the international ocean shipping industry. *But see* NASSTRAC I letter, *supra* note 167; *infra* notes 260-61.

²⁵⁵ Freightcon letter, *supra* note 253. The Freightcon approach differs from that of NASSTRAC. Whereas NASSTRAC is interested in securing actual rate discounts for all of its members, and seeks to develop bargaining power through an implied guarantee that NASSTRAC members will direct their cargo to carriers negotiating discounts with NASSTRAC, Freightcon is interested in securing

Although these Business Review Letters permit certain joint activities by groups of shippers, they also inhibit group action. First, participation in the group is voluntary, with no right to exchange cost information or to agree on rates.²⁵⁶ Negotiation of rates is conducted by an independent third party, who, at best, can arrange merely for a broad, geographic discount in rates. Second, and more importantly, each favorable letter has dealt with groups that represent only fifteen percent (or less), of the relevant transportation market. This fact, combined with the prohibition against committing specific volumes of cargo to identified carriers, diffuses much of the negotiating power of said groups.²⁵⁷ This latter point is particularly important in the context of the Shipping Act of 1984's failure to confer an antitrust immunity on its shippers' associations provisions, because the associations, while permitted to enter into service and volume contracts with specific carriers, may lack individual market power. Combined groups of shippers' associations may need to form in order to obtain market power and to assume the contemplated role of shippers' councils in the conference system. However, the Department of Justice's Business Review Letters on this type of activity (specifically referenced in the Conference Report to the Shipping Act of 1984) indicate that such a group would be limited to the activities discussed above, and would be allowed to represent no more than fifteen percent of the relevant market.²⁵⁸ In addition, while the Department has

additional volumes of cargo for its member shippers' associations. Freightcon members have previously attempted to broaden their traffic bases by individually soliciting the membership of shippers located in the various locations from which the associations receive cargo. These attempts have been unsuccessful because no single association provides service to more than one destination area; the shippers would have had to become members of numerous associations. Freightcon thus embodies a broad geographic area from which shipments of non-members may be solicited and shipments belonging to members of the participating shippers' associations may be consolidated. Although this will not lower rates charged to shipper association members, it will reduce administrative and transaction costs, including freight consolidation and distribution costs. It will also permit member shippers' associations to take greater advantage of existing volume shipment rate discounts. *Id.*

²⁵⁶ See NASSTRAC II letter, *supra* note 253, Freightcon letter, *id.* This emphasis on confidentiality and independent action is not limited to the freight consolidation proposals but has also been emphasized in other Department of Justice Business Review Letters involving the transportation industry. *E.g.*, Whitten letter, *supra* note 253, permits motor, rail, and other carriers to participate in a nationwide organization for the computerization of rate and tariff information that third parties could subscribe to and access. The organization also will perform computerized pricing based upon mathematical formulae. However, each subscribing carrier will set rates independently and will keep its cost information confidential. The WRTA letter, *supra* note 253 (rate dissemination with no interaction between competing carriers), NTTCC letter, *id.* (compiling and aggregating confidential cost data for comparison of members' operating efficiencies) and RCCR letter, *id.* (collect, disseminate, an file inflation cost recovery railroad rate and joint rate adjustments) will have a similar effect.

²⁵⁷ See NASSTRAC II letter, *supra* note 253 and Freightcon letter, *id.* NASSTRAC I letter, *supra* note 167.

²⁵⁸ See *infra* note 261.

stated in these letters that it would not challenge the status of the joint ventures, it has declined to state its enforcement intentions in regard to the shippers' associations participating in these ventures. The absence of such a guarantee may serve as a deterrent to shippers participation in such ventures.²⁵⁹

Finally, in an earlier version of the domestic trucking industry shippers' council Business Review Letter, the Justice Department refused to state that it would decline from prosecuting the proposed shippers' council if it were formed to consolidate small shipments and negotiate specific contracts in the domestic trucking industry.²⁶⁰ Even assuming the lack (or intent to achieve) market dominance or monopsony power, the Department stated that the uniformity of transportation rates achieved by the council members would restrict their price competition with one another and other competitors in the resale market where the shipped goods are sold.²⁶¹ Accordingly, the Department stated, the council

²⁵⁹ See Freightcon letter, *supra* note 253.

²⁶⁰ NASSTRAC I letter, *supra* note 167. See also the WRTA letter, *supra* note 253, where the Department of Justice approved a proposal to collect, list, and disseminate deregulated transportation rates for all domestic modes of carriers. These activities closely resemble those of a domestic consultative shippers' council. See also NTTC and RCCR letters, *id.*, and Brodley, *supra* note 157, at 1569-70; Davidow, *supra* note 75, at 277. See also *supra* note 71.

²⁶¹ Under the NASSTRAC I letter, the council would have formed a shippers' council to negotiate (1) flat discounts on less-than-truckload and volume shipments with motor carriers and motor carrier rate bureaus; (2) point-to-point commodity rates with motor carrier rate bureaus; and (3) contracts with railroads and contract motor carriers. While noting that the agreement could reduce price competition, or facilitate price collusion, in the final product market, the Department of Justice found that the agreement would not be anticompetitive, because the council would not have limited the quantity of goods that its members could ship, and because it represented less than 15% of the relevant market and also allowed its members to negotiate individually with carriers. NASSTRAC I letter, *supra* note 167; NASSTRAC II letter, *supra* note 253.

There are several reasons why this analysis arguably would not apply to the same organizational structure acting as a shippers' association under the Shipping Act of 1984. First, end market competition may be less important in foreign commerce than in its domestic counterpart, although this conclusion would be difficult to support under the Foreign Antitrust Improvements Act of 1982 if the shippers' council (or shippers' association) activity reduced competition between exporters or gave a competitive advantage to some exporters over others. Second, the joint negotiating activities of shippers' associations are explicitly authorized by §§ 3(24) and (10)(b)(12) of the Shipping Act of 1984. Under proposed FMC regulations, this authorization would extend to specific commodity, geographic, volume, and revenue-based service contracts. Thus, the NASSTRAC letters' concern over specific, as opposed to generalized, group activity may be obviated by the specific provisions of the Shipping Act.

Under a Shipping Act/Business Review analysis, however, the 15% market power rule, discussed in the NASSTRAC and Freightcon letters, would become important. The ability of shippers' associations to affect freight rates becomes crucial because the Act specifically defines such associations as groups which consolidate small volume shipments to obtain volume discounts, and specifically denies shippers' associations an antitrust immunity. Under the NASSTRAC letters, joint activities appear to become suspect when they occupy 15% of the market. However, this figure could vary depending on the specific commodities shipped through an association. An association

would unreasonably restrain competition among horizontal competitors and could be prosecuted, if not on a per se basis, under a rule of reason analysis.²⁶² Therefore, it must be presumed that a negotiating shippers' council of the type necessary to significantly counterbalance conference power would be subject to extensive potential antitrust liability. Indeed, most of the membership and negotiating requirements necessary for a strong bargaining council would probably be held to be per se illegal.²⁶³

2. *Shippers' Councils as Engaged in Foreign Activity*

The analysis of antitrust liability for shippers' councils perceived to be engaged primarily in foreign trade is very similar to that outlined above for the domestic industry, the major distinction in analysis being the existence of additional guidelines for exporters as to the scope of the antitrust laws. Opponents of antitrust exemptions for exporters argue that both the Department of Justice guidelines for joint ventures contained in the Department of Justice *International Guideline*, Business Review Procedures,²⁶⁴ and the antitrust effects doctrine of the *Alcoa*²⁶⁵ decision adequately inform United States companies as to whether their activities are permitted.²⁶⁶ Nevertheless, even if the permissible scope of export activities is broader under the *Alcoa* and Department of Justice guidelines, the key factor in the analysis is still whether the antitrust laws are so vague as to inhibit the formation of councils. Although there

that represents a large percentage of particular goods could achieve suspect market power, even if it represents less than 15% of the market. In such a case, the NASSTRAC II approach arguably would be necessary to resolve the antitrust problem. The same analysis would, of course, apply to negotiating shippers' councils, whether or not they seek recognition under the shippers' associations provisions of the Shipping Act of 1984.

²⁶² The situation may be analogous to the use of a delivered pricing base point formula. Cf. Hay, *supra* note 220, at 462-69; *Cement Mfrs. Ass'n*, 268 U.S. at 597-99; *Maple Flooring Mfrs. Ass'n*, 268 U.S. at 572; *Sugar Inst.*, 15 F. Supp. at 841-57.

²⁶³ *Live Poultry Dealers' Protective Ass'n*, 4 F.2d, at 843; Brodley, *supra* note 157, at 1552-53; Davidow, *supra* note 75, at 274; Kintner, *supra* note 159, at 1000-03, 1005; Popper, *supra* note 71, at 302-05; Selden, *supra* note 216, at 1581-82.

²⁶⁴ 28 C.F.R. § 50.6 (1982); see Goldsweig, *supra* note 239, at 755-56. Normally, the Department will prosecute only those offenses that injure consumers in the United States or restrain the export opportunities of United States residents. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, 4-5 (rev. March 1, 1977). See generally Fox, *Updating the Antitrust Guide for International Operations—A Greener Light for Export and Abroad*, 15 VAND. J. TRANSNAT'L L. 709 (1982).

²⁶⁵ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). See also *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1291 (3rd Cir. 1979); *Timberlane Lumber v. Bank of America, Nat'l Trust and Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976); *Todhunter-Mitchell & Co. v. Anheuser Busch, Inc.*, 383 F. Supp. 586 (E.D. Pa. 1974).

²⁶⁶ Garvey, *The Foreign Trade Antitrust Improvements Act of 1981*, 14 L. & POL'Y. INT'L BUS. 1, 6. But cf. H.R. REP. No. 686, 97th Cong., 2d Sess. (1982).

reasonably would be less official concern whether shippers' councils members engaged in price competition in their ultimate foreign market (as opposed to the domestic shippers' council situation discussed, *supra*), this inhibition has created a very real concern for shippers. This concern has been exhibited by the fact that the Congress has received testimony from at least one organization that was seeking to develop a shippers' council that it was deterred from further activity when the Department of Justice issued a Business Review Letter which was overly vague as to its enforcement intent as to shippers' councils activities in the export shipping industry.²⁶⁷ Similarly, the European National Shippers Council has testified that it no longer consults with liner conferences in the United States trade because it is afraid of potential liability.²⁶⁸ In response to this testimony, every regulatory reform bill introduced to the Congress has contained provisions specifically exempting foreign shippers' councils from an application of the United States antitrust laws, although such a provision was ultimately not included in the Shipping Act of 1984.²⁶⁹

In addition, although many commentators have rejected the argument that the antitrust laws are overly vague, recently enacted legislation has sought to clarify these laws by making it explicit that their application will apply only to conduct that will have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and domestic exports.²⁷⁰ Unfortunately, it is doubtful that such expanded general re-statements of the antitrust laws will aid the formation of shippers' councils, because the councils' activities entail aspects of both domestic and international commerce and the 1982 amendments do not afford protection for exporters who adversely affect the competitive position of other exporters.²⁷¹ Unless a clarification as to the specific activity and

²⁶⁷ *Closed Conference Hearings, supra* note 22, at 187 (testimony of Edwin A. Elbert, American Importers Association); *cf. S. REP. NO. 27, supra* note 175, at 19.

²⁶⁸ *Gorton Hearings, supra* note 10, at 257 (statement of J.F. Muheim, European National Shippers Council); *cf. Davidow, Cartels, supra* note 214, at 362-63, which contains other examples of how the Justice Department has acted towards foreign buying cartels.

²⁶⁹ *See S. 47, 98th Cong., 1st Sess. § 8(a)(6); H.R. 1878, 98th Cong., 1st Sess. § 7(a)(5); H.R. REP. NO. 600, supra* note 44, at 37.

²⁷⁰ Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1982).

²⁷¹ The 1982 clarifying Acts were oriented merely towards export activity and did not apply to import activity. Under these new Acts, trade associations, such as the National Industrial Traffic League and the American Association of Importers, would remain inhibited from using the Acts as an umbrella for shippers' councils, because some of their members import activities would not be exempt. Similarly, the Act does not extend to the issue of intermodalism because it is a domestic activity outside the scope of the Export Trading Company Act. 15 U.S.C. §§ 4001-4003 (1982). *See infra* notes 330-40 and accompanying text. *See also* Bruce & Peirce, *Understanding the Export Trading Company Act and Using (or Avoiding) Its Antitrust Exemptions*, 38 *BUS. LAW.* 975, 990-92

group exists, small and medium sized shippers are likely to use the same arguments as the United States flag ships make in arguing for a stronger conference system and will refuse to form shippers' councils because they are inhibited by the potential for liability.²⁷² It is therefore probable that the uncertainties existing under the antitrust laws and continuing under the recently enacted foreign trade amendments to the antitrust laws may preclude the formation of shippers' councils.²⁷³

3. *A Webb-Pomerene Act Analysis*

Of course, the foregoing analysis ignores provisions of the export laws that create a specific antitrust exemption for certain export activities. At issue is whether the antitrust exemptions contained in the Webb-Pomerene Act of 1918²⁷⁴ and the Export Trading Company Act of 1982²⁷⁵ could be used to justify the creation of shippers' councils. If recourse to the Webb-Pomerene Act has been available, then the question arises as to whether the export industry's failure to use the Act is a reflection of inadequacies in the Act or a reflection of structural aspects of the industry. If the failure reflects statutory inadequacies, then the role of the Webb-Pomerene amendments and the other provisions of the Export Trading Company Act of 1982 must be examined in the context of shippers' councils.

The Webb-Pomerene Act may serve as a vehicle for the creation of shippers' councils. The Webb-Pomerene Act was enacted in 1918 to specifically facilitate the creation of countervailing power in United States export trade,²⁷⁶ because Congress perceived small and medium sized exporters as being at a competitive disadvantage in dealing with foreign buying cartels and in need of an exemption from the antitrust laws to facilitate their achieving the economies of scale necessary to counterbalance this perceived power.²⁷⁷ An explicit purpose of the Act was to enable small and medium sized shippers to collectively negotiate rates with

(1983); Davidow, *Cartels*, *supra* note 214, at 359-60; Hawk, *supra* note 34, at 241; Unkovic & LaMont, *The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion*, 87 DICK. L. REV. 205, 214-15 (1983).

²⁷² See *supra* text accompanying notes 33-35.

²⁷³ Some commentators believe that the Antitrust Improvements Act will also inhibit the development of Export trading companies. Garvey, *The Foreign Antitrust Improvements Act of 1981*, 14 L. & POL'Y. INT'L BUS. 1 (1982).

²⁷⁴ 15 U.S.C. §§ 61-66 (1976).

²⁷⁵ 15 U.S.C. §§ 4001-4003 (1982).

²⁷⁶ FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50 YEAR REVIEW, 3-4 (1967) [hereinafter cited as 50 YEAR REVIEW]; see also FEDERAL TRADE COMMISSION STAFF UPDATE: 10 YEARS LATER (1978) [hereinafter cited as 10 YEAR REPORT].

²⁷⁷ 50 YEAR REVIEW, *supra* note 276, at 6-7.

shipping conferences, but the Act has been used for this purpose on only a very limited basis.²⁷⁸

The Webb-Pomerene Act creates an antitrust exemption for export associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade",²⁷⁹ provided that the association does not act "in restraint of trade within the United States" or "in restraint of the export trade of any domestic competitor of such association".²⁸⁰ In addition, no association may, "either in the United States or elsewhere, enter into any agreement, understanding or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States or commodities of the class exported by (the association) or which substantially lessens competition within the United States or otherwise restrains trade therein."²⁸¹ The Act further provides that export associations must be registered within thirty days of creation with the Federal Trade Commission to be entitled to the Act's antitrust exemption²⁸² and that the FTC monitor the associations and make suggestions for the adjustment of any business activity in which they engage.²⁸³ An association's failure to comply with these suggestions may result in the Commissions' referring the issue to the Department of Justice for prosecution of the activity as a violation of the antitrust laws.²⁸⁴

Judicial decisions interpreting the Webb-Pomerene Act have been limited.²⁸⁵ The Act has been interpreted as not permitting joint licensing activities,²⁸⁶ joint bidding on United States government financed projects,²⁸⁷ restrictions on use of members' patents,²⁸⁸ export marketing agreements with non-association member United States and foreign competitors,²⁸⁹ and the establishment of joint foreign subsidiaries.²⁹⁰ Nevertheless those activities which may inevitably result in a restraint of trade, including the use of an association as an exclusive foreign outlet, refusals of an association to handle the exports of American competitors, deter-

²⁷⁸ *Id.* at 4; 10 YEAR REPORT, *supra* note 276, at 11, 16; Fugate, *supra* note 249, at 686-87.

²⁷⁹ 15 U.S.C. § 62 (1976).

²⁸⁰ *Id.*

²⁸¹ *Id.*; *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 67 (S.D.N.Y., 1949).

²⁸² 15 U.S.C. § 65 (1976).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS, *supra* note 11, at 297.

²⁸⁶ *United States v. Minnesota Mining and Mfg.*, 92 F. Supp. 947 (D. Mass. 1950).

²⁸⁷ *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

²⁸⁸ *Minnesota Mining and Mfg.*, 92 F. Supp. at 964.

²⁸⁹ *United States Alkali Export Ass'n*, 86 F. Supp. at 74.

²⁹⁰ *Minnesota Mining and Mfg.*, 92 F. Supp. at 963.

mination of quotas and marketing policies, establishment of resale prices at which foreign distributors should sell, and limitations on the number of distributors permitted to handle members' products are permitted by the Act.²⁹¹ In essence, if the restraints are minimal and ancillary and are the inevitable consequences of the actions necessary to achieve association cohesion in the export trade, the activity is permissible under the Webb-Pomerene Act.²⁹²

a Success of the Act

After 64 years of existence, the Webb-Pomerene Act is generally perceived to be a failure.²⁹³ Currently, fewer than two percent of all exports utilize Webb-Pomerene associations,²⁹⁴ and fewer than 19 percent used the associations during its peak use in the 1930s.²⁹⁵ In 1979, there were only 33 Webb-Pomerene associations in existence.²⁹⁶ Despite recent studies which concluded that the Act should be revoked because it is more effective in facilitating domestic restraints of trade than it is in promoting exports,²⁹⁷ last year President Reagan signed the Export Trading Company Act of 1982,²⁹⁸ which created a second, similar antitrust exemption for export associations.²⁹⁹

The Export Trading Company Act of 1982 addresses several criticisms raised in studies on the failure of the Webb-Pomerene Act to promote exports by small and medium sized shippers. One is the by now familiar argument that the Webb-Pomerene Act's antitrust exemption is vague and inhibits the development of associations.³⁰⁰ Another is the Act's alleged failure to provide sufficient incentives, especially financial and information related resources, to enable small and medium sized exporters to use the act.³⁰¹ Several recent studies addressed these issues by

²⁹¹ *Id.* at 965.

²⁹² *Id.*; See generally Fugate, *supra* note 249, at 689-92.

²⁹³ Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J. L. & ECON. 461 (1970).

²⁹⁴ S. REP. NO. 97, *supra* note 175, at 18.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Larson, *supra* note 293, at 497-99.

²⁹⁸ 15 U.S.C. §§ 4001-4003 (1982).

²⁹⁹ *Id.* See generally Bruce & Peirce, *supra* note 271; Fugate, *supra* note 249; Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 NOTRE DAME LAW. 743 (1983); Unkovic & LaMont, *supra* note 271; Williams & Baliga, *The United States Export Trading Company Act of 1982*, 17 J. WORLD TRADE L. 224 (1983); Note, *The Export Trading Company Act of 1982: Export Trade Comes of Age in the United States*, 34 S.C. L. REV. 757 (1983).

³⁰⁰ S. REP. NO. 27, *supra* note 175, at 19; see also, McDermid, *The Antitrust Commission and the Webb-Pomerene Act, A Critical Assessment*, 37 WASH. & LEE L. REV. 105, 119-24 (1980).

³⁰¹ Williams & Baliga, *supra* note 299, at 225. Cf. S. REP. NO. 27, *supra* note 175, at 6. *But see*

recommending that the certification procedure for export trading companies and associations be transferred from the Federal Trade Commission to the Department of Commerce and that the antitrust exemption be expanded to encompass services.³⁰² Although the Export Trading Company Act did not amend the Webb-Pomerene Act, it did embody many of these proposals in the antitrust exemption that it created for export trading companies. In addition, a fundamental purpose of the new Act is to permit bank holding companies to own a percentage of trading companies established to promote export trade.³⁰³ The Act contemplates that small and medium sized exporters can effectively utilize the expertise and existing international financial and information networks available to the banks.³⁰⁴

Although the dual purposes of the Export Trading Company Act of 1982 of strengthening the antitrust exemptions for export associations and promoting the creation of new export brokerage firms are complementary, there is also a fundamental contradiction inherent in these goals. The Act implicitly recognizes that the existence of an antitrust exemption for combined export activities is not a sufficient incentive for the promotion of collective activity by small and medium sized exporters and therefore creates an alternative method to facilitate exports from this segment of the economy.³⁰⁵ This inherent contradiction is not inadvertent but would instead appear to reflect economic studies of the Webb-Pomerene Act which demonstrate that the nature of the export industry, not the vagueness of the Act's antitrust exemption, is responsible for its failure to promote small and medium sized manufacturer's exports.³⁰⁶ These studies imply that an antitrust exemption to promote collective activity by exporters must fail because small and medium sized exporters do not exhibit tendencies to develop either concentrated or countervailing power. Therefore, although the Export Trading Company Act embodies concepts similar to the Webb-Pomerene provisions for export associations, the Act really represents an alternative to export promotion which incorporates the results of the export industry studies.³⁰⁷ In the

HAYS ASSOCIATES, REPORT TO THE DEPARTMENT OF COMMERCE (Mar. 1977) reprinted in *Export Trading Companies and Trade Associations: Hearings on S.864, S.1499, S.1663, and S.1744, Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 1st Sess. 423-625 (1979) [hereinafter cited as HAYS REPORT].

³⁰² REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS, *supra* note 11, at 304.

³⁰³ 15 U.S.C. § 4001(b) (1982).

³⁰⁴ S. REP. NO. 27, *supra* note 175, at 6; see also Ferchill, *Banks and the Export Trading Company Act of 1982*, 6 FORDHAM INT'L L. J. 265 (1982-83).

³⁰⁵ Cf. Williams & Baliga, *supra* note 299, at 233-34.

³⁰⁶ 50 YEAR REVIEW, *supra* note 276, at 61.

³⁰⁷ *Id.* at 58; S. REP. NO. 27, *supra* note 175, at 4-5.

context of the creation of shippers' councils, the factors underlying this shift in export policy may also dictate the failure of such councils and the need to explore alternative methods to strengthen shippers' bargaining power.

b Federal Trade Commission Studies: Countervailing Power in the Export Trade

Federal Trade Commission reports released in 1967 and 1978 are the most influential studies of the Webb-Pomerene Act.³⁰⁸ These studies, in conjunction with a 1977 Department of Commerce sponsored study on the feasibility of export trading companies³⁰⁹ and an OECD report on export cartels,³¹⁰ demonstrate that although the theory of countervailing and concentrated power is applicable to some segments of the export industry, it is not a factor in the behavior of small and medium sized firms.

The failure of Webb-Pomerene associations is reflected by the fact that they handled only two to twelve percent of total U.S. exports between 1920 and 1965.³¹¹ In addition, fewer than 25 percent of all Webb-Pomerene associations lasted longer than ten years³¹² and only 36 percent lasted longer than five years.³¹³ The basic cause for this instability has been a lack of cohesion among members of export trade associations.³¹⁴ Frequently cited reasons for the dissolution of associations include internal member dissension, poor management, preferences for export trading companies, lack of any advantage in belonging to an association, and changing export markets, which place the individual firm in a better position than the export association to negotiate prices and sales terms.³¹⁵ Dissolved Webb-Pomerene associations often re-form as service organizations providing ancillary assistance to exporters.³¹⁶

The Federal Trade Commission's conclusions as to the traits necessary for successful Webb-Pomerene associations also support the countervailing power theory. Successful Webb-Pomerene associations tend to develop in Kaysen-Turner Class I oligopolies,³¹⁷ since the ability to maintain group cohesion in the division of markets, setting of prices, and

³⁰⁸ See *supra* note 276.

³⁰⁹ HAYS REPORT, *supra* note 301.

³¹⁰ O.E.C.D., EXPORT CARTELS, A REPORT OF THE COMMITTEE OF EXPORTS ON RESTRICTIVE BUSINESS PRACTICES (1974).

³¹¹ 50 YEAR REVIEW, *supra* note 276, at 23.

³¹² *Id.* at 24.

³¹³ *Id.*

³¹⁴ *Id.* at 26-27.

³¹⁵ *Id.*

³¹⁶ *Id.* at 27.

³¹⁷ *Id.* at 45-46.

in other joint activities requires an association composed of large firms but limited in membership to less than ten firms.³¹⁸ In addition, since product differentiation is not susceptible to joint marketing activities, the successful association also markets a homogenous product, such as basic commodities and raw materials.³¹⁹ Usually, this product already enjoys the advantage of a dominant world position before the association is created.³²⁰

The conclusion that only leading firms in concentrated markets can create successful Webb-Pomerene associations has led the FTC to recommend that the antitrust exemption be repealed or that a needs test be created in order to preclude conferring an antitrust exemption on corporations which could easily export on their own.³²¹ Many of the basic information dissemination functions of the Webb-Pomerene associations, often the only true service that they perform, could be performed easily by trade associations.³²² In addition, there has been little empirical support for the proposition that an antitrust exemption is needed to counteract foreign buying cartels.³²³ Not only have few Webb-Pomerene associations cited the existence of foreign buying cartels as a reason for their creation,³²⁴ but one commentator has implied that the attraction of an antitrust exemption, not the need to develop countervailing power, underlies the creation of these associations.³²⁵ As would be expected, since the majority of exporters who participate in a Webb-Pomerene association are competitors in the domestic economy, the associations also have a tendency to have their anticompetitive activities spill over into their domestic markets.³²⁶

4. *Application of the Webb-Pomerene Experience to Shippers' Councils*

The argument may be made that the failures of the Webb-Pomerene associations would not necessarily be repeated by shippers' councils. For example, if the activities of shippers' councils were to be strictly confined to the consultation or negotiation of rates, group cohesion should not be

³¹⁸ *Id.* at 33.

³¹⁹ *Id.* at 32.

³²⁰ *Id.* Essentially, these are the requirements for a successful cartel. *Cf.* Hay, *supra* note 220.

³²¹ 50 YEAR REVIEW, *supra* note 276, at 67-70.

³²² *Cf. Id.* at 49; Larson, *supra* note 293, at 466-68.

³²³ Note, *The Webb-Pomerene Act: A Re-examination of Export Cartels in World Trade*, 19 VA. J. INT'L L. 151, 164 (1978).

³²⁴ 50 YEAR REVIEW, *supra* note 276, at 58; Larson, *supra* note 293, at 485-86.

³²⁵ 50 YEAR REVIEW, *supra* note 276, at 10; *cf.* Larson, *supra* note 293, at 497-99; REPORT OF THE COMMISSION FOR THE REVIEW OF ANTITRUST LAWS, *supra* note 11, at 299-300.

³²⁶ See DEPARTMENT OF JUSTICE, REPORT ON THE TASK GROUP ON ANTITRUST IMMUNITIES 21 (1977).

as difficult to obtain as in the case of an association, where a broad range of activities is contemplated.³²⁷ Similarly, if the activity is limited solely to arranging the shipment of goods overseas, there should be a much more limited opportunity for the domestic spillover of anticompetitive effects.³²⁸

Unfortunately, these arguments tend to ignore the fact that ocean transportation is only one segment of the total exporting process. It is highly probable that successful shippers' councils will be similar to successful Webb-Pomerene associations, because the ability to successfully negotiate rates, consolidate shipments, or exchange service information would require a thorough disclosure by all participants of their total marketing strategies, cost structures, and export pricing.³²⁹ In addition to being superfluous in the context of the existing Webb-Pomerene exemption, a new antitrust exemption which limited shippers' councils rate negotiations and information exchange solely to matters affecting international ocean transportation costs would still present the danger of anticompetitive collusion in the negotiation of intermodal rates.

a The Domestic Spillover Problem of Intermodal Rates

Whether liner conferences are authorized to establish the ocean segment for intermodal land-ocean rates has presented a complex legal and political issue in international shipping during the past decade.³³⁰ Intermodalism arose with the "container revolution" of the 1960s and 1970s and is a term which describes the joint movement of cargo by rail and water carriers.³³¹ One rate is quoted for the whole movement, although each carrier establishes the rate for his portion of the movement and then negotiates with the other participating carriers to establish their respec-

³²⁷ See *Merchant Marine Hearings*, *supra* note 176, at 8 (statement of Thomas O'Neill, National Association of Beverage Importers).

³²⁸ Early proposals to authorize export trading companies contained a similar purpose, *i.e.* the promoting of exports as opposed to both imports and exports. These proposals often required that all of the export trading company's activities be in the exporting of goods. A recognition of the commercial necessity of importing goods resulted in the final Act's emphasis on exporting as the "principal" activity of the organization. See H.R. REP. 629, 97th Cong., 2d Sess. 12 (1982). H.R. REP. NO. 924 *supra* note 176, at 2506.

³²⁹ *House Judiciary Hearings*, *supra* note 28, at 8 (statement of James C. Miller, III); *Senate Hearings*, *supra* note 33, at 9-10 (statement of Peter Klein, Sea-Land Industries).

³³⁰ *United States v. Federal Maritime Comm'n*, 655 F.2d 247 (D.C. Cir. 1980), *pet. for rehearing en banc* dismissed as moot, decision vacated in part, (No. 79-1299, November 16, 1982); *House Judiciary Hearings*, *supra* note 28, at 5-6 (testimony of C. Jonathan Benner, General Counsel, Federal Maritime Commission).

³³¹ See generally Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203 (1970); Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311 (1979).

tive portions of the entire rate.³³² The legal problem in the context of the shipping industry is twofold because the domestic transportation industries have been deregulated and competition has been reintroduced: could liner conferences establish intermodal rates to be charged by their members for intermodal movements involving railroads and trucks, and must conferences publish their portion of the rate in a tariff,³³³ in effect also publishing the unpublished domestic portion of the intermodal rate?³³⁴ Although these legal issues were the subject of both litigation³³⁵ and a joint agreement between the Interstate Commerce Commission and the Federal Maritime Commission,³³⁶ they were resolved by the Shipping Act of 1984.³³⁷

This article has emphasized the fact that ocean transportation costs must be considered in the context of the total export of goods. If shippers' councils are created on a regional trade basis, as would appear likely for purposes of cohesion, then the issue of intermodal rates will be particularly important to their members, because most exporting of goods from the United States requires some intermodal transportation.³³⁸

³³² See H.R. REP. NO. 53, *supra* note 3, at 12-13.

³³³ Initially, the issue was whether the Interstate Commerce Commission and the Federal Maritime Commission exercised independent, concurrent or exclusive jurisdiction over such agreements. See *Pennsylvania v. I.C.C.*, 561 F.2d 278 (D.C. Cir. 1977); *Ex Parte* 261, Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, decisions contained at 337 I.C.C. 625 (1970), 341 I.C.C. 246 (1972), 346 I.C.C. 688 (1974), 350 I.C.C. 361 (1975), 351 I.C.C. 490 (1976), 355 I.C.C. 913 (1977). The issue later evolved into whether the Federal Maritime Commission had jurisdiction to approve such rates. *Federal Maritime Comm'n*, 655 F.2d at 247. See generally O'Neill, *Jurisdictional Conflicts Between the Federal Maritime Commission and the Interstate Commerce Commission*, 6 J. MAR. L. & COM. 51 (1981).

³³⁴ Under the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.) and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45 U.S.C.) (1984), contract rates and non-tariff rates are confidential and generally are not published, under a theory that competition is enhanced if competitors are ignorant of each others prices. By contrast, conference tariffs currently are filed and are published by the Federal Maritime Commission. A joint movement is one which is part tariff, part contract. If the rail carrier's portion is subsumed in the contract, but is separated out for tariff purposes, then there is the possibility that the purposes of the domestic deregulation Acts will be circumvented, since domestic surface carriers could reasonably estimate the rates of their competitors. For the related problem of how this has affected the setting of joint rates by Canadian railroads, see generally Peippo, *supra* note 89.

³³⁵ See *United States v. F.M.C.*, 655 F.2d 247 (D.C. Cir. 1980); see also *United States v. F.M.C.*, No. 80-1251 (D.C. Cir.) (Feb. 29, 1980).

³³⁶ See 18 C.F.R. § 341.67 (1984); 46 C.F.R. § 536.8(c) (1984); see also Revision of Tariff Regulations, All Carriers, 49 C.F.R. § 1312.38 (1984).

³³⁷ 46 U.S.C.A. §§ 1701(a) (1982).

³³⁸ The Export Trading Company Act of 1982 recognizes the importance of intermodal activity by permitting export trading companies to provide insurance on ocean cargo "warehouse to warehouse" activities. 12 U.S.C. § 1843(c)(14)(F)(ii) (1982); see H.R. REP. NO. 924, *supra* note 176, at 23-24.

Indeed, the ability of shippers' councils to negotiate total intermodal rates may be essential to their success, since many potential members may choose not to join a council if it is limited to issues affecting only the water portion of the rate. However, council members will have to exchange information concerning their domestic transportation costs in order to effectively negotiate intermodal rates, even if the council is not permitted to discuss or negotiate these rates with domestic transportation companies. This information dissemination may severely interfere with the free competition policies promulgated under the domestic transportation deregulation acts.³³⁹ It would therefore be especially unfortunate if shippers' councils providing intermodal services created a forum whereby shippers could exchange the competitively sensitive cost and price information which domestic transportation law is currently seeking to keep confidential in order to promote competition in the domestic transportation industries.³⁴⁰ In the domestic surface transportation industries, surface carriers have been able to participate in the rate bureau system, whereby groups of carriers have been able to meet with immunity from the antitrust laws in order to establish uniform rates and services offered to shippers in a manner analogous to the ocean conference system. In order to promote competition in the domestic surface transportation industries, the legislative trend to deregulate these industries has resulted in a reduction, and most probably will result in an eventual elimination of the antitrust-immune rate bureau system, accompanied by an increased emphasis on the confidentiality of sensitive economic cost and pricing data. Indeed, this has been a primary concern of the Justice Department in its Business Review Letters on domestic shippers' councils.

b Council Cohesion and American Entrepreneurism

An additional obstacle to the formation of shippers' councils may

³³⁹ Cf. Davidow, *supra* note 75, at 277. previous shippers' councils proposals have contained provisions prohibiting the negotiation of intermodal services by shippers' councils. See H.R. 6899, 96th Cong., 2d Sess. § 206 (1980), H.R. REP. NO. 935, *supra* note 8, at pt. 3, 27 (1980), but the most recent proposals are unclear on the issue. H.R. 4374 merely permitted activity that was "solely export conduct", which, broadly read, could include intermodal activities. Although S.1593 and S.47 authorized conference power over rate setting, they prohibited collective conference negotiation of rate agreements with inland carriers, while failing to specify whether conferences could discuss such rates with shippers' councils. See S. REP. NO. 414, *supra* note 35, at 28; S. REP. NO. 3, *supra* note 2, at 22.

³⁴⁰ *Senate Judiciary Hearings*, *supra* note 31, at 13, 15, 22-24 (statement of Thomas J. Campbell, Director, Bureau of Competition, Federal Trade Commission). Cf. Supplemental Brief for the United States at 16-28, *United States v. F.M.C.*, 655 F.2d 247 (D.C. Cir. 1980), *cf.* 149 CONG. REC. S1813-14 (daily ed. Mar. 1, 1983) (statement of Sen. Inouye).

exist. Studies on successful Webb-Pomerene associations suggest that large shippers with homogeneous products may dominate shippers' councils, thus aiding in the discriminatory use of conference rates against small and medium sized shippers.³⁴¹ The Webb-Pomerene studies also indicate, however, that small and medium sized exporters would not utilize shippers' councils even if the large exporters were excluded from membership in the councils³⁴² because the small and medium sized shippers are not a cohesive group.³⁴³ There must be both a perceived need and an inclination by industry members to form a group which has countervailing power. These factors also must be accompanied by a mutuality of interest strong enough to support the exercise of coordinated activity.³⁴⁴ Nevertheless, studies that have considered the potential success of export trading companies indicate that the small and medium sized exporters who are responsible for the twenty percent of the total United States exports will not be able to use those groups because they do not export homogeneous products, a presumed requisite for any successful group activity.³⁴⁵ Instead, these manufacturers produce highly technological, differentiated products which are the least susceptible to joint marketing.³⁴⁶

(1) *Use of Middlemen*

Small and medium size manufacturers also exhibit a strong disinclination to export goods.³⁴⁷ The primary focus of these producers, both historically and today, is on the domestic market and it is difficult even to develop their interest in export markets.³⁴⁸ The neophyte exporter, most likely a small shipper, has a tendency to use middlemen, primarily export brokerage companies, export management firms, distributorships, non-vessel operating common carriers, and freight forwarders; and it is likely that the Export Trading Company Act of 1982 will further this proclivity through its authorization of bank ownership and participation in export

³⁴¹ 50 YEAR REVIEW, *supra* note 276, at 32-34.

³⁴² HAYS REPORT, *supra* note 301, at 552.

³⁴³ See, GALBRAITH, *supra* note 192, at 150.

³⁴⁴ HAYS REPORT, *supra* note 301, at 554-56. The Report noted a definite tendency on the part of U.S. exporters to "go it alone" once the export trade was sufficiently developed. *Id.* at 456.

³⁴⁵ See, e.g., R. BORK, THE ANTITRUST PARADOX, 435-36 (1978). A similar concern is evidenced by the Senate's authorization of small shipper joint ventures and the shippers' associations provisions of the Shipping Act of 1984. See S. REP. NO. 3, *supra* note 2, at 23; see also *supra* text accompanying notes 168-171.

³⁴⁶ HAYS REPORT, *supra* note 301, at 470-71.

³⁴⁷ *Id.* at 433.

³⁴⁸ S. REP. NO. 27, *supra* note 175, at 5, 18 (1981).

trading companies.³⁴⁹

In general, the use of middlemen does not constitute countervailing power in the sense that a shippers' council would.³⁵⁰ Although the Shipping Act of 1984 has revoked the prior prohibition on freight forwarders and middlemen having a beneficial interest in the goods they ship, they may still fail to negotiate lower conference rates because forwarders acting without a beneficial interest in the goods they ship will continue to lack incentives to negotiate lower rates and forwarders who also ship their own goods will either negotiate lower rates only to the extent that the discounts they obtain exceed the fees that they receive from other shippers, or to the extent available to other similarly situated shippers.³⁵¹ In addition, small and medium sized exporters may use middlemen only for a short period of time.³⁵² Small and medium sized exporters act in a highly independent and entrepreneurial fashion which may inhibit the development of long term, stable relationships between councils and conferences and may inhibit the ability of a council to develop cohesive or uniform positions.³⁵³

³⁴⁹ HAYS REPORT, *supra* note 301, at 473; 15 U.S.C. § 4001 (1984). *See generally* 46 C.F.R. § 510.2(f)-(1); *Note, supra* note 299, at 773-75.

³⁵⁰ UNCTAD, Protection of Shipper Interests, *supra* note 70, at 3-4. *But cf. Senate Judiciary Hearings, supra* note 31, at 26-27 (statement of Thomas Campbell, Federal Trade Commission); *id.* at 90-95 (statement of Raymond P. de Member, The International Association of NVOCCs).

³⁵¹ “[The term] ‘beneficial interest’ includes any lien or interest in a right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term ‘beneficial interest’ shall not include any obligation in favor of a freight forwarder arising solely by reason of the advance out-of-pocket expenses incurred in dispatching a shipment.” 46 CFR § 510.2(b) (1983). Licensed and bonded by the FMC, an “independent ocean freight forwarder” is a person “performing freight forwarding services for a consideration, either monetary or otherwise, who is not a shipper or consignee or seller or purchaser of property in commerce from the United States.” 46 CFR § 510.1(j) (1983). *See generally*, LLHLMAN, *THE OCEAN FREIGHT FORWARDER, THE EXPORTER, AND THE LAW* (1967).

³⁵² *Cf. HAYS REPORT, supra* note 301, at 456-58. This conclusion was reached after considering that this prohibition strictly limited any incentives for freight forwarders to negotiate significantly lower rates, or to pass on these savings to shippers. Although the prohibition was temporarily removed by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1608(c) 95 Stat. 357 (codified as amended at 46 U.S.C. §§ 801, 841b (1982)), and has been permanently removed by the Shipping Act of 1984, 46 U.S.C. § 841b (1982), *repealed by* Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 88 (1984), the question as to what degree freight forwarders will significantly create countervailing power in the shipping industry still remains. *See infra* note 372. The long term stable relationships export trading companies developed with shippers but should apply equally to the development of strong shippers' councils.

³⁵³ The strong entrepreneurial nature of the small and medium sized American businessman has been cited as only one reason why the United States economy has failed to develop export trading companies, despite consistent conclusions that pre-Export Trading Company Act laws permitted the development of such companies. As with studies of the Webb-Pomerene associations, export trading company studies noted that increased experience, information and confidence on the part of exporters results in a lessened reliance on middlemen associations. Indeed, this is one reason why cartel

(2) *Government Information*

The studies on the Webb-Pomerene Act also indicate that small and medium sized shippers may not utilize consultative shippers' councils because the purpose of these councils, information exchange, may be adequately performed by the government.³⁵⁴ Exporters frequently cited the Department of Commerce's information services, used in conjunction with middlemen, as a major reason why they did not utilize Webb-Pomerene associations.³⁵⁵ Both Galbraith's theory and the UNCTAD proposals give government information agencies a strong role in the development of countervailing power and it is conceivable that a strengthened clearinghouse role for the Federal Maritime Commission might eliminate the need for many of the functions of a shippers' council.³⁵⁶ Although a proposal to strengthen a federal agency's powers in an era of deregulation may sound unusual, deregulation of the ocean shipping industry, with its strengthened antitrust exemption, may warrant such an approach.³⁵⁷

IV. THE EXPORT TRADING COMPANY ALTERNATIVE

Policy makers who seek to protect shippers' interests while strengthening conference activities face difficult choices when authorizing shippers' councils in the United States. Portions of this article have indicated that legislation with the purpose of obtaining lower shipping rates

theory precludes the formation of cartels in non-concentrated industries. The desire to act independent of group action, especially when the shipper has a substantial quantity of goods to ship, will be an important factor in the development of an individual's position in the export trade. POSNER, ANTITRUST LAW 53-54 (1976); *supra* note 346.

³⁵⁴ 50 YEAR REVIEW, *supra* note 276, at 61.

³⁵⁵ *Id.*

³⁵⁶ UNCTAD, Protection of Shipper Interests, *supra* note 70, Part III. *But cf. Omnibus Hearings*, part 1, *supra* note 21, at 514 (statement of Honorable Paul McCloskey); *supra* note 113. Indeed, many opponents of a continuation of the conference system recommend that a continuation of the system should be accompanied by an elimination of the requirement that tariffs be filed with and published by the FMC. They contend that this filing merely increases conference cohesion by disseminating information necessary for the monitoring of cartel activities. Whatever the validity of this argument proponents of the conference system may argue that the existence of this information does protect shippers and provides much of the information contemplated by the shippers' councils. The fact that shippers may be reluctant to utilize this information and the protective provisions of a federal agency does not indicate that they also would hesitate to use a shippers' council. Indeed, it is rather anomalous that while the strengthening of the conferences' antitrust exemptions would reduce the role of the FMC, the FMC's role in regulating the activities of shippers' councils would increase, therefore offsetting any potential governmental cost saving resulting from deregulation. *See, House Judiciary Hearings*, *supra* note 28, at 14-15 (statement of John H. Shenefield).

³⁵⁷ In those industries where antitrust exemptions exist, the responsible agency usually plays the role ensuring and protecting the consumer's interests. *Cf. H.R. REP. No. 935, supra* note 8, at 25 (statement of Andrew Popper, Dean of the American University School of Law).

through the use of shippers' councils will have to be very detailed and provide specific guidelines for exporters. This legislation, however, has the potential of being either superfluous or subject to abuse by large special interests because studies also have demonstrated that the intended beneficiaries of the councils may not use them.

Given that continued federal regulation appears to be unfeasible politically, export trading companies authorized under the Export Trading Company Act of 1982 might have to be used as an alternative means of offsetting liner conference pricing power.³⁵⁸ Assuming that the problems of international shipping essentially are merely one aspect of the general issue of international trade, that international liner conferences' economies constitute merely a derived demand from overall foreign trade demand, and that the solution to economic problems in the industry will have to be in the context of larger international trade issues, the success of shippers' councils will only be derived from the general economic viability of exporters. Since the obstacles to the creation of shippers' councils also have inhibited the development of exports by small and medium sized manufacturers, legislation which aims to promote the exports of these businesses also may remove the obstacles to the creation of the councils, thus accomplishing the goals of the councils and eliminating the need for any special shipper council legislation.³⁵⁹

A. Advantages to Exclusive Reliance on Export Trading Companies as a Form of Countervailing Power in the Conference Liner System

Currently, there are only two serious proposals for protecting small and medium sized shippers from the strengthened conference system. Neither of these proposals are promising. Inasmuch as continued federal

³⁵⁸ Cf. Letter from Allen Green, Chairman of the Federal Maritime Commission, to Sen. Slade Gorton Dec. 1, 1981), reprinted in *Gorton Hearings*, supra note 10, at 149-52 [hereinafter cited as Green letter]; see also *House Judiciary Hearings*, supra note 28, at 21 (proposed shippers' council amendment of Prof. Garvey). But see *Merchant Marine Hearings*, supra note 176, at 156-59 (statement of Eugene Milosh, American Association of Exporters and Importers). A similar suggestion was made by the Federal Trade Commission for recourse to Webb-Pomerene associations. 10 YEAR REPORT, supra note 276, at 11; see also H.R. 4374, 97th Cong., 1st Sess. § 3(a) (1982) (proposed section 15a) reprinted in *Regulatory Reform Hearings*, supra note 26.

³⁵⁹ See Green letter, supra note 358. This argument has been anticipated even in the context of domestic transportation rates. The Interstate Commerce Commission recently deregulated the movement of export coal by railroads. They relied, in part, upon the rationale that the railroad industry will be aware that the demand for its services is derivative of the demand for exported United States coal and will therefore not price the coal at uncompetitive levels. See Interstate Commerce Commission, *Ex Parte* No. 346 (Sub-7), Railroad Exemption—Export Coal at 15 (May 26, 1983), summary reprinted in 48 Fed. Reg. 26822 (1983) (to be codified at 49 C.F.R. § 1039 (1984)).

regulation is unfeasible³⁶⁰ and shippers' councils present problems of organization and anticompetitive spillover, export trading companies present a non-government method of concentrating the economic power of small and medium sized shippers without engendering the dangers of horizontal combinations of competitors.³⁶¹ Because the Export Trading Company Act permits export trading companies to act principally as exporters of their own goods and of the goods of unaffiliated individuals,³⁶² these companies will not present the problem of middlemen forwarders who, not having a beneficial interest in the goods they ship, lack an incentive to exercise countervailing power against the conferences. Instead, export trading companies with beneficial interests in their own goods will realize a greater profit from reduced costs, so they will have an incentive to negotiate lower rates with liner conferences.³⁶³

Export trading companies also may be structured to provide the information and negotiating mechanisms of a shippers' council. While focusing on the overall export transaction, the financial information,³⁶⁴ bank participation,³⁶⁵ and antitrust certification³⁶⁶ provisions of the Act

³⁶⁰ See *House Judiciary Hearings*, *supra* note 28, at 11-13 (testimony of Prof. George Garvey).

³⁶¹ The Act authorizes the formation of a single joint venture which would acquire title to the goods exported. 12 U.S.C. § 1843 (1982). Compare this approach with section 3(24) of the Shipping Act of 1984, which permit the creation of shippers' associations and joint ventures by small shippers for the aggregation of goods to be shipped by ocean carrier. This approach provides the advantage of avoiding the problems that shippers' councils would face as to whether they should be treated as a corporation or as an association. *Cf.* Kintner, *supra* note 159, at 981-83; Brodley, *supra* note 157, at 1544-47. See notes 168-171 and accompanying text.

³⁶² 15 U.S.C. § 4002(a)(4) (1982).

³⁶³ The Senate version of the Export Trading Company Act would have ensured that all export trading companies would have had a beneficial interest in some of the goods they shipped, inasmuch as it required that the export trading company be engaged both in the export of its own goods and in the export of the goods of other, unaffiliated individuals. S. REP. NO. 27, *supra* note 175, at 8. However, the compromise version of this definition, as enacted, permits the creation of export trading companies which export only their own goods. 15 U.S.C. § 4002(a) (1982); H.R. REP. NO. 924, *supra* note 176, at 2502-03. This change does not affect the analysis of the potential utilization of the Export Trading Company Act, inasmuch as export trading companies will either develop as large corporations exerting countervailing power, or as mixed organizations which will be permitted to "take title" to the exported goods of unaffiliated organizations with the incentive to negotiate lower rates. See H.R. REP. NO. 924, *supra* note 176, at 2507.

³⁶⁴ See H.R. REP. NO. 637, 97th Cong., 2d Sess. Pt. 1, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2431, 2433-34; S. REP. NO. 27, *supra* note 175, at 6.

³⁶⁵ 12 U.S.C. § 1843(c)(14) (1982); Export trading companies that include investments of bank holding companies may not engage in agricultural production activities or in manufacturing, except to the incidental degree required to conform export products to the needs of foreign countries. 12 U.S.C. § 1843(c)(14)(C) (1982). It also should be noted that the antitrust exemption created under the Act applies to any "persons", whether or not they are export trading companies as defined under section 203(3) of the Act. Certification Guidelines, *supra* note 164, at 15938; see also Federal Reserve System, International Banking Operations; Export Trading Companies, 48 Fed. Reg. 26,445 (1983) (to be codified at 12 C.F.R. § 211.31-211.602).

³⁶⁶ 15 U.S.C. §§ 4011-4021 (1982). This certification procedure provides for Department of

provide export trading companies with the opportunity to develop and exercise bargaining power against the liner conferences.

While the Export Trading Company Act has liberalized both the Sherman Act and the antitrust certification standards it borrowed from the Webb-Pomerene Act, there is no guarantee that the Act will increase United States exports. It may be that the antitrust certification provisions of the Act will deter new exporters,³⁶⁷ and that banks will be unable to adapt their financial expertise to commercial transactions.³⁶⁸ It is too

Commerce review of the proposed activities delineated in the application. Upon determination that the company will adhere to the guidelines outlined in the Act, and upon concurrence of the Attorney General, the Department of Commerce is authorized to issue a certificate of review. 15 U.S.C. § 4013 (1982). A holder of such a certificate is immune from criminal and civil antitrust action for conduct which is specified in and complies with the terms of the certificate. 15 U.S.C. § 4016(a) (1982). Any private party who brings a civil action against a holder of such a certificate has the burden of proving that the conduct complained of was outside of the scope of activities authorized by the certificate, 15 U.S.C. § 4016(b)(3) (1982) and any award against the holder of a certificate will be limited to actual damages. 15 U.S.C. § 4016(b)(1) (1982). Section 4016(b)(4) in addition to being the exclusive remedy for violations of the Act, provides that any plaintiff who loses a claim against a certificate holder on the basis that the conduct complained of was within the scope of the exception shall be responsible for the certificate holder's litigation expenses. *See* Certification Procedures, 48 Fed. Reg. 10595 (1983) (to be codified at 15 C.F.R. § 325).

³⁶⁷ Certification Guidelines, *supra* note 164. These guidelines primarily follow the provisions of the Act. They extend antitrust immunity to activities of exporters of goods and services and include the allocation of export quotas and the entering into of price, pooling, and distributorship agreements as long as the conduct would not violate certain articulated criteria. The criteria include a substantial lessening of competition in the United States or among competing exporter, an unreasonable effect on domestic prices, unfair competition, and an effect on goods to be resold within the United States. 15 U.S.C. § 4013(a) (1982). The criteria are illustrated in the Department of Commerce Guidelines by cases interpreting the Webb-Pomerene Act. 48 Fed. Reg. 15939, *et. seq.* Therefore a question arises as to what additional degree of certainty will be obtained by the export trading company antitrust immunity. In addition, the unfair competition element, which, in essence, permits section 5 of the Federal Trade Commission Act to apply to export trading company activities, does not exist in the Webb-Pomerene Act.

Furthermore, the Act's opponents criticize its antitrust exemption procedure. They argue that the Act increases the inhibiting effect of the antitrust laws on small and medium sized exporters by imposing a burdensome multi-agency certification procedure and by implying that an antitrust exemption is needed when existing regulations already adequately provide for exporting. In addition, they argue that the inhibiting effect of the antitrust laws is increased by the incorporation of the already prone to abuse Webb-Pomerene provisions into the Act and by the creation of a false illusion of certainty in the antitrust laws, because the certifications will be read narrowly by the courts and because they preclude any party from initiating litigation. *See* Garvey, *The Foreign Trade Antitrust Improvements Act of 1981*, 14 J. L. & POL. INT'L BUS. 1 (1982). *But see* H.R. REP. NO. 637, *supra* note 364, at Pt. II, 2447-54; Davidow, *Cartels*, *supra* note 214, at 359. Griffin, *Antitrust Issues in Countertrade*, 17 J. WORLD TRADE L. 236, 246-48 (1983); Golden & Kolb, *supra* note 299, at 780-81; Bruce & Peirce, *supra* note 271, at 1014-17. Notwithstanding these criticisms, recourse to the certification provisions still may be desirable in order to gain the protections of the single damages provisions of Title III. Hawk, *supra* note 32, at 218-19.

³⁶⁸ Ferchill, *supra* note 304, at 283. Opponents express the concern that the financial stability of the banking system will be undermined by breaking the tradition which prohibited banks from engaging in commercial activities. *See* *Financial Institutions and Export Trading Companies, Hearing*

early to ascertain whether these criticisms will prove to be true,³⁶⁹ Nevertheless, in the context of current exporters utilizing export trading companies (or export trading company certificates) as alternatives to shippers' councils, the 1982 Act provides as much of an incentive for joint action as would any specific amendment to the Shipping Act. The Export Trading Company Act permits any person, group, association, or corporation to obtain an antitrust certification for any activity related to export trade. H.R. 1878 (and arguably the Conference Committee Report to the Shipping Act of 1984) recognized the similarities between the two concepts and that the 1982 Act's certification provisions are sufficiently broad to permit a variety of shipper-based transportation activities.³⁷⁰ There is no reason why an export trading company could not be used to consolidate differentiated products, bulk goods, charter ships, search for alternative transportation routes, obtain and analyze general shipping and exporting information, and generally perform the functions of shippers' councils.³⁷¹ Even without explicit Shipping Act recognition, such organizations should be able to use existing provisions of the Act to exercise countervailing power, including the loyalty and service contract provisions authorized by the Shipping Act of 1984 as a method of increasing conference tying power.³⁷²

B. Examples: Ports and Domestic Cooperative Associations— Opportunities Created by the Shipping Act of 1984

Two examples illustrate how export trading companies could utilize

on S.2718: *Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 1, 1-2 (1980) (statement of Senator Proxmire). *But see* Cole, *Establishing American Trading Companies*, 2 NW. J. INT'L L. & BUS. 277 (1980).

³⁶⁹ HAYS REPORT, *supra* note 301, at 562-63. The first applications for Export Trading Company Certificates were accepted on June 9, 1983. Initial applications included antitrust certification requests for sporting goods, catfish farmers, health care goods and services. *See* International Trade Administration, Notice of Applications, 48 Fed. Reg. 29,034, 29,035, 29,934 (1983). As least one of the initial applicants intends to offer freight forwarding services. *See* Application 83-0002, 48 Fed. Reg. 29,035 (1983).

³⁷⁰ *See* notes 172-78 and accompanying text.

³⁷¹ *See* notes 88-116 and accompanying text.

³⁷² The elimination of the beneficial interest prohibition on freight forwarders under the Shipping Act of 1984 enables export trading companies which "take title" to their own goods to aggregate additional goods of other exporters to obtain the volume and service discounts permitted under the Act. Regulations under the Shipping Act of 1916 prohibited shippers from acting as forwarders of other shipper's cargo. Thus, an export trading company which took title to its own goods, could not aggregate additional goods of other exporters in order to obtain volume or service discounts. *See* S. REP. NO. 27, *supra* note 175, at 9; Joint letter from Malcolm Baldrige, Secretary of Commerce, and Alan Green, Jr., Chairman of the Federal Maritime Comm. to members of Congress, *summarized in* Traffic World, June 13, 1983 at 49; HAYS REPORT, *supra* note 301, at 517; *Regulatory Reform Hearings*, *supra* note 26, at 274 (testimony of Edward Schmeltzer). *See also infra* note 385.

existing and proposed Shipping Act provisions to exercise countervailing power in a manner similar to the power advocated by proponents of shippers' councils. First, the Congress contemplated ports and port authorities as forming or participating in export trading companies.³⁷³ This would be a logical role for ports in the context of the shippers' councils concept, since they act both as gateways for the overall export trade and as countervailing power sources against the liner conference systems. Indeed, the Shipping Act of 1984 retains the 1916 Act's provisions which protect ports from regional discrimination and grant them a limited antitrust immunity to negotiate with other ports and conferences concerning services and rate levels.³⁷⁴ Furthermore, some shippers' council proponents have contemplated port participation in the activities of various shippers' councils.³⁷⁵ Therefore, the existing antitrust immunity combined with export trading company immunity may be used with the same effect as the proposed shippers' councils antitrust immunity inasmuch as it would enable ports to exchange information relevant to conference rates and services, and would permit the export trading companies to utilize the same information in making export decisions.³⁷⁶

Ports, if they were to engage in export trading company activities, would gain the additional benefit of resolving their concern that the emphasis on intermodalism arising from the container revolution, the strengthening of conferences, and the authorization of shippers' councils could result in discrimination against certain ports, which might eventually result in their decline and a concomitant adverse effect on the eco-

³⁷³ H.R. REP. NO. 637, *supra* note 364, at Pt. I, 2438; H.R. REP. 924, *supra* note 176, at 2506. Unkovic & LaMont, *supra* note 271, at 245-46; Golden & Kolb, *supra* note 300, at 770 n.88. Even affiliates of railroad companies were contemplated as being entitled to function as export trading companies, as long as a separate identity and managed operations existed. H.R. REP. NO. 637, Pt. I, *supra* note 364. See generally Kursar, *U.S. Businesses Making Plans for Export Trading Companies*, *Traffic World*, September 26, 1983, at 53.

³⁷⁴ Section 4(b) of the Shipping Act of 1984, grants an antitrust immunity for both port association agreements and agreements between ports and shipping lines or terminal operators directly serving the shipping lines. See generally 46 C.F.R. §§ 533.1-.6 (1983). Buchwald, *Federal Maritime Commission Jurisdiction over Terminal Operators*, 12 J. MAR. L. & COM. 209 (1981); Lidinsky & Colson, *The Federal Regulation of American Port Activities*, 7 INT'L TRADE L. J. 38 (1981-1982).

³⁷⁵ *Closed Conference Hearings*, *supra* note 22, at 110-11 (testimony of Martin C. Pilsch, Massachusetts Port Authority; Richard A. Lindsy, Jr., Maryland Port Administration); *House Judiciary Hearings*, *supra* note 28 (statement of Stanley P. Hebert, American Association of Port Authorities); see also UNCTAD, *Protection of Shipper Interests*, *supra* note 70, at 8-10 (statement of Thomas Wilcox, National Association of Stevedores).

³⁷⁶ For example, section 4(b) of the Shipping Act of 1984 permits marine terminal operators to enter into agreements among themselves and with conferences to discuss, fix, or regulate rates or other conditions of service, and to engage in exclusive, preferential, or cooperative working arrangements. The availability of port authority facilities makes the port-export trading company combination particularly attractive in the context of accomplishing shippers' councils goals.

conomic status of their region.³⁷⁷ Furthermore, a policy of free domestic competition could be preserved and a strengthening of port's competitive positions ensured if the goals of shippers' councils are realized through the use of export trading companies with port authority membership. For example, port authority participation in export trading companies may result in broader service competition between ports, because the ports will want to persuade shippers, conferences, and surface transportation carriers to use the port's export trading company related services by offering additional port services.³⁷⁸ In addition, the antitrust exemptions of the Shipping and Export Trading Company Acts should be sufficient tools to enable the exercise of countervailing power by ports because the ports/export trading companies would have an incentive to obtain the lowest possible conference rates to attract shippers.³⁷⁹ Since the 1984 Shipping Act's antitrust immunity would extend only to the discussion of common issues affecting ports' relationships with conferences, any potential abuses which might arise in a port to port or export trading company to export trading company context should be curbed,

³⁷⁷ This problem is better known as cargo diversion. Under sections 16 and 17 of the Shipping Act of 1916, ports which are "naturally tributary" from the original points of shipment for goods were protected from conference-port agreements which conferred discriminatory advantages to ports which might be a greater distance from the original shipping point. A similar prohibition on discrimination between ports exists in section 10(b)(10) of the Shipping Act of 1984.

As some ports modernized into containerized terminals, conferences were willing to absorb some of the overland transportation rates in order to secure the faster turn-around time of the containerized facilities. The Federal Maritime Commission generally has upheld this cargo diversion activity where it has been found to be cost justified. See *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184 (1969); *Pacific Westbound Conference-Equalization and Absorption Rules and Practices*, No. 78-32 (Served May 25, 1984). See also *Boston Shipping Association, Inc. v. Federal Maritime Commission*, 706 F.2d 1231, 1237-40 (1st Cir. 1983). Recently, however, cargo has been diverted from U.S. ports to Canadian ports because the Canadian railroads and conferences have been subject to less restrictive laws and regulations regarding tariff filings. This activity has led to the introduction of several bills before Congress which would require the filing of tariffs for goods exported through Canadian ports, and port authority requests for continued Shipping Act statutory protection from unjust discrimination. See, *Merchant Marine Hearings*, *supra* note 176, at 4-7 (statement of Massachusetts and Virginia Port Authorities); H.R. 1511, 98th Cong., 1st Sess. (1983). While the discrimination provisions ostensibly have been retained in section 10 of the Shipping Act of 1984, Congress has not yet acted on the cargo diversion issue.

³⁷⁸ Spokesmen for port authorities argue that the antitrust immunity for marine terminal operators is necessary in order to ensure that conferences do not discriminate in rates and services with ports by permitting rate negotiations, but that in other respects, the agreements encourage other forms of service competition, especially through use of the exclusive and cooperative work arrangements. See *House Judiciary Hearings*, *supra* note 28 at 3-6 (testimony of American Association of Port Authorities). *Contra Senate Judiciary Hearings*, *supra* note 31, at 7 (statement of Thomas Campbell, Federal Trade Comm.); *House Judiciary Hearings*, *supra* note 28 (testimony of James C. Miller III); *id.* (testimony of Prof. George Garvey).

³⁷⁹ The Hays Report estimated that export trading companies could increase their profitability six to sixteen percent merely through negotiating lower shipping rates. HAYS REPORT, *supra* note 301, at 517-19.

since the export trading company antitrust certification would not authorize cooperative arrangements among ports in the context of export trading company issues and anticompetitive actions would therefore be subject to antitrust prosecution.³⁸⁰ In addition, ports still would need to utilize their Shipping Act authority to meet with other ports to provide conferences with information as to their service needs because they would remain subject to their legal obligations to provide non-discriminatory service to shippers who choose not to use the export trading company. Both of these activities should facilitate the rationalization of the conference system. Port participation in export trading company activities, however, may eventually lead to an elimination of the 1984 Shipping Act's port authority antitrust immunity, as the protection of ports from conference power is achieved through the countervailing power of export trading company/port combinations. This also would facilitate increased competition among ports.³⁸¹

Another advantage to port authority participation in export trading companies would be a reduction in the potential conflict between shippers' negotiating the ocean portion of intermodal through rates, while maintaining competition in the domestic surface transportation industries, because only one entity (the export trading company) would engage in the negotiation of rates and the shipment of goods, and would limit discussion to topics of export transportation importance. This approach is consistent with the concerns expressed by the Department of Justice in its domestic shippers' council Business Review Letters. Finally, ports/export trading companies would be regional in nature. In contrast with shippers' councils, which for cohesion purposes may need to be based on basic commodities or similar products, ports/export trading companies may become effective in developing costing information on a broad mix of goods. This, in turn, could result in a countervailing pressure on con-

³⁸⁰ On advantage of having ports act as export trading company members is that any cooperative agreements among ports should be offset by the need to lower rates for the shipper. In other words, countervailing power would not result in an increase in costs to consumers because the negotiating partners, i.e., ports, would also be consumers. Similarly, because the Export Trading Company Act prohibits export trading company activity which would restrain competition in the domestic economy or export trade, any competitive advantages emanating from port antitrust exemptions still would have to reflect economies of scale. This type of protection from abuse of an antitrust exemption exists under case law interpreting the Capper-Volstead Act. *See* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); Maryland & Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939); Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975). *But see* Senate Judiciary Hearings, *supra* note 31, at 14 (testimony of Thomas J. Campbell).

³⁸¹ 46 U.S.C. § 816 (1982); *see* H.R. REP. NO. 53, *supra* note 3, at Pt. 2, 21-22; Federal Maritime Commission, Inquiry and Intent to Review Regulation of Ports and Marine Terminal Operators, 48 Fed. Reg. 41199 (1983) (Notice of Inquiry); Buchwald, *supra* note 374, at 216-17; *supra* note 378.

ferences which would more accurately reflect real shipping costs rather than the bargaining power of a particular good. It also would spread the benefits of such power to more types of goods, perhaps indirectly increasing the interest of small and medium sized manufacturers in exporting.³⁸² Nor is it necessarily true that a regionally based port/export trading company would export only those items produced in that company's region, and lead to a market dominance in particular types of goods or regional market power dominance. Intermodalism has already demonstrated that the services and overall package offered to a manufacturer can divert his shipment of goods from a "naturally tributary" port (that is, a port that is geographically or regionally nearby) to one which is further away or even in a foreign country. Thus, port authority participation in export trading companies should not only preclude a form of regional or product dominance in the context of shipping, but it should promote service and rate competition between ports, in conference shipping, and, to an ancillary degree, in domestic intermodal rate competition.³⁸³

A second example of export trading companies acting as shippers' councils are organizations, such as shippers' associations or cooperative associations,³⁸⁴ that exist in the domestic economy but may use existing statutory tools to facilitate their negotiating power with conferences. These organizations, which often used the Webb-Pomerene Act or freight forwarder provisions of the Shipping Act in the past,³⁸⁵ can be expected to utilize the certification provisions of the Export Trading Company Act in order to more effectively accomplish the goals contemplated by the shippers' councils proposals, now that the Shipping Act of

³⁸² See Bruce & Peirce, *supra* note 271, at 997 n.129. *But see supra* note 236.

³⁸³ See *supra* note 377.

³⁸⁴ Commodity Associations perform functions similar to those performed by shippers' associations for a specific product. See 49 U.S.C. § 10562(3) (1982); Agricultural cooperatives, authorized under 12 U.S.C. § 1141(j)(a) (1982), may act as joint purchasers and marketers of farm products and supplies. They also are exempt from Interstate Commerce Commission jurisdiction under 49 U.S.C. § 10562(1) (1982) and are allowed to consolidate transportation. These organizations also may enjoy immunity from application of the antitrust laws under the Capper-Volstead Act, 7 U.S.C. § 291 (1982), and the Clayton Act, 15 U.S.C. § 17 (1982).

³⁸⁵ While these organizations currently are exempt from Interstate Commerce Commission jurisdiction as private, non-profit cooperative shippers' associations (49 U.S.C. § 10562(3) (1982)), they were subject to Federal Maritime Commission jurisdiction as non-vessel operating common carriers and were subject to a common carrier status and tariff filing requirements of the Commission. 46 U.S.C. § 814 (1982). They are, however, also entitled to enter into agreements as "other persons" under section 15 of the Act. *Id.* These provisions allegedly inhibited these organizations from utilizing the legal tools which would permit them to consolidate goods for foreign transport, a situation which would be alleviated by the Shipping Act of 1984's recognition of shippers' associations. See *Senate Hearings, supra* note 33 (testimony of Ronald N. Cobert, American Institute of Shippers' Associations); see also *supra* note 372.

1984 has recognized their legal status.³⁸⁶ Shippers' associations have become an increasingly dominant force in the domestic surface transportation industries and they probably will assume a greater role in international shipping. Indeed, the 1984 Shipping Act, with its prohibitions on conferences and common carriers' refusals to negotiate with shippers' associations, has the potential of accomplishing as much as any United States shippers' council would in the context of controlling conference economic power or in protecting the interests of small shippers. This result will only occur, however, if such organizations actively and creatively utilize the export trading company certificates of review to achieve market power, or if they combine with organizations such as ports to creatively market their services. The use of the Export Trading Company Act certification provisions would appear to be especially useful for those basic commodities which would not be expected to use product differentiated export trading companies or would provide the natural foundation for commodity based shippers' councils.³⁸⁷ These organizations would also have the additional flexibility of choosing both their domestic and international routing of traffic, as opposed to port based export trading companies which would have an interest in shipping goods through their particular member port.

C. Criticisms

A proposal to permit export trading companies to assume the role of shippers' councils is subject to several criticisms. First, this indirect method of achieving countervailing power does not explicitly recognize shippers' rights to exercise the tools needed to achieve this power on a group (or combination) basis.³⁸⁸ Second, the proposal relies heavily on a "free market" of export trading company development, with no guarantees that export trading companies will be seriously interested in negoti-

³⁸⁶ Cf. *Senate Hearings*, *supra* note 33, at 71-73 (testimony of Ronald N. Cobert). An especially important advantage to the shippers' association approach is that it eliminates the middlemen associated with freight forwarders and NOVCCs. *Id.*

³⁸⁷ For example, these provisions would be useful for commodity groups which have proven to be successful Webb-Pomerene associations. Examples of these commodities groups include agricultural export associations for rice, lumber, and fruit. See 10 YEAR REPORT, *supra* note 276, at 10; *Omnibus Hearings*, *supra* note 21, at 526 (testimony of Peter Klein, Sea-Land Industries). See notes 306-26 and accompanying text.

³⁸⁸ See *Merchant Marine Hearings*, *supra* note 176 (statement of American Association of Exporters and Importers), stating that the use of export trading companies as an alternative to shippers' councils is unacceptable to importers and exporters. They appear to object because a specific anti-trust exemption, exclusively for negotiation with conferences, does not exist. In part, this objection reflects the interests of the small importers and exporters who are not interested in the services offered by export trading companies, and perhaps the interests of the umbrella organizations representing their interests.

ating lower conference rates (as opposed to absorbing cost differences). There also is no guarantee that small or medium sized shippers will use export trading companies, or that export trading companies will even develop. Third, an export trading company could act anticompetitively, in a manner akin to potential anticompetitive aspects of shippers' councils discussed in section III. Any one of these hypothetical developments may place exporters in a worse position than they would have been in had a shippers' council, even a consultative shippers' council, existed to represent their interests.

However, these arguments are not persuasive. There is no guarantee that a shippers' council will be able to develop properly or that it could develop lower rates.³⁸⁹ Indeed, due to the necessary characteristics of a successful council, there is the potential that a negotiating shippers' council would be more prone to anticompetitive activity than an export trading company, and it is fairly certain that an export trading company would be more effective than a consultative shippers' council would be in lowering rates.³⁹⁰ Similarly, the fact that a small exporter who declines to utilize export trading companies (especially shippers' association based export trading companies) and decides to ship on his own may be put in a worse position than he would be placed in under the shippers' council concept is an unfortunate side effect of economic life. Recourse to the Export Trading Company Act in lieu of an additional, and duplicative, exemption for shippers' councils, is warranted under the presumption that only a minimum number of restraints should be placed upon a free market economy.

D. Contract Rate Advisory Boards

The government information provisions contained in the UNCTAD proposals and a concept embodied in the Staggers Railroad Deregulation Act of 1980 may be borrowed to aid the small exporters who choose not to use export trading companies.³⁹¹ The UNCTAD proposals sought to protect small shippers by creating government investigation units which would consolidate information concerning the shipping industry for the use of shippers' councils and all shippers.³⁹² A variation on this idea is contained in the Staggers Act, which provided for the creation of a railroad contract rate advisory board within the Interstate Commerce

³⁸⁹ See notes 191-329 and accompanying text.

³⁹⁰ *Id.*

³⁹¹ Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45 U.S.C.).

³⁹² UNCTAD, Protection of Shippers Interests, *supra* note 70, Part III.

Commission.³⁹³

The goal of protecting shippers' interests in the railroad industry is very similar to the goal of protecting shippers' interests in the ocean conference system. As previously noted, although the concept of rationalization in the liner conference system is to be accomplished through a strengthening of an antitrust exemption while in the railroad industry it is achieved through competition, both forms of regulatory reform contemplate the use of contract rates to promote competition and the development of shipper loyalty to the individual carrier.³⁹⁴ As discussed earlier, the effective use of contracts will occur primarily through those shippers who have a sufficiently large volume of goods as to be able to negotiate effective rates.³⁹⁵ These shippers will either be large firms or middlemen such as freight forwarders or export trading companies. In the railroad industry, as in the liner conference system, contract concessions by carriers are often compensated for by a corresponding increase in the stated tariff for the carriage of a good, and although both the ICC and the FMC have the jurisdiction to review certain posted tariffs for reasonableness and antidiscrimination purposes, a certain degree of price discrimination is anticipated in the transportation industries in order to achieve rationalization.³⁹⁶ Congress, in order to create some protection

³⁹³ 49 U.S.C. § 10713(m) (1982).

³⁹⁴ The touchstone of the Staggers Act was to eliminate the total reliance on common carrier concepts of competition in the railroad industry. Instead, the Act authorized railroads and shippers to enter into contracts which are approved by the Interstate Commerce Commission. 49 U.S.C. § 10713 (1982). (Compare this with the loyalty and service contract provisions of sections 7 and sections 6 and 8(c) and section 8(c) of the Shipping Act of 1984. Under the Staggers Act, shippers' protections against abuse of contract power include guarantees of common carrier service through statutory limitations on the percentage of rail equipment that can be allocated to contract service, § 10713(d)(2), a requirement that similarly situated shippers not be unreasonably discriminated against in the opportunity to enter into a contract service, and prohibitions on destructive competition. Provisions concerning railroad market dominance and limited zones of rate flexibility provide an alternative check on railroad power 49 U.S.C. §§ 10713(f), 10707a., 10709 (1982); see also H. REP. NO. 1035, 96th cong., 2nd Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3978. See also *Gorton Hearings*, supra note 10, at 232 (answers of the National Industrial Traffic League to questions of Sen. Inouye); Carr, supra note 246. GENERAL ACCOUNTING OFFICE, INFORMATION ON REGULATORY REFORM UNDER THE STAGGERS RAIL ACT OF 1980 (1983).

³⁹⁵ See supra notes 87-90; H.R. REP. NO. 1430, 96th Cong., 2nd Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4110, 4130-33.

³⁹⁶ See *House Judiciary Hearings*, supra note 28, at 13-14 (statement of Prof. George Garvey). Although the I.C.C.'s regulatory review role recently was limited to determining whether filed tariff rates are unreasonable, it still retains much greater authority to disapprove filed rates. This power distinguishes it from the F.M.C.'s power which dates back to the original 1916 Shipping Act. Compare, for example, the Commission's jurisdiction to review and suspend tariff rates under Chapter 107 of Title 49 with the Federal Maritime Commission's authority to disapprove any rate or charge "so unreasonably high or low as to be detrimental to the commerce of the United States", 46 U.S.C. 817(b)(5) (1982). This latter power seldom has been exercised and was eliminated by the Shipping

for smaller shippers who do not know or cannot effectively utilize contract rates, included section 208(a)(m) in the Staggers Act. This section authorized the creation of a railroad contract rate board within the ICC which would summarize contract rates for small shippers. The purpose of this service is not only to compile and disseminate to interested parties non-confidential summaries of the provisions of individual contract information relating to provisions of contracts entered into under section 208 of the Staggers Act, but also to provide interested parties with advice regarding contracts and to enable the government to assess the impact of variations between contract rates on competition among shippers.³⁹⁷ In essence, this provision provides some market information to the government on the effectiveness of contract rate competitiveness as well as providing the small shipper information as to his competitive posture in the area of shipping rates. Thus, it is very similar to the UNCTAD government information board proposals.³⁹⁸

It is proposed that a similar structure could be created within the Federal Maritime Commission to monitor contract rates in the liner industry and to provide contract information to those small shippers who choose not to utilize export trading companies. Such a provision exists in section 8(c) of the Shipping Act of 1984 which, in addition provides that "similarly situated" shippers be eligible to enter into contracts containing the same "essential terms" with the same carriers. However, while these provisions aid in the dissemination of contract service terms, they do not establish a government service which would render advice to parties concerning contract rates. Such advice is especially important for small shippers who are not "similarly situated" to contracting shippers and who may not have any means by which to evaluate the published "essential terms" of a filed service contract in terms of their economic situation and needs. This latter approach would be similar to the governmental investigation unit functions of the UNCTAD proposals with the additional benefit of providing information for the use of export trading companies and providing some form of protection to small exporters. Although not a strong form of protection, such a method of information dissemination may aid the goal of rationalization in the liner conference system.³⁹⁹

The current system of filing conference tariffs with the Federal Mar-

Act of 1984. H.R. REP. NO. 53, *supra* note 3, at Pt. 2, 2-3. See generally Farris, *Discrimination in Transportation and the Antitrust Laws*, 46 I.C.C. PRAC. J. 509 (1979).

³⁹⁷ See H.R. REP. NO. 1430, *supra* note 394, at 4132-33.

³⁹⁸ See *supra* notes 354-57 and accompanying text.

³⁹⁹ See notes 97-107 and accompanying text. The Shipping Act of 1984 requires that each contract entered into pursuant to the Act be

itime Commission should be preserved as a final protection for small shippers.⁴⁰⁰ Although the Shipping Act of 1984 ultimately preserved tariff filing, many critics of the conference system have proposed that the tariff filing system be eliminated if the antitrust exemption for liner conferences is to be retained. These critics reason that a system of tariff filing merely strengthens the conferences' ability to maintain cartel cohesion and that a system without tariffs would encourage independent action by conference members, thus undermining conference stability.⁴⁰¹ However, this argument cannot be reconciled with a conscious policy decision to promote rationalization through antitrust exempt cooperative arrangements. An elimination of tariff filing in order to undermine conference cohesion will merely serve to injure smaller shippers in a regulatory system which contemplates a system of countervailing power based on large volume shippers armed with such negotiating tools as loyalty and service contracts. While these large shippers will have the power to develop the information necessary to protect themselves in a tariff free environment, it is doubtful that small shippers will be able to protect themselves against discriminatory rebating and pricing against them.⁴⁰² In an economic system dominated by concentrated buyers and sellers, the proper role of government is to ensure that the weak are not unfairly precluded from the opportunity to compete.

V. CONCLUSION

In enacting the Shipping Act of 1984, the 98th Congress implemented liner conference regulatory reform in the form of strengthened

filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include—

- (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements.
- (2) the commodity or commodities involved;
- (3) the minimum volume;
- (4) the line-haul rate;
- (5) the duration;
- (6) service commitments; and
- (7) the liquidated damages for non-performance, if any.

46 U.S.C.A. § 1707(c) (1984). While these provisions clearly provide a depository of information concerning service contracts that shippers can refer to, it is not the same as an advisory board that can provide additional assistance to shippers, as exists under the Staggers Act.

⁴⁰⁰ § 18, Shipping Act 1916, 46 U.S.C. § 817 (1982).

⁴⁰¹ *House Judiciary Hearings*, *supra* note 28, at 4-5 (testimony of James C. Miller III); *Regulatory Reform Hearings*, *supra* note 26, at 510 (testimony of Drew Lewis, Secretary of Transportation); *Senate Judiciary Hearings*, *supra* note 31, at 11-12, 19-22 (testimony of Thomas Campbell, Federal Trade Comm.).

⁴⁰² *See Regulatory Reform Hearings*, *supra* note 26, at 375-83.

conference antitrust exemptions. This approach was accompanied by some protections from the strengthened conference power for shippers. However, the very fact that the Congress has authorized a five year review of the new Act is an indication that (as with other industries facing the realities of international economic conditions) there are doubts as to whether the Shipping Act of 1984 goes far enough in reforming United States regulation of the liner conference system or in protecting shippers' interests. It can be expected that over the next five years, the advocates of shippers' councils will certainly continue to present the concept to policy makers, whether it be the Congress in oversight hearings or before the Presidential Advisory Commission. Whether they argue for shippers' councils as distinct entities or for an antitrust exemption and stronger negotiating tools for shippers' associations remains to be seen.⁴⁰³ Whatever its guise, given the nature of the United States' export trade and domestic competition policy, it is doubtful that shippers' councils, either consultative or negotiating, will be accepted in the United States as a method of economic regulation. If some form of "social justice" is needed to protect small shippers, recourse to export trading companies and the shippers' associations provisions of the Shipping Act of 1984 will provide adequate safeguards for small exporters and importers to offset conference power and protect themselves from conference discrimination. To do otherwise would be to ignore the warnings of F.A. Hayek:

Misinterpretation of market order as an economy that can and ought to satisfy different needs in a certain order of priority, shows itself particularly in the efforts of policy to correct prices and incomes in the interest of what is called "social justice." Whatever the meaning social philosophers have attached to this concept, in the practice of economic policy it has almost always meant one thing, and one thing only: the protection of certain groups against the necessity to descend from the absolute or relative material position which they have for some time enjoyed.⁴⁰⁴

⁴⁰³ See *supra* text accompanying note 44.

⁴⁰⁴ F.A. von Hayek, *Competition as a Discovery Procedure*, in *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS* 186 (1978).