

The Catholic University of America, Columbus School of Law
CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1984

Regulatory Reform in the Ocean Shipping Industry: An Extraordinary U.S. Commitment to Cartels

George E. Garvey

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Admiralty Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

George E. Garvey, Regulatory Reform in the Ocean Shipping Industry: An Extraordinary U.S. Commitment to Cartels, 18 GEO. WASH. J. INT'L L. & ECON. 1 (1984).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

REGULATORY REFORM IN THE OCEAN SHIPPING INDUSTRY: AN EXTRAORDINARY U.S. COMMITMENT TO CARTELS

GEORGE E. GARVEY*

I.	REGULATION OF THE OCEAN SHIPPING INDUSTRY	3
A.	<i>General Background</i>	3
B.	<i>Economic Considerations</i>	7
1.	Justification for Shipping Conferences	7
2.	Flawed Economic Assumptions	8
C.	<i>Shipping Act of 1916</i>	10
1.	Legislative History	10
2.	The <i>Svenska</i> Standard	15
3.	Commitment to Competition	16
II.	RATIONALE FOR REGULATORY REFORM	19
A.	<i>Economic Health of the U.S. Liner Industry</i>	20
B.	<i>Vague Regulatory Standards</i>	23
C.	<i>Efficiency-Promoting Combinations</i>	29
D.	<i>Inconsistency with Foreign Laws and Policies</i>	32
E.	<i>Discriminatory Enforcement</i>	36
III.	POTENTIAL IMPACT OF PROPOSED REGULATORY REFORM	37
A.	<i>Monopolistic Abuse</i>	37
B.	<i>Discrimination</i>	40
C.	<i>Potential Impact on Ports</i>	43
D.	<i>International Implications</i>	45
IV.	PROPOSALS	45
A.	<i>Study Commission</i>	45
B.	<i>Flexible Review Standard</i>	47
C.	<i>Structural Controls</i>	48
D.	<i>Tariff Enforcement</i>	49
V.	CONCLUSION	49
	ADDENDUM	50

Much of the substance of this article was summarized and presented in testimony before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary on May 19, 1983.

* Associate Professor, The Catholic University of America, Columbus School of Law; J.D., University of Wisconsin, 1972; B.A., University of Illinois, 1969; Former Counsel to the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary, 1980-1981.

In the last several sessions of Congress, significant efforts have been made to modify the nature and scope of regulation in the ocean shipping industry.¹ These efforts have been renewed, and proponents expect Congress to enact regulatory reform legislation during the 98th Congress.² The specific provisions of the proposals have varied over time, but there have been two persistent themes: (1) ocean common carriers should be absolutely immunized from the antitrust laws,³ and (2) the regulatory role of the Federal Maritime Commission (FMC) should be diminished.⁴ The proposals, therefore, would increase reliance on self-regulated ocean shipping cartels, known as conferences, to protect and promote U.S. foreign commerce.

This extraordinary commitment to the "benefits" of shipping cartels comes as the U.S. economy grows increasingly dependent on foreign trade and vulnerable to foreign competition.⁵ Because foreign trade also

1. See, e.g., H.R. 4374, 97th Cong., 2d Sess. (1982); S. 1593, 97th Cong., 1st Sess. (1981); H.R. 6899, 96th Cong., 2d Sess. (1980); H.R. 11422, 95th Cong., 2d Sess., 124 CONG. REC. 6331 (1978).

2. The expected legislation is the Shipping Act of 1983, S. 47, 98th Cong., 1st Sess., 129 CONG. REC. S1828 (daily ed. Mar. 1, 1983). The House version of S. 47 is embodied in H.R. 1878, 98th Cong., 1st Sess., 129 CONG. REC. H8202 (daily ed. Oct. 17, 1983) [hereinafter cited as S. 47 (House Version)]. The Senate passed S. 47 on March 1, 1983. 129 CONG. REC. S1828 (1983). The House passed H.R. 1878 on October 17, 1983. 129 CONG. REC. H8216 (1983). The House later vacated its passage of H.R. 1878, passing in its place a version of S. 47 which had been amended by the House to contain certain language of H.R. 1878. 129 CONG. REC. H8223 (1983). The two versions of S. 47 then went to conference. For purposes of this article, "S. 47" refers to the version passed by the Senate on March 1, 1983, whereas the version passed by the House will be referred to as "S. 47 (House Version)."

After the writing of this article, Congress enacted the Shipping Act of 1984 (the 1984 Act), Pub. L. No. 98-237, 98 Stat. 67 (to be codified at 46 U.S.C. §§ 1701-1719). The Act became law on March 20, 1984. An addendum to this article summarizes the legislation and reviews its impact on the regulation of the U.S. ocean shipping industry. References to relevant provisions of the 1984 Act have been incorporated in the footnotes.

3. One of the stated objectives of the proposed Shipping Act of 1982, for example, was "to permit ocean common carriers to conduct international liner shipping and related intermodal activities with complete immunity from the antitrust laws." S. 1593, *supra* note 1, § 2(7). The 1984 Act continues this theme, albeit, with less direct language. The declaration of policy contained in the Act states that one of its purposes is "to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a *minimum of government intervention and regulatory costs*." Shipping Act of 1984, Pub. L. No. 98-237, § 2, 98 Stat. 67, 67 (to be codified at 46 U.S.C. app. § 1701) (emphasis added).

4. See, e.g., SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, REPORT ON THE SHIPPING ACT OF 1982, S. REP. NO. 414, 97th Cong., 2d Sess. 1 (1982) ("The paramount objective of this regulatory scheme [S. 1593] is to develop and maintain an efficient ocean transportation system through commercial means, with minimum government involvement . . ."); HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON INTERNATIONAL OCEAN COMMERCE TRANSPORTATION, H.R. REP. NO. 611, pt. 1, 97th Cong., 2d Sess. 15 (1982) ("[T]he entire method of regulation is changed [by H.R. 4374] to minimize government involvement in shipping operations."). The power of the FMC to control the practices of ocean common carriers has been limited by the 1984 Act. See *infra* notes 385-89 and accompanying text.

5. See Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORD. L. REV. 201, 201-207 (1982). See generally Study of U.S. Competitiveness (Sept. 9, 1980)

is vital to U.S. producers, workers, and consumers, and because the primary characteristics of effective cartels are enhanced prices and diminished production or service, a policy that strengthens the position of international shipping conferences while reducing natural market forces should be scrutinized carefully.

This article explores the historical basis for and nature of the existing regulatory model for the U.S. shipping industry, the reasons suggested for the changes under consideration, and the possible impact of the proposed changes.⁶ The article concludes that the primary justifications for continued regulation of ocean shipping are flawed and thus require more serious consideration than is likely to occur through the legislative hearing process. Alternatively, if the changes are imperative politically, the facts suggest efficient U.S. liner companies are likely to thrive in a more competitive regime. More radical deregulation than Congress has considered seriously, therefore, might be desirable.

I. REGULATION OF THE OCEAN SHIPPING INDUSTRY

A. *General Background*

Ocean shipping conferences⁷ developed in the late 1800's with the advent of steam ships.⁸ Sailing vessels had provided sporadic and indefinite service that stimulated little ocean-borne trade.⁹ Steam-powered vessels made regularly scheduled sailings possible, however, and, as a result, liner service developed.¹⁰ The regularity and relative speed of ocean liners, coupled with the needs of the industrial revolution, re-

(submitted by the President to Congress as required by § 1110 of the Trade Agreements Act of 1979), reprinted in STAFF OF SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96TH CONG., 2D SESS., EXPORT PROMOTION, EXPORT DISINCENTIVES, AND U.S. COMPETITIVENESS 273-612 (Comm. Print 1980).

6. Because the various proposals have changed from Congress to Congress and committee to committee, no effort will be made to deal with specific provisions, although they may be used as examples. The focus of the article will be on the major thrust of the several bills.

7. See D. MARX, INTERNATIONAL SHIPPING CARTELS: A STUDY OF INDUSTRIAL SELF REGULATION BY SHIPPING CONFERENCES (1953), wherein it is stated:

Shipping conferences, or rings as they are sometimes called, are agreements organized by shipping lines to restrict or eliminate competition, to regulate and rationalize sailing schedules and ports of call, and occasionally to arrange for the pooling of cargo, freight monies, or net earnings

The basic purpose of shipping conferences is to minimize losses or to maximize profits.

Id. at 3.

8. See *id.* at 45-46; United Nations Conference on Trade and Development, The Liner Conference System Report by the UNCTAD Secretariat 3, U.N. Doc. TD/B/C.4/62/Rev. 1 (1970) [hereinafter cited as Liner Conference System Report]; Agman, *Competition, Rationalization, and United States Shipping Policy*, 8 J. MAR. L. & COMM. 1, 1 (1976); see also ROYAL COMMISSION ON SHIPPING RINGS 75-80 (1909) [hereinafter cited as ROYAL COMMISSION REPORT].

9. D. MARX, *supra* note 7, at 45; see ROYAL COMMISSION REPORT, *supra* note 8, at 75.

10. D. MARX, *supra* note 7, at 45. Liners provide regular service on set schedules and sail

sulted in an increased demand for shipping services.¹¹ As the demand for liner services increased, faster and larger steam ships were built and placed in service.¹² Ultimately, the volume of available service exceeded demand, and shipping lines began competing aggressively for available carriage.¹³ Liner companies responded with mergers, acquisitions, and the formation of conferences.¹⁴ Conferences were believed by many to benefit both carriers and shippers.¹⁵ Carriers benefited by reduced competition, operating and administrative economies, shared risks of operation, and assurance of a compensatory rate level.¹⁶ Shippers, in turn, received stable and reliable services and rates.¹⁷

Although the early conferences claimed to protect the interests of shippers as well as their own members, they frequently abused their concerted economic power, and as a result, many shippers viewed the combinations with alarm.¹⁸ Complaints by shippers' organizations and concerns of nations without maritime fleets¹⁹ led to two major investigations of the shipping industry²⁰ shortly after the turn of the century.²¹

In 1906, the Royal Commission on Shipping Rings was appointed to investigate the impact of conferences on the commerce of the United Kingdom.²² The Royal Commission issued majority and minority reports in 1909.²³ The majority opined that the danger of shipping con-

whether or not their space is fully utilized. Hanson, *Regulation of the Shipping Industry: An Economic Analysis of the Need for Reform*, 12 LAW & POL. INT'L BUS. 973, 974-975 (1980).

11. B. DEAKIN, SHIPPING CONFERENCES, A STUDY OF THEIR ORIGINS, DEVELOPMENT AND ECONOMIC PRACTICES 15-21 (1973); U.S. DEP'T OF JUSTICE, STUDY OF THE REGULATED OCEAN SHIPPING INDUSTRY 6-7 (Jan. 1977) [hereinafter cited as JUSTICE DEPARTMENT STUDY].

12. D. MARX, *supra* note 7, at 45.

13. *Id.* at 46; Kryvoruka, *American Ocean Shipping and the Antitrust Laws Revisited*, 11 J. MAR. L. & COMM. 67, 71 (1979).

14. D. MARX, *supra* note 7, at 47-48. There are several distinct types of liner agreements: freight conference agreements, rate agreements, pooling agreements, joint service agreements, sailing agreements, transshipment agreements, and cooperative working agreements. 46 C.F.R. § 522.2(a) (1982).

15. The term *carriers* refers to shipping lines (e.g., U.S. Lines), and the term *shippers* refers to those utilizing the carriers' transportation services.

16. D. MARX, *supra* note 7, at 47; Kryvoruka, *supra* note 13, at 72.

17. See 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. 51, 295-302 (1914) [hereinafter cited as ALEXANDER REPORT]. The report is named after Joshua W. Alexander, then chairman of House Committee on Merchant Marine and Fisheries.

18. H.R. REP. NO. 611, *supra* note 4, at 16.

19. D. MARX, *supra* note 7, at 48-49.

20. See ROYAL COMMISSION REPORT, *supra* note 8; ALEXANDER REPORT, *supra* note 17.

21. D. MARX, *supra* note 7, at 48-49; ROYAL COMMISSION REPORT, *supra* note 8; ALEXANDER REPORT, *supra* note 17.

22. ROYAL COMMISSION REPORT, *supra* note 8, at i-ii; see D. MARX, *supra* note 7, at 49.

23. ROYAL COMMISSION REPORT, *supra* note 8, at 1-90 (majority report), 93-116 (minority report). A subsequent Canadian Committee noted that the majority members of the Royal Com-

ferences acquiring excessive power was limited by (1) competition from tramps²⁴ and nonconference liners, (2) internal service competition, and (3) competition from other concerted shippers' organizations and conferences.²⁵ The majority proposed that the British Board of Trade be empowered to appoint conciliators or arbitrators to resolve differences between shipping conference lines and associations or committees of shippers.²⁶ The majority concluded that the benefit to shippers realized through conference participation outweighed the danger of concentrated power, which could be minimized by administrative intervention.²⁷ The minority of the Royal Commission believed the majority had exaggerated the advantages of the shipping conference system²⁸

mission were largely identified with shipping interests, while the minority were not. JOURNALS OF THE HOUSE OF COMMONS, DOMINION OF CANADA, Appendix to 60th Vol., xi (1923), quoted in D. MARX, *supra* note 7, at 50 n.7.

24. "A tramp ship, in traditional terms, is one that operates on an irregular or non-scheduled basis from one port of lading to one port discharge, lifting one dry cargo commodity, usually of low value, without mark or count, and from one shipper to one consignee." I. HEINE, THE U.S. MARITIME INDUSTRY, IN THE NATIONAL INTEREST 88 (1980).

25. ROYAL COMMISSION REPORT, *supra* note 8, at 77.

26. *Id.* at 89. The majority of the Royal Commission also recommended that conferences employing deferred rebates be required to file conference agreements with the Board of Trade and that the Board be allowed to conduct investigations whenever important national interests were involved. *Id.*

27. *Id.*

28. *Id.* at 95. The minority of the Royal Commission was extremely critical of the conference system:

Summing up the conclusions at which we have arrived: —

(1.) The Conference system with the deferred rebate — the natural evolution of a highly organised trade dealing with customers for the most part scattered or disorganised — has created on almost all the chief Ocean routes a monopoly, the limitations upon which are in many cases illusory, and which generally tend to decline;

(2.) The system was introduced in the first instance with the objective of raising or preventing their fall and diminishing competition;

(3.) It has been successful in raising or keeping up rates;

(4.) The public have, as a rule, to pay higher rates of freight than they would pay in an open market;

(5.) The system has been injurious to 'tramps,' the strongest element in the British mercantile marine, and it leads . . . to waste and to higher rates of freight;

(6.) The system tends to waste in various other directions, owing to the manner in which the Rings are constituted; [Since conferences are a partnership monopoly there is less rationalization and perhaps none.]

(7.) There is no satisfactory evidence that the saving in cost, if there is any . . . exceeds the waste which is due to that system;

(9.) The system tends to inflate the amount of tonnage and consequently the amount of capital invested upon which interest has to be paid.

(11.) It gives a country such as the United States, in which the system is illegal, an advantage as compared with the United Kingdom.

(12.) It has caused in the case of South Africa a diversion of British trade. (13.) There is no evidence that it has appreciably increased regularity of sailing or greatly improved the quality of steamers; but it has tended to bring about equality and stability of rates.

Id. at 114.

and, therefore, refused to concur in the recommendations of the majority.²⁹

In 1912, the U.S. House of Representatives directed the Committee on Merchant Marine and Fisheries to investigate combinations in the ocean shipping industry.³⁰ The Committee conducted an intensive investigation of the practices of the ocean shipping industry and published the results in the Alexander Report in 1914.³¹ The House Committee found benefits in the conference system,³² as had the Royal Commission, but it also found that conference carriers had abused their collective power.³³ It recommended the creation of a regulatory body to guard against such abuses.³⁴ The Committee's report ultimately resulted in passage of the Shipping Act of 1916.³⁵

The international response to shipping cartels has varied among nations and over time. The United Kingdom has opted for relatively independent conferences subject to the countervailing power of shippers' organizations.³⁶ Some nations have bargained directly with liner conferences on behalf of their shippers,³⁷ and others have established state-run shipping companies to compete with conferences.³⁸ Still others have imposed varying degrees of governmental regulation.³⁹ The intent of each of these responses has been to prevent conferences from exercising their monopoly power to the detriment of consumers, shippers, or competing ocean carriers.⁴⁰

29. *Id.* at 95-116. The recommendations of the Royal Commission minority were similar to those submitted by the majority, giving the Board of Trade power to recognize shipping conferences, but without the reservations and restrictions of the majority report. *See id.* at 114-16.

30. H.R. Res. 425, 62d Cong., 2d Sess., 48 CONG. REC. 2835-36 (1912); H.R. Res. 587, 62d Cong., 2d Sess., 48 CONG. REC. 8350 (1912).

31. ALEXANDER REPORT, *supra* note 17; *see infra* text accompanying notes 82-87.

32. *See infra* text accompanying notes 84-85.

33. ALEXANDER REPORT, *supra* note 17, at 304-07; *see infra* notes 86-87 and accompanying text.

34. H.R. REP. NO. 659, 64th Cong., 1st Sess. (1916).

35. Shipping Act of 1916, ch. 451, 39 Stat. 728 (current version at 46 U.S.C. §§ 801-842 (1982)).

36. *See supra* text accompanying notes 25-27. Australia also has sanctioned a comprehensive shippers' organization, known as the Australian Oversea Transport Association (A.O.T.A.), to bargain with ocean carriers. D. MARX, *supra* note 7, at 93-95; Agman, *supra* note 8, at 21-22.

37. D. MARX, *supra* note 7, at 92-97. For example, South Africa and New Zealand bargain directly with shipping conferences on behalf of their shippers. *Id.*

38. I. HEINE, *supra* note 24, at 157. Australia established a national line at the end of World War I, but ultimately abandoned that approach in favor of a strong shippers' council. Agman, *supra* note 8, at 20-22.

39. *See generally*, D. MARX, *supra* note 7, at 84-104.

40. *See id.* at 103.

B. *Economic Considerations*⁴¹

1. Justification for Shipping Conferences

Those seeking to justify the cartelized ocean liner system suggest that the industry's cost structure makes a total commitment to competition unacceptable.⁴² As a result of the development of new vessel and related support technology,⁴³ ocean shipping has become increasingly capital intensive. A modern container ship, for example, may cost in excess of \$100 million,⁴⁴ and container-related terminal facilities are similarly expensive to produce.⁴⁵ The ratio of fixed to variable costs is an even more significant factor than the high absolute costs. Approximately seventy-five percent of the costs of ocean liner operators is fixed.⁴⁶ These high fixed costs, coupled with a perceived inelastic demand for shipping services,⁴⁷ may induce carriers to engage in aggressive price competition to recover variable costs during times of slack demand.⁴⁸ If this competition, usually described by carriers as destructive or cut-throat,⁴⁹ continues for an extended period, the industry may experience numerous failures.⁵⁰ Thus, proponents of the cartelized ocean liner system conclude that conferences resolve this problem by eliminating competition and raising rates to a level that ensures long-term profits.⁵¹

Proponents of the system argue further that only a cartelized system

41. A full development of the economics of ocean liner shipping is beyond the scope of this article. For discussions of liner economics, see generally B. DEAKIN, *supra* note 11; R. GOSS, *STUDIES IN MARITIME ECONOMICS* (1968); D. MARX, *supra* note 7; Agman, *supra* note 8; Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MAR. L. & COMM. 93 (1972); Hanson, *supra* note 10, at 976-82.

42. See Agman, *supra* note 8, at 11-14.

43. *Id.*

44. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, REPORT ON S. 504, TO IMPROVE THE INTERNATIONAL OCEAN COMMERCE TRANSPORTATION SYSTEM OF THE UNITED STATES, S. REP. NO. 3, 98th Cong., 1st Sess. 9 (1983).

45. Agman, *supra* note 8, at 12.

46. S. REP. NO. 3, *supra* note 44, at 9. As with capital expenditures, the proportion of fixed to total costs has increased with the advent and production of container vessels. Agman, *supra* note 8, at 12-13. The designation of particular costs as fixed or variable, however, cannot be made with mathematical precision. For example, costs that will generally be considered fixed for liners may be treated as variable for tramps. D. MARX, *supra* note 7, at 12.

47. S. REP. NO. 3, *supra* note 44, at 8.

48. See Agman, *supra* note 8, at 10; Kryvoruka, *supra* note 13, at 72.

49. The normative concept of "destructive" competition has lost much of its credibility in related transportation industries. See Bennathan & Walters, *supra* note 41, at 97; *Oversight Hearings on Maritime Antitrust, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 97-98 (1982) (testimony of Thomas J. Campbell, Director, Bureau of Competition, Federal Trade Commission, and Robert D. Tollison, Director, Bureau of Economics, Federal Trade Commission) [hereinafter cited as *Maritime Antitrust Oversight Hearings*].

50. Bennathan & Walters, *supra* note 41, at 96.

51. *Id.*

can protect shippers given the economics of the shipping industry.⁵² They argue that conferences protect shippers against the ultimate monopoly that would follow extensive rate wars.⁵³ The Alexander Report,⁵⁴ for example, stated:

To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.⁵⁵

Conference agreements are more frequently justified as a source of stable and nondiscriminatory services and rates.⁵⁶ Although conference carrier rates may be higher than they would be in competitive markets, they provide a degree of certainty that allows shippers to calculate costs and to depend on regular sailings.⁵⁷

2. Flawed Economic Assumptions

Several of the economic premises underlying legalized shipping cartels, however, are questionable. First, the belief that the demand for shipping services is unresponsive to rate changes — that it is inelastic — is at best a gross generalization. Several factors actually affect the elasticity of demand for ocean carriage. One economic study shows that demand becomes more elastic as freight rates increase as a percentage of total delivered costs.⁵⁸ The study also shows that demand is largely derived from and varies directly with the demand for the product being shipped.⁵⁹ Demand is therefore elastic for some goods and relatively unresponsive to rate changes for others. Furthermore, the response of particular shippers to rate changes depends on the transportation alternatives available. Those shippers facing the highest freight rates may view air transportation as an alternative,⁶⁰ while those shipping goods subject to low tariff rates may find bulk carriers and tramps to be a realistic alternative to liner service.⁶¹ Shippers in both instances may be

52. Schmeltzer & Weiner, *Liner Shipping in the 1980's: Competitive Patterns and Legislative Initiatives in the 96th Congress*, 12 J. MAR. L. & COMM. 25, 29-30 (1980).

53. *Id.*

54. See *supra* notes 31-34 and accompanying text.

55. ALEXANDER REPORT, *supra* note 17, at 416.

56. See S. REP. NO. 3, *supra* note 44, at 9; The Liner Conference System, *supra* note 8, at 5; Bennathan & Walters, *supra* note 41, at 98-99.

57. See The Liner Conference System Report, *supra* note 8, at 5-6.

58. B. DEAKIN, *supra* note 11, at 144.

59. *Id.* at 8, 144; see also D. MARX, *supra* note 7, at 16.

60. B. DEAKIN, *supra* note 11, at 215.

61. *Id.*

sensitive and highly responsive to liner rate changes.⁶²

Second, there is evidence that aggressive competition in the liner industry will not result in the significant number of bankruptcies or the ultimate single-firm monopoly feared by proponents of the cartelized system. Related transportation industries, such as trucking, have not become unduly concentrated following deregulation,⁶³ and liners have survived in those routes where the conference system has been unsuccessful.⁶⁴ Concentration has increased among American liner companies in recent years,⁶⁵ primarily as a result of technological change or mismanagement,⁶⁶ despite the existence of conferences. Failures are unlikely unless liner firms dramatically miscalculate the long-term demand for their services.⁶⁷ The propriety of shifting the costs of such miscalculations to shippers has been questioned: "[E]ven if shipowners over-built consistently, it is reasonable to expect them to pay for their own mistakes. It is unfair to expect the shippers to pay — in markets rigged with high cartelized rates — for the follies of owners."⁶⁸

Finally, stability, which is the principal perceived benefit of conferences to shippers, might not be as certain or as beneficial as proponents of collective liner activities claim. Liner rates are less responsive to market forces, but more responsive to changes in costs,⁶⁹ than are tramp rates. As a result, liner rates tend to be higher than those of tramps during periods of slack demand and lower when demand peaks.⁷⁰ In spite of this relative overall stability, however, individual shippers may face substantial fluctuations based on surcharges, rebates, and rate cuts during periodic rate wars.⁷¹ These factors make individual rates for liner services more volatile than the general tariffs would indicate. Stability also comes at a cost that is imposed on all conference customers regardless of their individual needs or desires. One study of the cartel shipping system stated:

62. *Id.* Even within the mid-range of rates — those not generally subject to competition from air carriers or tramps — the elasticity of demand varies, with elasticity tending to be higher at the lower end of this mid-range. *Id.*

63. See Bennathan & Walters, *supra* note 41, at 97-98.

64. *Id.* at 98.

65. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CHAIRMAN, COMMITTEE ON MERCHANT MARINE AND FISHERIES, U.S. HOUSE OF REPRESENTATIVES, GAO/PAD-82-11, 11 (1982) [hereinafter cited as GAO REPORT]. "[T]he number of U.S. flag liner carriers declined from 19 in 1970 to 9 in 1981." *Id.*

66. *Id.*

67. See Bennathan & Walters, *supra* note 41, at 97.

68. *Id.*

69. D. ROBERTSON, ECONOMIC FRAGMENTS 122 (1931), cited with approval in D. MARX, *supra* note 7, at 242.

70. *Id.*

71. Bennathan & Walters, *supra* note 41, at 99

The rate stability that is in fact being sold by the conferences is, of course, part and parcel of the sale of total conference service; the buyer gets it and pays for it whether he likes it or not. If he wants more stability he may be able to buy it at Lloyd's, but he cannot contract for less. If the cartel is successful in fighting down outside competition, shippers who would prefer a lower rate and less stability have no choice; they cannot sell any part of the stability they get.⁷²

As a result of the system, those shippers less interested in services and rate stability must subsidize those that are more concerned with certainty.⁷³ Furthermore, the rate stability established by shipping cartels "tends to destabilize other prices and incomes."⁷⁴

If freight rates do not respond to market stimuli, the prices and revenues of producers and shippers must make the needed adjustment. The "instability" inherent in a market economy does not disappear when ocean freight rates are fixed. The response to fluctuations in supply or demand that naturally should be experienced by ocean carriers is shifted to others in the relevant chain of production and distribution. Carriers, rather than consumers, dictate how scarce resources will be allocated and consumer demand satisfied.

To summarize, the predominant economic justification given for shipping conferences is that they prevent destructive competition in an industry with high fixed costs and inelastic demand.⁷⁵ Conferences purportedly prevent absolute monopolization⁷⁶ and provide stable service and rates.⁷⁷ Some economists, however, question many of the underlying assumptions regarding the impact of competition and the benefits of cartels in the ocean shipping industry.⁷⁸ Their studies show that the demand for shipping services is responsive at times to certain rate changes,⁷⁹ that competition in the industry will not result in an ultimate all-powerful monopoly,⁸⁰ and that the cost of "stability" in the cartelized industry is high and ultimately borne by the consumer.⁸¹

C. *Shipping Act of 1916*

1. Legislative History

In 1914, the House Committee on Merchant Marine and Fisheries

72. *Id.* at 100-01.

73. *Id.* at 101

74. *Id.*

75. *See supra* notes 42-57 and accompanying text.

76. *See supra* text accompanying notes 53-55.

77. *See supra* text accompanying notes 56-57

78. *See supra* notes 58-74 and accompanying text.

79. *See supra* notes 58-62 and accompanying text.

80. *See supra* notes 63-68 and accompanying text.

81. *See supra* notes 69-74 and accompanying text.

The 1984 Act allows concerted liner activities to enjoy almost total antitrust immunity.³⁸¹ The new legislation retains the FMC as the principal and initial authority to enforce all prohibitions of the statute; antitrust agencies are to challenge activities of ocean common carriers as antitrust violations only in the event an "enforcement vacuum" has occurred.³⁸² The antitrust laws apply, however, only if there is no reasonable basis to believe the activity was identified in an effective agreement or otherwise exempt from the filing requirement of the 1984 Act.³⁸³ Finally, the most potent weapon in the antitrust arsenal, the private treble damage action, was eliminated as a remedy for injuries caused by activities in violation of antitrust law which also violate the 1984 Act.³⁸⁴

The FMC, once able to disapprove an agreement solely on the grounds that it was detrimental to the public interest,³⁸⁵ may now disapprove only those agreements that fail to meet the minimal requirements of section 5 of the 1984 Act.³⁸⁶ An agreement that satisfies section 5

House to S. 47 reported to their respective Houses on February 23, 1984. CONFERENCE REPORT TO ACCOMPANY S. 47, H.R. REP. NO. 600, 98th Cong., 2d Sess. 1 (hereinafter cited as CONFERENCE REPORT). The recommendations of the conference committee were adopted by both Houses of Congress. The Senate passed the conference version of S.47 on February 23, 1984, 130 Cong. Rec. S1603; the House on March 6, 1984, 130 Cong. Rec. H1297. The President signed the Shipping Act of 1984 into law on March 20, 1984.

381. See Shipping Act of 1984, § 7, 98 Stat. at 73-74 (to be codified at 46 U.S.C. app. § 1706). Section 7 of the 1984 Act states, *inter alia*, that the antitrust laws do not apply to

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

Id. § 7(a)(2), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1706(a)(2)). Prior to the 1984 Act, parties acting pursuant to an *unapproved* agreement were subject to the full extent of the antitrust laws. See *supra* notes 94-99 and accompanying text.

382. See CONFERENCE REPORT, *supra* note 380, at 29.

383. See Shipping Act of 1984, § 7(a)(2), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1706(a)(2)).

384. Shipping Act of 1984, § 7(c)(2), 98 Stat. at 74 (to be codified at 46 U.S.C. app. § 1706(c)(2)). The 1984 Act does not limit the amount of award to actual injuries in every instance.

Section 11(g) states:

For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this Act plus reasonable attorney fees. Upon a showing that the injury was caused by activity that is prohibited by section 10(b)(5) or (7) or section 10(c)(1) or (4) of this Act, or that violates section 10(a)(2) or (3), the Commission may direct the payment of *additional amounts*; but the total recovery of a complainant may not exceed *twice the amount of the actual injury*.

Id. § 11(g), 98 Stat. at 80-81 (to be codified at 46 U.S.C. app. § 1710(g)) (emphasis added).

385. See *supra* notes 115-16 and accompanying text.

386. Shipping Act of 1984, § 6(b), 98 Stat. at 72 (to be codified at 46 U.S.C. app. § 1705(b)).

Section 5 reads in relevant part:

(b) CONFERENCE AGREEMENTS. — Each conference agreement must —
 (1) state its purpose;

requirements normally will become effective within forty-five days after filing.³⁸⁷ If, however, the agreement is "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost,"³⁸⁸ the FMC may seek to enjoin its operation.³⁸⁹

The 1984 Act differs from the bills passed by the House and Senate in the area of service contracts. The use of service contracts, which enhance the possibility of both discrimination and competition,³⁹⁰ was limited severely in the bills enacted by both Houses of Congress. The "prohibited acts" section of each bill contained a provision which barred common carriers from giving unreasonable preferences to any person.³⁹¹ Such provision may have limited *unreasonably* discriminatory service contracts.³⁹² The conference committee, however, amended the section to permit discrimination through service contracts.³⁹³ The conferees also noted that an ocean shipping conference may prohibit its members from entering into service contracts.³⁹⁴ A conference's ability

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

(4) at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;

(5) prohibit the conference from engaging in conduct prohibited by section 10(c)(1) or (3) of this Act;

(6) provide for a consultation process designed to promote —

(A) commercial resolution of disputes, and

(B) cooperation with shippers in preventing and eliminating malpractices;

(7) establish procedures for promptly and fairly considering shippers' requests and complaints; and

(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

(c) INTERCONFERENCE AGREEMENTS. — Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for conference.

Id. § 5(b)-(c), 98 Stat. at 71 (to be codified at 46 U.S.C. app. § 1704(b)-(c)).

387. *Id.* § 6(c)(1), 98 Stat. at 72 (to be codified at 46 U.S.C. app. § 1705(c)(1)).

388. *Id.* § 6(g), 98 Stat. at 72-73 (to be codified at 46 U.S.C. app. § 1705(g)).

389. *Id.* § 6(h), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1705(h)).

390. *See supra* text accompanying notes 315-20.

391. S. 47, *supra* note 2, § 12(d)(2), S. 47 (House Version), *supra* note 2, § 9(b)(1). For the full list of prohibited acts contained in § 9 of S. 47 (House Version), *see supra* note 223.

392. *See supra* notes 315-20 and accompanying text.

393. *See* Shipping Act of 1984, § 10(b)(11), 98 Stat. at 78 (to be codified at 46 U.S.C. app. § 1709(b)(11)).

394. CONFERENCE REPORT, *supra* note 380, at 29.

published the Alexander Report,⁸² which provided the factual basis for adoption of the Shipping Act of 1916.⁸³ The Alexander Report concluded that U.S. foreign commerce could benefit from the continued existence of shipping conferences.⁸⁴ It stated that the conference system secured greater regularity of service, faster and better vessels, extended periods of stable rates, uniformity of rates to all merchants rather than the preferential treatment accorded larger shippers in time of rate wars, and the maintenance of rates from the United States to foreign countries on a parity with those from other countries.⁸⁵

The report also said, however, that the conference system generated problems natural to cartels, such as high and discriminatory rates, poor service, and predatory conduct.⁸⁶ In its report to the House, the committee stated that "effective Government control" was the only way to strike a balance between the benefits of concerted carrier activities and their "inherent" abusive proclivities.⁸⁷

The Shipping Act of 1916 established a multifarious regulatory format. Some practices of the conferences were expressly prohibited, including the use of "fighting ships,"⁸⁸ "deferred rebates,"⁸⁹ and retaliatory or discriminatory rates or services.⁹⁰ The Act authorized the U.S. Shipping Board, a predecessor of the Federal Maritime Commis-

82. ALEXANDER REPORT, *supra* note 17; see *supra* text accompanying notes 30-35.

83. Shipping Act of 1916, ch. 451, 39 Stat. 728 (current version at 46 U.S.C. §§ 801-842 (1982)).

84. ALEXANDER REPORT, *supra* note 17, at 295-303.

85. *Id.* at 295-302.

86. *Id.* at 417. The Alexander Report noted:

A considerable number of complaints were also filed with the committee [by exporters and importers] objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods — such as fighting ships, deferred rebates and threats to refuse shipping accommodations — used by some conferences to meet the competition of nonconference lines.

Id.

87. *Id.* at 417-18.

88. Shipping Act of 1916, ch. 451, § 14, 39 Stat. 728, 733 (current version at 46 U.S.C. § 812 (1982)). The Act defines *fighting ship* as "a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade." *Id.*

89. *Id.* The statute defines *deferred rebate* as

a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Id.

90. *Id.* §§ 14, 16, 39 Stat. 733-34 (current version at 46 U.S.C. §§ 812, 815 (1982)).

sion,⁹¹ to disapprove international rates that were "so unreasonably high or low as to be detrimental to the commerce of the United States."⁹²

Section 15 contained the Act's primary regulatory mechanism.⁹³ Section 15 required common carriers and others subject to the Act to file with the Shipping Board all agreements, including memoranda specifying the terms of oral agreements involving, inter alia, rates and the allocation or limitation of services.⁹⁴ The Act authorized the Board to disapprove agreements found to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Shipping Act.⁹⁵ Parties to an approved agreement were exempt from the Sherman Act⁹⁶ and the Wilson Tariff Act⁹⁷ when acting within the

91. The authorized regulatory agency of the Shipping Act of 1916 has had several names. The Federal Maritime Commission was created by Reorganization Plan No. 7 of 1961. 3 C.F.R. at 874 (1959-1963 compilation).

92. Shipping Act of 1916, ch. 451, § 18, 39 Stat. 728, 735 (current version at 46 U.S.C. § 813a (1982)).

93. *Id.* § 15, 39 Stat. 733 (current version at 46 U.S.C. § 814 (1982)).

94. *Id.* The current version of section 15 states in relevant part:

Every common carrier by water, or other person subject to this act shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements The Commission shall . . . disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences or carriers serving different trades that would otherwise be naturally competitive unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

46 U.S.C. § 814 (1982).

95. Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 733 (current version at 46 U.S.C. § 814 (1982)).

96. 15 U.S.C. §§ 1-7 (1982).

97. *Id.* §§ 8-11.

terms of such an agreement.⁹⁸ Those acting pursuant to an unapproved agreement were in violation of the Shipping Act and were subject to the full extent of the antitrust laws.⁹⁹

Amendments to the Shipping Act in 1961 were prompted by the 1958 decision of the U.S. Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.*¹⁰⁰ In *Isbrandtsen*, the Court held that the dual rate contract system, widely used by conferences to foster shipper loyalty, violated the Shipping Act if employed as a predatory device.¹⁰¹ A "dual rate" contract provides lower rates to shippers that commit themselves to ship all or a specified portion of their cargo to the contract carrier or conference.¹⁰² Congress immediately suspended the effect of the *Isbrandtsen* decision for two years and began an investigation into the dual rate system.¹⁰³ Congress ultimately enacted section 14b of the Shipping Act, which permitted the use of dual rate contracts approved by the FMC.¹⁰⁴ This section

98. Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728, 733 (current version at 46 U.S.C. § 814 (1982))

99. *Id.* Several Supreme Court decisions, based on the doctrine of primary jurisdiction, raised some questions about the applicability of the antitrust laws to liner activities. *See, e.g.,* *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *see also Hearings on H.R. 6899 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 91-92 (1980) (statement of Robert J. Blackwell on behalf of Council of American Flag-Ship Operators). [hereinafter cited as *Hearings on H.R. 6899*]. A decision contemporaneous with the *Cunard S.S. Co.* decision, however, explicitly noted that the available antitrust exemption in the Shipping Act was limited to *approved* agreements. *United States v. American Union Transport*, 327 U.S. 437, 447 n.8 (1946).

100. 356 U.S. 481 (1958).

101. *Id.* at 499.

102. *American Export Isbrandtsen Lines, Inc. v. Fed. Maritime Comm'n*, 380 F.2d 609, 619 (D.C. Cir. 1967).

103. Act of Aug. 12, 1958, Pub. L. No. 85-626, § 1, 72 Stat. 574.

104. Act of Oct. 3, 1961, Pub. L. No. 87-346, § 1, 75 Stat. 762 (codified as amended at 46 U.S.C. § 813a (1982)). Section 14b of the Shipping Act states, in pertinent part:

Notwithstanding any other provisions of this Chapter, on application the Federal Maritime Commission (hereinafter "Commission"), shall . . . permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier . . . ; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is

indorsed nondiscriminatory availability, set the standards for Commission approval, and established several mandatory requirements for valid dual rate contracts.¹⁰⁵

The *Isbrandtsen* decision spawned inquiries by both the House Merchant Marine and Fisheries Committee and the House Committee on the Judiciary. The Antitrust Subcommittee of the House Committee on the Judiciary inquiry quickly expanded beyond the issue of dual rate contracts. The subcommittee published the results of its far-reaching investigation of carrier practices and of the regulatory practices of the Federal Maritime Board in a report known as the Celler Report.¹⁰⁶ The report was extremely critical of conference practices, their impact on U.S. commerce, and the performance of the Federal Maritime Board.¹⁰⁷ The report found that foreign carriers dominated conferences and voted as a bloc against U.S. interests,¹⁰⁸ that conferences had grown in strength since the time of the Alexander Report and had continued their abusive monopolistic practices,¹⁰⁹ that carriers avoided regulatory oversight by entering into secret, unfiled agreements,¹¹⁰ and that "U.S. for-

available; (5) limits damages recoverable for breach by either party to actual damages . . . ; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk . . . ; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit.

Id.

105. *Id.*

106. STAFF OF THE ANTITRUST SUBCOMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT ON THE OCEAN FREIGHT INDUSTRY (Comm. Print 1962) [hereinafter cited as CELLER REPORT]. The report is named after Emanuel Celler, then chairman of the Antitrust Subcommittee of the House Committee on the Judiciary.

107. *See id.* at 384-99. The Federal Maritime Board, established by Reorganization Plan No. 21 of 1951, 3 C.F.R. at 1012 (1949-1953 compilation), was the predecessor of the Federal Maritime Commission.

108. CELLER REPORT, *supra* note 106, at 384.

109. *Id.* at 385. The Celler Report stated:

The recommendations of the Alexander committee, culminating in the historic Shipping Act of 1916, have, through no fault of that committee, utterly failed in attaining its objectives. Over the years, the conference system has been steadily augmented in strength, while at the same time there have continued flagrant abuses of its privileges. This is not idle conjecture. The files of only a small number of lines selected at random by the subcommittee for study disclosed some 240 apparent violations of existing Federal statutes or conference agreements, including an untold number of secret and unfiled agreements in violation of section 15 of the Shipping Act, both open and concealed rebating, "fighting committees" (in lieu of the clearly outlawed "fighting ship"), numerous predatory practices aimed at curtailing or impairing outside competition, geographical discriminations against nations and ports, and favoritism to preferred shippers.

Id.

110. *Id.* at 391

oreign trade routes [were] rife with malpractice."¹¹¹ The Antitrust Subcommittee reserved its most serious criticism in the report for the Federal Maritime Board. The report noted that the Board and its predecessors had never attempted seriously to regulate the industry.¹¹² For example, the subcommittee found that the Board had no investigators prior to 1954 and only six at the time of the inquiry,¹¹³ and it had *never* imposed the \$1,000 per day fine for violations of section 15.¹¹⁴

In response to the Celler Report, section 15 was revised in three significant respects by the 1961 amendments: (1) interconference agreements would be approved only if conference members retained the right of independent action; (2) conferences were required to remain open to all qualified carriers, which must be free to exit without penalty; and (3) agreements would not be approved if "contrary to the public interest."¹¹⁵ These amendments strengthened the regulatory role of the Federal Maritime Commission and encouraged some measure of competition within the conference system.¹¹⁶

2. The *Svenska* Standard

The standards by which the FMC is to approve liner agreements under the Shipping Act were construed by the Supreme Court in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*.¹¹⁷ The Court agreed with the decision of the FMC that agreements containing restraints inconsistent with antitrust principles must be closely scrutinized prior to approval.¹¹⁸ The FMC had concluded that the Shipping Act is not an absolute commitment to the conference system; rather, the Act requires the Commission to strike an appropriate balance between the competitive goals of the antitrust laws and the intent of the Shipping

111. *Id.* at 392.

112. *Id.* at 396.

113. *Id.*

114. *Id.* Chairman Emanuel Celler concluded that the "record of regulatory neglect by the Federal Maritime Board is unparalleled." *Id.*

115. Act of Oct. 3, 1961, Pub. L. No. 87-346, § 2, 75 Stat. 762 (codified as amended at 46 U.S.C. § 814 (1982)).

116. See Celler Report, *supra* note 106, at 395. The House Committee on the Judiciary believed that the continued existence of independent competition was essential:

[I]t is one thing for this country to authorize the establishment of a cartel with anticompetitive devices authorized by law, but it is quite another for this Government to permit such a cartel to become a total supermonopoly unrestrained either by Government oversight or by free economic forces. Only by maintaining some competition against these cartelized foreign-dominated steamship conferences can there be any hope that the fundamental economic interests of the United States will be preserved.

Id.

117. 390 U.S. 238 (1968).

118. *Id.* at 243.

Act to permit certain collective conduct.¹¹⁹ The FMC established that the proponents of an agreement contrary to antitrust policy must "bring forth such facts as would demonstrate that [the proposed activity] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."¹²⁰ This regulatory standard is generally identified as the *Svenska* standard.¹²¹ The public interest in the maintenance of competition allows the FMC, therefore, to authorize anticompetitive agreements only to the extent that they are necessary to effectuate the purposes of the Shipping Act.¹²²

Since *Svenska*, the FMC and the federal courts have continued to insist that anticompetitive agreements be carefully tailored to meet legitimate Shipping Act goals.¹²³ The Commission is required to conduct an adequate investigation of all agreements containing anticompetitive provisions.¹²⁴ The FMC must scrutinize closely all agreements involving activities that are per se illegal as well as all agreements having any antitrust implications.¹²⁵ Proponents of anticompetitive agreements must "meet the *heavy burden* of showing that, on balance, the agreement is in the public interest."¹²⁶

3. Commitment to Competition

The maintenance of limited competition as a check on the monopolistic power of conferences always has been a goal of the Shipping Act.¹²⁷ The emphasis on competition, however, was increased significantly by the 1961 amendments, and subsequent administrative and judicial decisions have reinforced the commitment to the operation of market forces.¹²⁸ This heightened commitment to competition, however, runs counter to the goals and practices of ocean shipping conferences and has been a major irritant to conference carriers. For example, a primary

119. Investigation of Passenger Steamship Conferences Regarding Travel Agents, 10 F.M.C. 27, 33 (1966).

120. *Id.* at 45.

121. *Hearings on H.R. 6899, supra* note 99, at 72 (statement of Sanford M. Litvack, Assistant Attorney General, Antitrust Division).

122. *Isbrandtsen Co. v. United States*, 211 F.2d 51, 57 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

123. *See, e.g., United States Lines v. Fed. Maritime Comm'n*, 584 F.2d 519, 528 (D.C. Cir. 1978).

124. *Id.* at 543; *Marine Space Enclosures, Inc. v. Fed. Maritime Comm'n*, 420 F.2d 577, 586 (D.C. Cir. 1969).

125. *Sea-Land Services v. Fed. Maritime Comm'n*, 653 F.2d 544, 547 (D.C. Cir. 1981).

126. *Id.* at 547 (emphasis added).

127. *See* CELLER REPORT, *supra* note 106, at 26.

128. *See supra* notes 117-26 and accompanying text

objective of shipping conferences is to "rationalize" trade routes.¹²⁹ In order to rationalize services, conferences must have effective control over all available tonnage.¹³⁰ To achieve this control, conferences historically have employed tying devices,¹³¹ limited their own membership, and driven independent carriers out of their trades.¹³² One industry analyst has stated that rationalization is fostered best by accepting and sanctioning the use of closed conferences and making the institutional changes necessary to facilitate rationalization.¹³³ United States anti-trust policy, however, is antagonistic to both closed conferences and tying devices.¹³⁴ The maintenance of competition in the shipping industry, even though limited, has been an obvious source of tension in an industry committed to the collective rationalization of services.

The Shipping Act currently responds in three ways to the probability that conference members will abuse their collective power. First, the Shipping Act, through section 15, subjects all anticompetitive agreements to strict scrutiny.¹³⁵ Second, the act prohibits specific abusive practices.¹³⁶ Ocean liners are common carriers and as such are expected to offer their services on a fair and equal basis. The Celler Report stated that U.S. maritime policy has insisted on "fair play and equal treatment for shippers large and small [and] protection of cargo and ports against unfair discrimination."¹³⁷ Major prohibitory provisions of the Act, therefore, proscribe discriminatory conduct.¹³⁸ The requirement that conferences file tariffs and adhere strictly to their terms,¹³⁹ for example, protects less knowledgeable or less influential shippers from unequal rates or services.

"Fighting ships,"¹⁴⁰ a classic example of predation,¹⁴¹ have been pro-

129. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 174 (2d ed. 1980). F. M. Scherer defines rationalization as "integrated planning of production" and describes a rationalization cartel as "[t]he ultimate in overt agreement, short of merging all producers into a monolithic monopoly . . ." *Id.*

130. *See id.*

131. For a discussion of deferred rebates and other tying devices designed to ensure a shipper's exclusive patronage, see D. MARX, *supra* note 7, at 55-56.

132. GAO REPORT, *supra* note 65, at 4-5.

133. Agman, *supra* note 8, at 47.

134. *Id.*

135. See Shipping Act of 1916, ch. 451, § 15, 39 Stat. 728 (current version at 46 U.S.C. § 814 (1982)). For the review standards employed by the FMC, see *supra* notes 95, 115 & 117-26.

136. 46 U.S.C. §§ 812, 813a, 815, 817 (1982).

137. CELLER REPORT, *supra* note 106, at 381.

138. See 46 U.S.C. §§ 812, 813a-817 (1982).

139. *Id.* § 817.

140. For the definition of *fighting ships*, see *supra* note 88.

141. The congressional aversion to carrier predation is also manifest in the Merchant Marine Act of 1936, which prohibits the payment of subsidies to American carriers that enter into an agreement unjustly discriminatory or unfair to another American carrier. Ch. 858, § 810, 49 Stat.

hibited since the Act was first enacted in 1916.¹⁴² Also, the FMC must disapprove any tariff rate it finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States,"¹⁴³ and carriers may not raise unremunerative rates without establishing that circumstances other than the failure of a competitor justify the increase.¹⁴⁴

Third, the Act places certain restrictions on conference agreements to ensure a reasonably competitive structure.¹⁴⁵ Section 15 prohibits inter-conference agreements that do not permit independent action,¹⁴⁶ and it requires each conference to remain "open."¹⁴⁷ "Open" conferences must allow all qualified carriers to join on equal terms.¹⁴⁸ Proponents of open conferences claim that free access will prevent unchecked anticompetitive conference behavior.¹⁴⁹ A profit-maximizing or closed conference, they argue, will remove any incentive to develop new transportation technologies or incorporate other cost-reducing measures.¹⁵⁰ Conference members, on the other hand, argue that open U.S. conferences naturally are prone to overtonnaging and, therefore, are unable to achieve the efficiencies of fully rationalized services.¹⁵¹

Any reform on ocean shipping regulatory legislation must be considered against this many-pronged format and the inherent tension it generates in an industry traditionally hostile to competition. Congress could advance one of the three legislative prerogatives: 1) abandon its commitment to competition, leaving the industry to self-regulated shipping cartels; 2) subject ocean common carriers to the competitive regime generally controlling the U.S. economy; or 3) continue a regulatory structure that attempts to mediate between the conflicting goals of self-regulation and competition. Most reform efforts to date have advocated

2015 (codified as amended at 46 U.S.C. § 1227 (1982)). The courts have interpreted this provision to require the termination of subsidy payments, as well as the recovery of those already paid, when subsidized American liner firms engage in acts of predation intended to injure a U.S. carrier. *See* *Safir v. Gibson*, 417 F.2d 972, 977 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970); *Safir v. Klutznick*, 526 F. Supp. 921, 926 (D.C. Cir. 1981).

142. Shipping Act, 1916, ch. 451, § 14(2), 39 Stat. 733 (1916) (current version at 46 U.S.C. § 812(2) (1982)). The Celler Report found that the Act had not eliminated "fighting committees." *CELLER REPORT*, *supra* note 106, at 385.

143. 46 U.S.C. § 817(b)(5) (1982).

144. *Id.* § 818.

145. *Id.* §§ 813a, 814, 817.

146. *Id.* Agreements between carriers in different trades must provide each carrier with a right of independent action and each conference must retain its independence in interconference agreements. *Id.*

147. *Id.* The prohibition against closed conferences is uniquely American. *See* *Schmeltzer & Weiner*, *supra* note 52, at 30.

148. 46 U.S.C. § 814 (1982).

149. *See* *Schmeltzer & Weiner*, *supra* note 52, at 28.

150. *Id.* at 31.

151. *Id.* at 26.

strengthened cartels with limited regulatory oversight.¹⁵²

II RATIONALE FOR REGULATORY REFORM

Several articulated motives might have propelled the reform efforts in the shipping industry. Most significant is the perceived need to bolster a seriously depressed industry.¹⁵³ Also, a healthier U.S. merchant marine would promote U.S. foreign trade,¹⁵⁴ help to improve U.S. balance of payments,¹⁵⁵ and provide for the needs of the military during emergencies.¹⁵⁶ The several bills that have been considered by recent Congresses attempt to achieve the goal of a healthy fleet by removing many anti-trust and regulatory constraints from the liner industry.¹⁵⁷ Proponents of this change argue that the current regulatory standards are vague,¹⁵⁸ incompatible with efficiency-promoting combinations,¹⁵⁹ inconsistent with and frequently antagonistic to the policies of other nations,¹⁶⁰ and applied discriminatorily to the detriment of U.S. carriers.¹⁶¹

The regulatory reformation contemplated for the industry — one

152. See, e.g., S. 1593, 97th Cong., 1st Sess. (1981); S. 125, 97th Cong., 1st Sess. (1981); S. 2585, 96th Cong., 2d Sess. (1980); H.R. 6899, 96th Cong., 2d Sess. (1980).

153. See, *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133 (statement of Albert E. May, Executive Vice President, Council of Flag-Ship Operators); *Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation: Hearings on S. 1593 and S. 125*, 97th Cong., 1st Sess. 311-12 (1981) (statement of Peter Luciano, Executive Director, Transportation Institute) [hereinafter cited as *Hearings on S. 1593 and S. 125*]; *Hearings on H.R. 6899*, *supra* note 99, at 103 (statement of Charles I. Hiltzheimer, Chairman and Chief Executive Officer, Sea-Land Industries Investments, Inc.); *Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries: Hearings on H.R. 11422*, 95th Cong., 2d Sess. 80 (1978) (statement of Robert Brennan, Executive Vice President, Lykes Bros. Steamship Company, Inc.) [hereinafter cited as *Hearings on H.R. 11422*].

154. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 140-41 (statement of Peter M. Klein, Vice President and General Counsel, Sea-Land Industries Investments, Inc.); *Hearings on H.R. 6899*, *supra* note 99, at 45-46 (statement of Rep. John M. Murphy); Agman, *supra* note 8, at 39.

155. *Hearings on H.R. 4769 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 78 (1979) (testimony of Hon. Richard J. Daschback).

156. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133-34 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators); *id.* at 140 (statement of Peter M. Klein, Vice President and General Counsel, Sea-Land Industries Investments, Inc.).

157. S. REP. NO. 3, *supra* note 44, at 18-19; H.R. REP. NO. 611, *supra* note 4, at 14-15.

158. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 139 (statement of Peter M. Klein, Vice President and General Counsel, Sea-Land Industries Investments, Inc.).

159. *Id.* at 133 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators); *id.* at 143 (statement of Peter M. Klein, Vice President and General Counsel, Sea-Land Industries Investments, Inc.); see *Hearings on S. 1593 and S. 125*, *supra* note 153, at 312 (statement of Peter Luciano, Executive Director, Transportation Institute).

160. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133-34 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators); *Hearings on H.R. 6899*, *supra* note 99, at 48 (statement of Rep. Paul N. McCloskey, Jr.).

161. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133-34 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators); *Hearings on H.R. 11422*, *supra* note 153, at 81 (statement of Robert Brennan, Executive Vice President, Lykes Bros. Steamship Company, Inc.).

which represents a substantial commitment to the benefits of cartels — is alien to the basic economic ethos of the United States and contrary to the prevailing efforts to deregulate U.S. industry.¹⁶² Because the proposed reformation rejects the fundamental U.S. commitment to the value of a free-enterprise system, its justification must be closely scrutinized and the likely impact of its application clearly understood.

A. *Economic Health of the U.S. Liner Industry*

The primary motivation for reform of the Shipping Act of 1916 has been a belief that the U.S. flag merchant fleet is seriously distressed,¹⁶³ as evidenced by the declining numbers of U.S. firms and vessels in the liner fleet,¹⁶⁴ and that the current regulatory structure is responsible for that economic distress.¹⁶⁵

The General Accounting Office (GAO), in a comprehensive study¹⁶⁶ conducted at the instance of the House Committee on Merchant Marine and Fisheries, has concluded, however, that the declining numbers of vessels and companies does not mean that the U.S. industry is seriously ill.¹⁶⁷ Instead, the study revealed that the technological shift to container ships has resulted in more efficient liner companies able to provide faster service with fewer vessels at lower costs.¹⁶⁸ The evolution of container services, therefore, has produced liner firms that can provide increased ocean carriage with fewer ships. For example, modern

162. HOUSE REPUBLICAN RESEARCH COMMITTEE TASK FORCE ON CONGRESSIONAL AND REGULATORY REFORM, *REGULATORY REFORM: THE QUIET REVOLUTION* 11 (1983). Maritime reform legislation is frequently identified as deregulatory, but it lacks the primary characteristic of other reform efforts. Deregulation of trucking, railroads, airlines and communications, for example, has represented a commitment to competitive market forces (i.e., the principles of the antitrust laws) while the proposed maritime legislation is antagonistic to those principles. *See id.* at 11-12.

163. *See supra* note 153 and accompanying text.

164. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators); GAO REPORT, *supra* note 65, at 11. This article will not discuss the state of the non-liner fleet because the Shipping Act does not relate to that portion of the U.S. merchant marine.

165. *See, e.g.*, Letter from the Hon. Walter B. Jones, Chairman, House Committee on Merchant Marine and Fisheries, to the Editor of the Washington Post, Wash. Post, July 27, 1982 at A14, col. 4; Letter from the Hon. Alan Green, Jr., Chairman, Fed. Maritime Comm'n, to the Editor of the Washington Post, Wash. Post, July 27, 1982 at A14, col. 5; Letter from the Hon. H. E. Shear, Maritime Adm'r, U.S. Dep't of Transportation, to the Editor of the Washington Post, Wash. Post, July 27, 1982 at A14, col. 5. Regulatory reform legislation for the shipping industry pending during the 97th Congress generated negative editorials by three major newspapers. *See Torpedo the Maritime Bills*, Wall St. J., July 15, 1982, at 30, col. 1 (*but see* response, Wall St. J., July 27, 1982, at 31, col. 1 and July 29, 1982, at 19, col. 1); *Beware the Cargo Ship Cartel*, N.Y. Times, July 14, 1982, at A22, col. 1 (*but see* responses, N.Y. Times, July 27, 1982, at A22, col. 3); *The Healthy Fleet*, Wash. Post, July 12, 1982, at A14, col. 1.

166. GAO REPORT, *supra* note 65.

167. *Id.* at 11.

168. *Id.* at 11-12.

container vessels are estimated to carry three to five times the cargo of conventional freighters.¹⁶⁹ As in other industries, market forces are not gentle with companies that have failed to seize the benefits of an efficiency-generating technological breakthrough. The GAO found that shipping firms that have recently failed either lacked the capital to develop container ships, adopted the wrong type of container technology for the trades served, or made managerial decisions to commit their capital to other, perhaps more certain, uses.¹⁷⁰ The widespread containerization of liner services has created unprecedented scale economies, and "in the future, successful liner companies may be those that are larger, multi-route operations."¹⁷¹ The picture, therefore, is not one of a distressed industry but one of an industry adjusting to innovation. The failure of some to make the adjustment is not evidence of a sick fleet.

The economic performance of liner companies also demonstrates that there are efficient, highly profitable firms as well as the highly visible, unsuccessful ones. In 1980, for example, return on equity among shipping firms ranged from a high of 35.8% to a low of negative 193.9%.¹⁷² The GAO found that "some major U.S. flag liner operators have had consistently and substantially *higher* than average rates of return on equity and assets during the 1976-80 period, while other operators have shown consistently and substantially *lower* than average rates of return"¹⁷³

Other evidence suggests that several U.S. liner companies are highly competitive. Since U.S. flag carriers have been required to operate U.S.-built ships with domestic crews,¹⁷⁴ they have experienced higher labor costs than most foreign competitors.¹⁷⁵ As a result, Congress enacted the Merchant Marine Act of 1936¹⁷⁶ to provide direct construction and operating subsidies to place U.S. carriers at parity with foreign carriers.¹⁷⁷ In recent years, however, some U.S. carriers have been able to compete effectively for ocean carriage without operating subsidies.¹⁷⁸ Obviously these carriers have achieved impressive cost-saving efficien-

169. I. HEINE, *supra* note 24, at 61.

170. GAO REPORT, *supra* note 65, at 16.

171. *Id.*

172. *Id.* at 67.

173. *Id.*

174. I. HEINE, *supra* note 24, at 6. Section 27 of the Merchant Marine Act of 1920 spelled out in detail that operations in the U.S. coastal, intercoastal, and noncontiguous trades must be reserved for U.S.-built ships manned by U.S. citizens. *Id.*

175. *Id.*

176. Ch. 858, 49 Stat. 1985 (current version at 46 U.S.C. §§ 1101-1294 (1982)).

177. I. HEINE, *supra* note 24, at 10.

178. *See id.* at 54-56. United States Lines has abandoned its operating subsidy and Sea-Land Services, Inc. has not applied for one. *Id.*

cies to compete effectively with foreign liners in spite of substantially higher labor costs.

Since technological advances have dictated a liner fleet of fewer but larger firms,¹⁷⁹ and evidence demonstrates that some firms have captured the benefits of this new order,¹⁸⁰ no likely advantage would be gained by interfering with the natural adjustment process brought on by market forces. A prominent transportation economist, Clinton Whitehurst, has aptly noted:

We must shake out the U.S. transportation system in general [W]e have too many firms and too much right-of-way. There are going to be losers — there is no way around it. I strongly believe that we cannot do anything about this and that we should not Actually, loss is just the other side of the profit coin. In a free market economy we cannot talk about one without the other.¹⁸¹

Advocates of strong shipping cartels, however, tend to equate the economic health of individual carriers with that of the industry as a whole.¹⁸² The exploitation of new and innovative technologies and services by individual firms to capture market share — a virtue in a free market economy — is treated as a vice by advocates of cartels in this industry.¹⁸³ The rapid adoption of container technology by innovative U.S. firms,¹⁸⁴ for example, has been identified by one writer as the “best example of the *problems* . . . caused by [U.S.] law.”¹⁸⁵ Congress should examine thoroughly this alien economic view before it eliminates the “problems” of innovation and competition in an industry so vital to the United States’ position as an international trader.

The present status of the U.S. fleet¹⁸⁶ suggests that this may be a particularly opportune time to foster a more competitive industry. United States liner companies are at the forefront of the container revolution,¹⁸⁷ and since 1979 the United States has had the largest container ship capacity in the world.¹⁸⁸ This trend appears to give the U.S. liner fleet an advantage in a more, rather than less, competitive regime than exists today. A policy that fosters a more extensive use of agreements not to compete between U.S. and foreign liner firms seems particularly inap-

179. *See supra* text accompanying note 168.

180. *See supra* text accompanying notes 172-78.

181. FORMING MULTIMODAL TRANSPORTATION COMPANIES, BARRIERS, BENEFITS, AND PROBLEMS 63 (C. Whitehurst ed. 1978).

182. *See Agman, supra* note 8, at 27.

183. *See id.* at 26-27.

184. *See supra* text accompanying notes 168-71.

185. Agman, *supra* note 8, at 27 (emphasis added).

186. *See supra* text accompanying notes 163-78.

187. GAO REPORT, *supra* note 65, at 12.

188. *Id.* at 13-14.

propriate under these circumstances. It is an expensive and questionable way to attempt to salvage those U.S. firms that may be destined to fail in any case because they have lacked needed capital or suffered from poor management.¹⁸⁹

B. *Vague Regulatory Standards*

Several congressional committees have concluded that the present regulatory standards are too vague.¹⁹⁰ The Senate Committee on Commerce, Science, and Transportation, for example, reported that "vague standards such as the 'public interest' or 'detriment to the commerce' tests must be eliminated in order to bring predictability to what has been an unruly regulatory process."¹⁹¹ Accordingly, the currently proposed legislation would remove from the Act these tests, found respectively in sections 15¹⁹² and 14b¹⁹³ of the Shipping Act, together with the "unjustly discriminatory" standard of section 14b,¹⁹⁴ as standards for FMC approval of conference agreements.¹⁹⁵

The magnitude of uncertainty under the Shipping Act is often greatly exaggerated. The standards for approval of agreements under section 15 are not precise, nor is the outcome predictable in every application. Nevertheless, the statute's language, its legislative history,¹⁹⁶ and decisional precedents, give the section meaning and direction. One analyst, for example, has noted that "although the exact meanings of [the standards] are unclear (because none of them is defined), one is left in no doubt as to their general purport."¹⁹⁷ The FMC must protect the public against monopolistic abuses by ocean liner firms while allowing the firms to gain the benefits of cooperation and rationalization.

Congress has been most concerned about the perceived uncertain application of U.S. antitrust laws to concerted conduct subject to Shipping Act regulation.¹⁹⁸ There are two aspects to this uncertainty. First, those

189. See *supra* text accompanying note 170.

190. See, e.g., S. REP. NO. 3, *supra* note 44, at 27; H.R. REP. NO. 611, *supra* note 4, at 30-31.

191. S. REP. NO. 3, *supra* note 44, at 27.

192. 46 U.S.C. § 814 (1982). Section 814 is reprinted in pertinent part *supra* note 94.

193. *Id.* § 813a (1982). Section 813a is reprinted in pertinent part *supra* note 104.

194. *Id.*

195. See *supra* note 2. The 1984 Act repeals § 14b of the Shipping Act of 1916. Shipping Act of 1984, Pub. L. No. 98-237, § 20(a), 98 Stat. 67, 88 (repealing 46 U.S.C. § 813a). Section 15 is amended so as to apply only to common carriers by water in *interstate commerce* and not to all common carriers by water. *Id.* § 20(b), 98 Stat. at 89. This amendment removes ocean liner conferences from the purview of § 15.

196. S. REP. NO. 860, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & AD. NEWS 3108-43.

197. R. GOSS, *supra* note 41, at 23.

198. See S. REP. NO. 3, *supra* note 44, at 3-9.

subject to the act cannot be certain that the FMC will approve an anticompetitive agreement.¹⁹⁹ Second, the extent of the antitrust immunity provided by the act after FMC approval is indefinite.²⁰⁰ Carriers that complain about their inability to predict the outcome of FMC determinations necessarily must minimize the value of the protection that liners enjoy against antitrust prosecution. Conferences, and others subject to the Shipping Act, receive an exemption from the antitrust laws for all fully disclosed and approved agreements.²⁰¹ Such exemption provides a degree of certainty that few other industries, foreign or domestic, enjoy.²⁰² The standard for approval from an antitrust perspective is also reasonably clear. Proponents of anticompetitive agreements generally must establish that the benefits outweigh the potential detriment to U.S. commerce.²⁰³ If one ignores for the moment any international implications of this policy, the standard is so obviously reasonable in a society fundamentally committed to the benefits of a free-enterprise system that the call for its elimination in the name of clarity is radical.

Short of congressional omniscience, any regulatory standard written by Congress to provide absolute predictability necessarily will impair the efficiency of carriers or compromise the interests of their competitors and customers.²⁰⁴ A prime benefit of a specialized regulatory body is, after all, its ability to apply specific facts to a general standard and to enforce its mandate with a sensitivity grown out of accumulated expertise. Carriers are entitled to reasonably swift, consistent, and reasoned decisions by the FMC regarding the approval or disapproval of agreements filed under section 15, and any statutory or regulatory changes that foster that end would be salutary. Eliminating or minimizing oversight as a condition of antitrust immunity to promote certainty may expose U.S. shippers and consumers to the substantial risk of price increases caused by either needless inefficiency or monopolistic overreaching.

The second aspect — concern over the extent of antitrust immunity — is more problematic. In those instances where conferences and their

199. *H.R. 6899 Hearings, supra* note 99, at 93 (statement of Robert J. Blackwell on behalf of the Council of American-Flag Ship Operators).

200. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON INTERNATIONAL OCEAN COMMERCE TRANSPORTATION, H.R. REP. NO. 53, part I, 98th Cong., 1st Sess. 12 (1983).

201. 46 U.S.C. § 833a (1982).

202. An example of another industry having a preclearance process is the export trading company industry. Export trading companies may determine in advance whether certain of their export trade activities are exempt from U.S. antitrust law. Export Trading Company Act §§ 301-312, 12 U.S.C. §§ 4011-4021 (1982).

203. *See supra* text accompanying notes 117-26.

204. *See Maritime Antitrust Oversight Hearings, supra* note 49, at 88-89, 132 (testimony of Thomas J. Campbell, Director, Bureau of Competition, Fed. Trade Comm'n).

members have been subjected to antitrust liability, there seems to be little doubt that the illegal conduct was knowingly beyond the terms of an approved agreement. In the 1979 *North Atlantic Container*²⁰⁵ case, a federal grand jury indicted seven North Atlantic liner firms for criminal antitrust violations.²⁰⁶ The defendants allegedly had fixed rates pursuant to agreements that never were filed with or approved by the FMC and that contained provisions specifically prohibited by the Shipping Act.²⁰⁷ Under such circumstances, any purported surprise of defendants that they could be subjected to antitrust prosecution would merit little attention.

In an action before the FMC involving similar facts, *Rates on U.S. Government Cargoes*,²⁰⁸ concerted carrier predatory pricing activities were found responsible for the failure of Sapphire Steamship Lines, Inc., an independent liner. Sapphire was formed primarily to provide containerized transport for the household goods of military personnel at a substantially lower rate than was then available.²⁰⁹ Other carriers and conferences transporting these goods, mainly the Atlantic and Gulf American Flag Berth Operators (AGAFBO), responded to this new competition by lowering their rates to noncompensatory levels²¹⁰ and by pressuring van lines to prevent their cooperation with Sapphire.²¹¹ Once Sapphire's economic ruin was assured, the conference rates were raised.²¹² The FMC found that the conference conduct was predatory and therefore in violation of section 15.²¹³ The separate opinion of Chairman Harllee and Commissioner Barrett describes the conference activity in strong condemnatory language:

The various AGAFBO activities lead to but one conclusion, that the carriers agreed to take whatever steps were necessary to drive Sapphire from the trade. The cumulative effect of all of these acts was decidedly one to destroy competition; that is, to end the threat of Sapphire and preserve the monopoly of AGAFBO. This concerted under-

205. *United States v. North Atlantic Container Line*, No. 79-00271, slip op. (D.D.C. June 1, 1979), reprinted in *Maritime Antitrust Oversight Hearings*, supra note 49, at 204. The agreements charged in the indictment went beyond the permitted geographic scope of all approved agreements and included understanding between members of different conferences that they would not exercise their right of independent action. *Id.* This latter understanding is explicitly prohibited by section 15. See 46 U.S.C. § 814 (1982).

206. *United States v. North Atlantic Container Line*, No. 79-00271, slip op., at 1 (D.D.C. June 1, 1979).

207. *Id.* at 15-17.

208. 11 F.M.C. 263 (1967).

209. *Id.* at 270-71.

210. *Id.* at 282.

211. *Id.* at 272-74.

212. *Id.* at 275; see also *Safir v. Gibson*, 417 F.2d 972, 974 (2d Cir. 1969), cert. denied, 400 U.S. 850 (1970).

213. *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 283 (1967).

taking amounted to a new scheme of rate combination and discrimination not embodied in the AGAFBO agreement. Thus, there was no section 15 authorization for such conduct.²¹⁴

Conceptually, however, carriers face a grey area of potential liability when arguably acting within the scope of an approved agreement. In *Sabre Shipping Corp. v. American President Lines*,²¹⁵ the court held that approval by the FMC under section 15 extends antitrust immunity only to activities that are otherwise lawful.²¹⁶ The establishment of predatory rates in violation of section 18(b)(5) of the Shipping Act²¹⁷ was held to be beyond the antitrust exemption provided by defendants' approved rate-making agreement.²¹⁸

Although the *Sabre Shipping* case interjects some uncertainty regarding the scope of the protection against antitrust liability that section 15 approval provides conferences, that decision, along with *North Atlantic Container* and *Rates on U.S. Government Cargoes*, suggests that antitrust exposure is, on the whole, limited to egregious behavior that reasonable persons should have anticipated to be beyond the scope of an approved agreement. Although it may have some conceptual basis, a carrier's defense of surprise, when faced with antitrust exposure, does not seem reasonable given the controlling standards for exemption and the facts of the prominent cases.

Moreover, assuming that predictability is a compelling virtue, the proposed amendments to the Shipping Act would produce no greater certainty than now exists. They would replace the "public interest" and related standards, which embody an antitrust element, with a lengthy list of prohibited acts.²¹⁹ The list, however, is replete with activities that are only proscribed if "unjust" or "unreasonable."²²⁰ Section 12(d)(2) of the Senate bill provides a striking example. It states that common carriers, freight forwarders, and terminal operators may not

make or give any *undue or unreasonable* preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subject any particular person, locality, or description of traffic to an *unreasonable* refusal to deal or any *undue or unreasonable*

214. *Id.* at 289.

215. 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied*, 395 U.S. 922 (1969).

216. *Id.* at 954-55.

217. 46 U.S.C. § 817(b)(5) (1982). Section 18(b)(5) requires the FMC to disapprove rates that are "so unreasonably high or low as to be detrimental to the commerce of the United States." *Id.*

218. 285 F. Supp. at 954-55.

219. *E.g.*, S. 47, *supra* note 2, § 12. The 1984 Act, as well, contains a long list of prohibited acts. Shipping Act of 1984, Pub. L. No. 98-237, § 10, 98 Stat. 67, 77-80 (to be codified at 46 U.S.C. app. § 1709).

220. *E.g.*, S. 47, *supra* note 2, § 12. The 1984 Act includes similar indefinite terms. *E.g.*, Shipping Act of 1984, § 10(b)(6), 98 Stat. at 78 (to be codified at 46 U.S.C. app. § 1709(b)(6)).

prejudice or disadvantage in any respect whatsoever.²²¹

To the extent that statutory uncertainty has driven the move for reform, the various proposals for change do not adequately address this problem.

There is also inevitable tension between section 3 of the proposed legislation, identifying presumptively permissible anticompetitive acts,²²² and section 9, identifying expressly prohibited acts.²²³ Carriers may, for example, agree to "engage in exclusive, preferential, or cooperative working arrangements among themselves or with . . . marine terminal

221. S. 47, *supra* note 2, § 12(d)(2) (emphasis added).

222. *Id.* § 4; S. 47 (House Version), *supra* note 2, § 3. The list of presumptively permissible activities indicates that common carriers, for example, may

- (1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of services;
- (2) pool or apportion traffic, revenues earnings or losses;
- (3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;
- (4) limit or regulate the volume or character of cargo or passenger traffic to be carried;
- (5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or nonvessel-operating common carriers; and
- (6) control, regulate, or prevent competition among themselves.

S. 47 (House Version), *supra* note 2, § 3(a).

223. S. 47, *supra* note 2, § 12; S. 47 (House Version), *supra* note 2, § 9. The section of prohibited acts states, in part, as follows:

(a) **IN GENERAL** — No person may —

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

(2) operate under an agreement required to be filed under section 4 that has not become effective under section 5, or that has been rejected, disapproved, or cancelled; or

(3) operate under an agreement required to be filed under section 4 except in accordance with any modifications made by the Commission to the agreement.

(b) **COMMON CARRIERS** — No common carrier, either alone or in conjunction with any other person, directly or indirectly, may —

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith [from] the rates and charges that are specified in its tariffs;

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with the tariffs;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs;

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(5) retaliate against any shipper by refusing, or threatening to refuse, cargo space ac-

operators or non-vessel-operating common carriers,"²²⁴ but they are prohibited from giving "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever."²²⁵ The only certainty provided by the legislation is that the burden of proving a violation is with the injured party.²²⁶

commodations, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

- (6) engage in any unfair or unjustly discriminatory practice in the matter of —
 - (A) rates;
 - (B) cargo classifications;
 - (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;
 - (D) the loading and landing of freight in proper condition; or
 - (E) the adjustment and settlement of claims;
- (7) employ any fighting ship;
- (8) offer or pay any deferred rebates;
- (9) use a royalty contract, except in conformity with the antitrust laws;
- (10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;
- (11) make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or
- (12) knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier without the consent of the shipper or consignee

(c) CONCERTED ACTION — No conference or group of two or more common carriers may —

- (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;
- (2) engage in conduct that unreasonably conditions or otherwise unreasonably restricts the ability of a shipper to select a common carrier in a competing trade, an ocean tramp, or a bulk carrier;
- (3) engage in conduct that discourages the use of intermodal services or technological innovations by member carriers;
- (4) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;
- (5) negotiate with a nonocean carrier or group of nonocean carriers . . . on any matter relating to rates or services provided to ocean common carriers within the United States by those nonocean carriers: *Provided*, That this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint service, or an association of ocean common carriers;
- (6) except as otherwise required by the law of the United States or the importing or exporting country, or as agreed to by a shipper in a service contract, allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party of the agreement from soliciting cargo from a particular shipper.

S. 47 (House Version), *supra* note 2, § 9(a)-(c). The Shipping Act of 1984 maintains this tension since it incorporates lists of both permissible anticompetitive acts, § 7, 98 Stat. at 73-74 (to be codified at 46 U.S.C. app. § 1706), and expressly prohibited acts, § 10, 98 Stat. at 77-80 (to be codified at 46 U.S.C. app. § 1709).

224. S. 47 (House Version), *supra* note 2, § 3(5).

225. *Id.*, § 9(b)(11).

226. S. 47, *supra* note 2, § 6(e). The current House version of S. 47 does not have a provision expressly designating which party carries the burden of proof. The 1984 Act places the burden of proof on the Commission in suits to enjoin operation of an agreement. § 6(h), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1705(h)).

Much of the legislative history of the proposed amendments to the Shipping Act will exacerbate the indefinite application of the law. The House Committee on Merchant Marine and Fisheries, for example, identifies the oversight role of the FMC in two potentially inconsistent ways. First, the committee states that the FMC may modify or cancel an agreement "only if prohibited conduct is demonstrated to be the logical result of an agreement's implementation."²²⁷ Later, the committee notes that "the basis for changing the terms of an agreement shall be measured only by specific conduct; the FMC may not take such action based on anticipated or speculative wrongs that may be derived from an analysis of the agreement itself."²²⁸ Reconciliation of this and related issues will require potentially complex and costly litigation, placing a heavy burden on the victims of anticompetitive agreements.

In summation, both the uncertainty of existing law and the clarity of the proposed amendments are exaggerated by those advocating change. The fear of unexpected and unjustified antitrust exposure, although having some theoretical basis, is largely unjustified in fact. Furthermore, rather than eliminate vague standards, the amendments merely shift the problems caused by indefinite standards to those objecting to the impact of anticompetitive agreements.

C. *Efficiency-Promoting Combinations*

Albert E. May, testifying on behalf of the Council of American-Flag Ship Operators in 1982, stated:

U.S.-flag carriers are generally unable to merge or otherwise organize shipping enterprises to minimize investment risk and maximize financing stability.

U.S.-flag carriers are, as a consequence, less able to attain the efficiencies of scale so significant in our high fixed cost industry. Thus, we are not fully competitive on a cost basis with the rationalized consortia with which we must compete for cargoes.²²⁹

Neither the current Shipping Act nor the proposed amendments deal meaningfully with the merger issue raised by Mr. May.²³⁰ Because mergers between common carriers are not subject to section 15,²³¹ the FMC has no authority to approve such transactions.²³²

In *American Mail Line, Ltd. v. Federal Maritime Commission*,²³³ the Court

227. H.R. REP. NO. 53, *supra* note 200, at 4.

228. *Id.* at 11-12.

229. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133.

230. The 1984 Act is similarly without meaningful provision on this merger issue.

231. *See* 46 U.S.C. § 814 (1982).

232. *See* *Fed. Maritime Comm'n v. Seatrain Lines*, 411 U.S. 726 (1972); *United States v. R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656, 661-63 (D.N.J. 1971), *cert. denied*, 410 U.S. 964 (1973).

233. 503 F.2d 157 (D.C. Cir.), *cert. denied*, 419 U.S. 1070 (1974).

of Appeals for the District of Columbia vacated a Commission decision approving an agreement that would have placed the world's two largest containership companies under the control of a single corporate parent.²³⁴ The court found that a principal feature of the transaction was in fact a merger of two containership fleets.²³⁵ The court held that even though section 15 was enacted in part to allow common carriers to enter into on-going cooperative agreements, an agreement involving an outright merger or acquisition is beyond the scope of the Shipping Act.²³⁶ Thus, the FMC has no jurisdiction over Clayton Act violations. The proposed legislation maintains this posture.²³⁷

The Clayton Act, however, need not prevent the types of mergers that Mr. May suggests are desirable. An efficiency-promoting merger that would not unduly concentrate the liner industry may well survive a Clayton Act challenge.²³⁸ Further, since existing U.S. liner firms are experiencing serious financial problems,²³⁹ the failing-company defense may be appropriately invoked.²⁴⁰ United States merger law is, therefore, not an absolute barrier to the consolidation of ocean common carriers, and to the extent that predictability is desirable, the pre-merger notification requirement of the Hart-Scott-Rodino Act²⁴¹ provides for Justice Department and Federal Trade Commission review prior to consummation of a merger.

Consolidations that fall short of a merger, such as joint ventures, consortia, pooling agreements and various other contractual agreements, are more problematic under the Clayton Act and the Shipping Act. Professor Areeda states that the concept of a joint venture lacks "definite meaning or antitrust consequence."²⁴² Joint ventures have been treated

234. *Id.* at 171. The agreement would have made United States Lines a wholly owned subsidiary of R. J. Reynolds Tobacco Company, while Reynolds already controlled Sea-Land Services, Inc. *Id.* at 159.

235. *Id.* at 166-67.

236. *Id.* at 162-66.

237. *See* S. 47, *supra* note 2, § 4(c); S. 47 (House Version), *supra* note 2, § 3(c). Section 4(c) of the 1984 Act expressly removes acquisitions of voting securities or assets from the purview of the Act. Shipping Act of 1984, § 4(c), 98 Stat. at 70 (to be codified at 46 U.S.C. app. § 1703(c)).

238. Although a thorough analysis of merger law and policy is beyond the scope of this article, the reader should consult U.S. Dep't of Justice, Antitrust Div., Merger Guidelines, 47 Fed. Reg. 28,493 (1982); Fed. Trade Comm'n, Policy Statement on Horizontal Mergers, *reprinted in special supplement*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, at 5-12 (June 17, 1982); *Symposium: 1982 Merger Guidelines*, 71 CALIF. L. REV. 280 (1983).

239. *See* GAO REPORT, *supra* note 65, at 58. In its response to the GAO findings, the Department of Transportation stated that three of the existing nine U.S. liner firms have serious financial problems. *Id.*

240. For discussions of the failing company defense, see *Citizens Publishing Co. v. United States*, 394 U.S. 131, 136-139 (1969); L. SULLIVAN, ANTITRUST 628-30 (1977).

241. 15 U.S.C. § 18a (1982).

242. P. AREEDA, ANTITRUST ANALYSIS 360 (3d ed., 1981).

as mergers, subject to scrutiny under section 7 of the Clayton Act,²⁴³ and as combinations that may violate section 1 or 2 of the Sherman Act.²⁴⁴ This uncertainty under the antitrust laws has implications for Shipping Act enforcement. While the FMC may exempt carrier agreements from the antitrust laws generally, it may not approve a merger subject to section 7 of the Clayton Act.²⁴⁵

Despite this apparent ambiguity, the FMC has approved joint ventures. It defines a "joint service agreement," which is subject to FMC approval, as "[a]n agreement which establishes a new and separate line or service to be operated by the parties as a joint venture. The new and separate service fixes its own rates, publishes its own tariffs, issues its own bills of lading, and acts generally as a single carrier."²⁴⁶ If, as proponents of change contend,²⁴⁷ the FMC will not approve joint service or consortia agreements between U.S. firms that will achieve desirable scale economies, or that are required to obtain needed capital, the problem is one of enforcement and not one mandated by existing law.

The *Svenska* standard²⁴⁸ authorizes the FMC to approve an agreement, even if inconsistent with antitrust principles, if the proponents establish that the agreement would, inter alia, further "a valid regulatory purpose of the Shipping Act."²⁴⁹ A primary goal of the Shipping Act is to strengthen the U.S. merchant marine fleet and to prevent it from coming under the control of foreign interests.²⁵⁰ If the FMC has refused to approve joint service agreements among U.S. firms that are necessary to make the firms internationally competitive, either the parties to those agreements could not or would not demonstrate the need for the consolidation or the Commission has been untrue to its mandate. Neither an amendment to the substantive provisions of the existing law nor changes in the established enforcement standards seem necessary or warranted under these circumstances.

243. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

244. 15 U.S.C. §§ 1-2 (1982); see, e.g., *United States v. Pan American World Airways*, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd on other grounds*, 371 U.S. 296 (1963). Whether a court will scrutinize a joint venture under the rule of reason or apply a per se analysis is uncertain. Compare *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) with *United States v. Topco Assocs.*, 405 U.S. 596 (1972) and *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

245. See *supra* text accompanying notes 236-37.

246. 46 C.F.R. § 522.2(a)(4) (1982).

247. See, e.g., *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 139 (statement of Peter Klein, Vice President and General Counsel, Sea-Land Industries Investments, Inc.).

248. See *supra* text accompanying notes 120-21.

249. *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 45 (1966).

250. See *Chemical Bank New York Trust Co. v. Steamship Westhampton*, 358 F.2d 574, 580 (4th Cir. 1965), *cert. denied*, 385 U.S. 921 (1966).

D. *Inconsistency with Foreign Laws and Policies*

The United States' tolerance of the conference system is induced primarily by the international nature of ocean shipping. The case for even less restraint than is imposed currently by the United States is strengthened by the perception that the United States' regulatory and antitrust policies largely are antagonistic to those of the rest of the world.²⁵¹ This perception, however, exaggerates the differences between U.S. and foreign competition policies.

The basic competition policies of the European Community, contained in articles 85 and 86 of the Treaty of Rome,²⁵² are consistent in major respects with fundamental antitrust policies of the United States. The articles prohibit agreements that restrict trade²⁵³ and outlaw the abuse of a firm's dominant market position.²⁵⁴ Articles 85 and 86 cur-

251. See S. REP. NO. 3, *supra* note 44, at 7.

252. Treaty of Rome, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11, 47-49.

253. *Id.* art. 85, 298 U.N.T.S. 47-48. Article 85 of the Treaty provides:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:
 - (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
 - (b) the limitations or control of production, markets, technical development or investment;
 - (c) market-sharing or the sharing of sources of supply;
 - (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
 - (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:
 - any agreements or classes of agreements between enterprises,
 - any decisions or classes of decisions by associations of enterprises, and
 - any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share of the profit resulting therefrom, and which:
 - (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
 - (b) nor enable such enterprise to eliminate competition in respect of a substantial proportion of the goods concerned.

Id.

254. *Id.* art. 86, 298 U.N.T.S. 48-49. Article 86 of the Treaty provides:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

- (a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

rently apply to the ocean shipping industry, although the Commission of the European Community — the Community's enforcement arm — is without authority to enforce the competition rules against ocean carriers.²⁵⁵ Enforcement of the treaty is left to the Community's member nations, although the Commission may investigate violations by ocean shipping firms and recommend enforcement actions to the member countries.²⁵⁶

The European Community is currently considering rules proposed by the European Commission that would exempt the ocean shipping industry from articles 85 and 86.²⁵⁷ The proposal was prompted by concern that the member countries would reach conflicting conclusions regarding conference conduct under articles 85 and 86 — a realistic fear in light of the several complaints against conferences the Commission has received.²⁵⁸ The rules, if adopted, would specify conditions and impose obligations on carriers seeking to remain eligible for the exemption.²⁵⁹ The exemption would be lost if carriers violated these conditions, and the Treaty would then be enforced directly by the European Commis-

-
- (b) the limitation of production, markets or technical development to the prejudice of consumers;
 - (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
 - (d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Id.

255. [(EEC) B1] WORLD L. OF COMPETITION (MB) Pt. 1 § 2.01 (3)(c) (July 1982).

256. *Id.* In the absence of regulations providing for the enforcement of articles 85 and 86 to the ocean transport industry, articles 88 and 89 remain applicable. *Id.* Article 88 provides:

Until the date of the entry into force of the provisions adopted in application of Article 87, the authorities in Member States shall, in accordance with their respective municipal law and with the provisions of Article 85, particularly paragraph 3, and of Article 86, rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market.

Treaty of Rome, *supra* note 252, art. 88, 298 U.N.T.S. 49.

Article 89 provides:

1. Without prejudice to the provisions of Article 88, the Commission shall, upon taking up its duties, ensure the application of the principles laid down in Articles 85 and 86. It shall, at the request of a Member State or *ex officio*, investigate, in conjunction with the competent authorities of the Member States, which shall lend it their assistance, any alleged infringement of the above-mentioned principles. If it finds that such infringement has taken place, it shall propose appropriate means to bring it to an end. 2. If such infringement continues, the Commission shall, by means of a reasoned decision, confirm the existence of such infringement of the above-mentioned principles. The Commission may publish its decision and may authorize Member States to take the necessary measures, of which it shall determine the conditions and particulars, to remedy the situation.

Id. art. 89, 298 U.N.T.S. 49-50.

257. Proposal For a Council Regulation (EEC), Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maintain Transport, COM (81) 423 final, Oct. 13, 1981.

258. *Id.* at 2.

259. *Id.* arts. 4, 5 of proposed regulation.

sion.²⁶⁰ This history demonstrates that the Community views the shipping industry differently than it does industry in general, but it does not demonstrate an unqualified commitment to unregulated shipping conferences.

The response of the United Kingdom to the proposed community rule regarding ocean shipping is significant. Despite a strong historical commitment to the conference system, the United Kingdom has expressed serious concern over the possible elimination of nonconference competition.²⁶¹ British shippers have argued that loyalty contracts should be limited to seventy percent of the contract shipper's goods.²⁶² And, notably, the British government tentatively has taken the position that predatory conduct aimed at nonconference carriers, as well as the abuse of a conference's dominant position, should result in revocation of the exemption.²⁶³

The Canadian government also is reconsidering the role its competition laws play in the ocean shipping industry. Canada's "Shipping Conferences Exemption Act"²⁶⁴ is scheduled, under a sunset provision, to expire in 1984.²⁶⁵ Unless the Act is renewed, conferences will become subject to the competition policies of the Combines Investigation Act.²⁶⁶ To determine if the exemption should be renewed, the Bureau of Competition Policy, Consumer and Corporate Affairs Canada, sponsored a survey to reveal how Canadian shippers view shipping conferences.²⁶⁷ Eighty-five percent of the shippers responding were dissatisfied with the existing exemption.²⁶⁸ More than forty percent of the respondents favored outright repeal of the exemption, while another forty percent believed that a renewed exemption should more effectively control conference activities.²⁶⁹ Shippers desiring greater control divided almost equally between those wanting more active governmental control and those wishing to strengthen shippers' councils.²⁷⁰ This survey, of course, does not dictate what the Canadian government ultimately will

260. *Id.* at 4.

261. *European Shippers Seek Narrow Exceptions to Stimulate More Competition Among Conferences*, 42 Antitrust & Trade Reg. Rep. (BNA), No. 1059, at 739 (Apr. 8, 1982); see also, *Her Majesty's Government's Evidence to the House of Lords Select Committee on the European Communities*, draft instrument 10150/81 (Oct. 22, 1981) [hereinafter cited as *Her Majesty's Government's Evidence*].

262. *Her Majesty's Government's Evidence*, *supra* note 261, at 10.

263. *Id.* at 12.

264. Shipping Conferences Exemption Act, CAN. REV. STAT. ch. 39, 1st supp. (1970).

265. E.M. LUDWICK & ASSOCIATES, INC., SHIPPING CONFERENCES: SURVEY OF USERS' VIEWS 1 (1983).

266. *Id.* The Combines Investigation Act is codified at CAN. REV. STAT. ch. C-23 (1970).

267. E.M. LUDWICK & ASSOCIATES, INC., *supra* note 265, at 1.

268. *Id.* at Executive Summary.

269. *Id.*

270. *Id.*

do about the exemption, but it does indicate that there is no uniform belief in Canada that unregulated conferences will serve the needs of shippers.

International attitudes toward shipping conferences also are in a state of transition. The pending implementation of the UNCTAD Code of Conduct for Liner Conferences,²⁷¹ which represents the first international system of liner regulation,²⁷² and the growing use of bilateral agreements²⁷³ are the result of international and national concern about the practices of shipping conferences.

Although the basic U.S. pro-competition system no longer is unique to the United States, substantial differences remain between the enforcement policies of the United States and those of much of the rest of the world. Most notably, liberal U.S. discovery policies and private treble damage actions have been a major irritant to other nations,²⁷⁴ which occasionally have responded with blocking statutes that prohibit disclosure of documents under certain circumstances and deny the use of their courts to enforce a foreign civil judgment with a punitive element.²⁷⁵ In addition to blocking statutes, England has adopted a "claw-back" statute allowing suits by nationals to recover the punitive portion of any judgment executed in the United States.²⁷⁶ This foreign hostility to U.S. antitrust enforcement policies was heightened by the 1979 criminal prosecution and subsequent treble damage class actions against members of the ocean shipping industry,²⁷⁷ but the problem is not limited to this industry.²⁷⁸

271. UNCTAD, United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conference, U.N. Doc. TD/CODE/13/Add. 1, Vol. II (1975).

272. Larsen and Vetterick, *The UNCTAD Code of Conduct for Liner Conferences: Reservations, Reactions and U.S. Alternatives*, 13 LAW & POL'Y INT'L BUS. 223, 223 (1981).

273. *Id.* at 272; see, KEARNEY, MANAGEMENT CONSULTANTS, THE IMPACT OF BILATERAL SHIPPING AGREEMENTS: AN ANALYSIS OF SERVICE, RATES AND SHIPPER RESPONSES 3 (1983); Lopatin, *The UNCTAD Code of Conduct for Liner Conferences: Time for a United States Response*, 22 HARV. INT'L L. J. 355, 376-77 (1981).

274. Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982); Pettit and Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

275. *E.g.*, Protection of Trading Interests Act, 1980, ch. 11 (United Kingdom); Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979, Austl. Acts No. 13; Cira, *supra* note 274, at 248-60. "Over a dozen major shipping nations have now legislated to limit the thrust and applicability of U.S. regulatory and antitrust law. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 134 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators).

276. Cira, *supra* note 274, at 249. One such example of this legislation is the Protection of Trading Interests Acts, 1980, Ch. II, § 6 (United Kingdom). Canada has proposed legislation that would reimburse all damages paid by a national in a similar suit. Cira, *supra* note 274, at 259.

277. Cira, *supra* note 274, at 251.

278. *Id.* at 249-50. Civil actions against the international uranium cartel were a major precipitating factor leading to adoption of foreign blocking statutes. *Id.*

Currently, conferences are regulated more extensively by the United States than by other nations.²⁷⁹ The proposed amendments retain the United States in its regulatory role of agreement enforcer.²⁸⁰ If consistency with foreign policies is a major goal of the legislation under consideration, legislation allowing largely unregulated conferences to engage in commercially desirable conduct should be accompanied by enforcement left to commercial means, a measure more consistent with international practice.

E. *Discriminatory Enforcement*

United States carriers argue that foreign blocking and claw-back statutes,²⁸¹ together with domestic enforcement policies, result in discrimination against U.S. flag operators.²⁸² They claim that U.S. shipping regulations and antitrust laws are applied more stringently to their activities than to those of foreign carriers.²⁸³

The available evidence, however, fails to demonstrate that either the FMC or Justice Department has favored foreign carriers. The GAO, for example, concluded that the FMC has enforced the Shipping Act evenhandedly.²⁸⁴ In fact, the GAO found that fewer cases had been brought against American carriers than would be expected if malpractice and rebating proceedings bore a direct relationship to the proportion of tonnage controlled by Americans.²⁸⁵ The Justice Department also has prosecuted foreign as well as domestic carriers. The 1979 criminal antitrust action, *United States v. Atlantic Container Line, Ltd.*,²⁸⁶ for example, named three foreign liner companies as defendants.²⁸⁷ These carriers entered pleas of nolo contendere and paid substantial fines.²⁸⁸ The Justice Department likewise has intervened in section 15 proceedings involving agreements primarily among foreign flag carriers.²⁸⁹ The

279. H.R. REP. NO. 53, *supra* note 200, pt. 2, at 24.

280. *See infra* notes 292-95 and accompanying text.

281. *See supra* notes 275-76 and accompanying text.

282. *Maritime Antitrust Oversight Hearings*, *supra* note 49, at 133-34 (statement of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators).

283. *Id.*

284. GAO REPORT, *supra* note 65, at 16-17.

285. *Id.*

286. No. 79-00271, slip op. (D.D.C. June 1, 1979), *reprinted in Maritime Antitrust Oversight Hearings*, *supra* note 49, at 204.

287. *Id.* at 2-3. The three foreign liner companies named as defendants were Atlantic Container Line, Ltd., Containerline Company, Ltd., and Hapag-Lloyd Aktiengesellschaft. *Id.*

288. *Settlements of About \$51.4 million Approved in Ocean Shipping Litigation*, 42 *Antitrust & Trade Reg. Rep.* (BNA), No. 1052, at 370 (Feb. 18, 1982).

289. *Ocean Shipping Act of 1983: Hearings on S. 47 Before the Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 62 (1983) (Letter from Alan Green, Jr., Chairman of the Fed. Maritime Comm'n to Sen. Daniel L. Inouye, (Feb. 9, 1983)).

antitrust division of the Justice Department naturally may be more concerned about the activities of U.S. firms because they have a more obvious and immediate impact on U.S. commerce — certain U.S. cargoes are reserved to U.S. flag carriers²⁹⁰ — and enforcement raises little or no diplomatic concern. Nevertheless, the facts do not support the contention that U.S. carriers have been the victims of discriminatory enforcement policies by either the Department of Justice or the FMC.

III. POTENTIAL IMPACT OF PROPOSED REGULATORY REFORM

A. *Monopolistic Abuse*

The proposed changes to the Shipping Act would result in a radical departure from the traditional role of economic regulatory bodies. In industries where competition is believed to be unworkable, regulatory bodies substitute for market forces, controlling service while attempting to ensure fair rates.²⁹¹ The proposed amendments to the Shipping Act would leave much of this traditional regulatory function to the industry itself, relegating the FMC largely to the role of enforcing conference agreements.

The international nature of ocean shipping has resulted in a less assertive regulatory role for the FMC and its predecessors than has been true in other transportation industries. Most notably, the FMC has lacked the authority to approve rates generally.²⁹² The agency's primary responsibility has been to (1) prevent the establishment of unreasonably high or low rates,²⁹³ (2) review and approve or disapprove anticompetitive agreements,²⁹⁴ and (3) enforce the prohibitory provisions of the statute.²⁹⁵ The proposed changes would eliminate the FMC's authority to reject conference rates regardless of their level, minimize its ability to disapprove anticompetitive agreements, and stress its enforcement role. The FMC would be left with a limited ability to prohibit anticompetitive agreements and prevent their natural consequences.

The reliance of the legislation's sponsors on a list of prohibited acts²⁹⁶ misconstrues the "evil" of monopoly. The list consists largely of devices to achieve, maintain, or exercise a monopolistic position.²⁹⁷ For exam-

290. I. HEINE, *supra* note 24, at 11-13.

291. *See*, L. SCHWARTZ & J. FLYNN, *ANTITRUST AND REGULATORY ALTERNATIVES* 687-691 (5th ed. 1977).

292. D. MARX, *supra* note 7, at 119-20, 290.

293. *See* 46 U.S.C. § 817(b)(5) (1982).

294. *See id.* § 814.

295. *See id.* §§ 812-813, 815-816.

296. S. 47, *supra* note 2, § 12; S. 47 (House version), *supra* note 2, at § 9. Section 9 is reprinted in part *supra* note 223.

297. *See supra* note 223.

ple, fighting ships and other forms of predation destroy competitors; tying and preferential agreements with shippers and ports foreclose markets to other carriers; and discrimination maximizes monopolistic returns. While prohibiting many of these practices, the proposed changes to the Shipping Act would not necessarily prevent the ultimate vices of monopoly: higher prices and limited service. The legislation not only would eliminate the FMC's authority to disapprove monopolistic rates, it also would compel the Commission to enforce tariffs containing such rates. Alfred Kahn, former chairman of the Civil Aeronautics Board and of the President's Council of Economic Advisors, described this legislation as a "cartelist's Nirvana."²⁹⁸ Kahn continued that he had "never heard anyone . . . ask for government *enforcement* of tariffs *that it does not have the authority to disallow*."²⁹⁹ The primary limitation on the carriers' ability to achieve monopolistic returns will be their own inability to obtain agreements at profit-maximizing levels of service and rates.

The United States has a particularly pressing reason for controlling excesses in the ocean shipping industry. Approximately seventy percent of shipping revenues in the U.S. trades are received by foreign carriers.³⁰⁰ Thus, only about thirty percent of the monopolistic rents exacted by liner agreements would benefit U.S. flag carriers. To the extent that rates are increased, therefore, U.S. exports will suffer and U.S. dollars will be transferred to foreign firms, further impairing the U.S. balance of payments.

Monopolistic rates in this foreign-dominated industry also may have a more subtle adverse effect on the U.S. economy. The demand for ocean shipping services is a derived demand,³⁰¹ and rates are set independently for specific items.³⁰² Profit-maximizing cartels will attempt to exact all the monopoly profits available for each product shipped. For example, if U.S. producers of a particular product are able to charge foreign purchasers a price per unit above their marginal costs, a knowledgeable carrier cartel will set its rates at a level that exacts the entire excess over the producers' marginal cost. More accurately, the carriers will increase the marginal costs of the foreign sales until U.S. producers receive only a

298. Testimony Before the Subcomm. on Monopolies and Commercial Law, May 19, 1983, quoted in H.R. REP. NO. 53, *supra* note 200, pt. 2, at 80.

299. *Id.* (emphasis added).

300. Testimony of James C. Miller, III, Chairman, Fed. Trade Comm'n, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 12 (May 18, 1983) (prepared statement to be published in *Hearings on H.R. 1878, Shipping Act of 1983*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *H.R. 1878 Hearings*]).

301. The demand for shipping services is derived from the demand for the product being shipped.

302. See *supra* text accompanying notes 58-62 and *infra* text accompanying note 313.

competitive return. Were the producers able to take the full monopoly rents, increased capital would flow into the domestic industry, expanding U.S. production and employment.

The apparent faith of some that shipping conferences will practice self-restraint finds little support in history. Both major congressional investigations of the shipping industry — the Alexander Report³⁰³ and the Celler Report³⁰⁴ — revealed that conferences engage in activities characteristic of cartels.³⁰⁵ Under the proposed law, the shipping industry will be invited to maximize its profits using cartel practices. The notion that strengthened ocean shipping cartels will make service and rate determinations in ways that increase social utility, while ignoring their potential returns, flies in the face of common sense, historical practice, and economic reality. This is not to say that ocean common carriers are particularly devious or lacking in business ethics; rather, over time, carriers will maximize profits with the unprecedented advantage of legally acting as a cartel with authority to set its own rates.

Although ocean carriage is considered vital to healthy international commerce and to the transport of supplies during times of war and other crises, liner conferences cannot be expected to act in the public interest out of patriotic fervor. Ocean carriage is perhaps the quintessential international industry. Even if one assumes that each country's national-flag carriers are committed to their nation's well-being, when they act in the context of conferences, with no common national interest, loyalties become diverse. U.S. flag carriers are in the minority in conferences serving U.S. trades, and studies indicate that foreign carriers have voted in blocs against U.S. interests.³⁰⁶

The proposed legislation increases the risk of anticompetitive behavior by eliminating the deterrent of private antitrust suits,³⁰⁷ even for secret, unfiled agreements.³⁰⁸ Injured private parties must seek relief through the FMC,³⁰⁹ an agency historically lax in enforcing the Shipping Act.³¹⁰ Injured parties will be entitled to recover only actual damages³¹¹ plus interest, upon proof that the conduct violates the vague

303. ALEXANDER REPORT, *supra* note 17.

304. CELLER REPORT, *supra* note 106.

305. *See supra* text accompanying notes 86-87, 106-11.

306. *See supra* text accompanying note 108.

307. S. 47, *supra* note 2, § 8(c)(2); S. 47 (House Version), *supra* note 2, § 6(c)(2). The 1984 Act disallows private antitrust suits. Shipping Act of 1984, Pub. L. No. 98-237, § 7(c)(2), 98 Stat. 67, 74 (to be codified at 46 U.S.C. app. § 1706(c)(2)).

308. S. 47, *supra* note 2, § 12(a)(1); S. 47 (House Version), *supra* note 2, § 9(a)(2).

309. S. 47, *supra* note 2, § 13; S. 47 (House Version), *supra* note 2, § 10.

310. *See supra* text accompanying notes 112-14.

311. S. 47, *supra* note 2, § 13(f); S. 47 (House Version), *supra* note 2, § 10(g). The FMC may, in its discretion, direct payment of up to twice the amount of actual injury only in certain situations.

standards of the "prohibited acts" section.³¹² The proposed civil enforcement mechanism would discourage injured shippers and carriers from attempting to vindicate their rights unless the illegal acts are manifest and the injury severe.

The proposed legislation represents a major change in the regulatory philosophy of the Shipping Act, by limiting the role of the FMC as a regulator of shipping conferences while continuing its function as an enforcer of conference agreements. This limitation of the government's function as a mediator between the public's interest in the benefits of competition and the traditions of the ocean liner industry might subject U.S. shippers and consumers to monopolistic abuse without any assurance that there will be countervailing gains.

B. *Discrimination*

One of the more troubling aspects of the proposals under consideration is their propensity to foster discrimination. The rate structure of ocean shipping is inherently discriminatory; rates are based on the value of the goods shipped rather than the cost of the service.³¹³ Once set, however, they generally apply equally to all shippers of like goods.³¹⁴ The proposed Shipping Act would permit discrimination among individual shippers of similar goods by authorizing "service contracts."³¹⁵ Carriers could enter into service contracts with shippers that provide rates and services other than those published in the particular carrier's

S. 47, *supra* note 2, § 13(f); S. 47 (House Version), *supra* note 2, § 10(g). A similar provision is found in the 1984 Act. Shipping Act of 1984, § 11(g), 98 Stat. at 80-81 (to be codified at 46 U.S.C. app. § 1710(g)).

312. S. 47, *supra* note 2, § 12; S. 47 (House Version), *supra* note 2, § 9.

313. See H. REP. NO. 611, *supra* note 4, pt. 2, at 25.

314. See 46 U.S.C. § 817(b)(3) (1982). Section 18(3) of the Shipping Act of 1916 as amended states in relevant part:

No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time

Id.

315. S. 47, *supra* note 2, § 9(c). The 1984 Act permits the use of service contracts under similar terms. Shipping Act of 1984, Pub. L. No. 98-237, § 8(c), 98 Stat. 67, 75 (to be codified at 46 U.S.C. app. § 1707(c)). For a discussion of the provisions of the 1984 Act affecting service contracts, see *infra* notes 390-95. The Senate version of the Shipping Act of 1983 defines *service contract* as follows:

[S]ervice contract means 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 a defined service level — such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party

S. 47, *supra* note 2, § 3(22). The 1984 Act contains an identical definition. Shipping Act of 1984, § 3(21), 98 Stat. at 69 (to be codified at 46 U.S.C. app. § 1702(21))

or conference's tariff.³¹⁶ Large, powerful shippers would be the likely beneficiaries of this provision. In this industry, with high fixed costs and fixed sailing schedules, the competition among carriers for the trade of large-volume shippers will be great, particularly during times of slack demand. Carriers might be motivated to provide service to large-volume shippers at rates approaching the costs of loading and unloading while exacting large profits from smaller shippers. Those shippers large enough to obtain favorable service contracts could be placed at a competitive advantage over their less influential competitors,³¹⁷ an advantage not related to the efficiencies of the competing firms.

Discrimination in transportation industries has been of significant concern to Congress since the latter half of the nineteenth century. In fact, discriminatory railroad rates, induced by large shippers, were a primary reason for the enactment of both the Interstate Commerce Commission Act and the Sherman Act.³¹⁸ The elimination of preferential rates and rebates also has been a principal goal of Shipping Act enforcement.³¹⁹ Contrary to this historical aversion to discriminatory rates, the explicit legalization of service contracts would appear to institutionalize a preferential rate structure.

The availability of service contracts also reduces a significant source of pressure on conferences to keep their rates at a fair level for all shippers. The reduction in tariff rates at the instance of a powerful shipper generally works to the benefit of all shippers of the particular commodity.³²⁰ Service contracts, however, would allow carriers to provide off-tariff rates to the large shipper, without lowering rates to others. This might pose a particular threat to independent carriers, as conferences will be able to offer the same rates as an independent carrier to the major shippers without lowering their rates to low-volume shippers.

Several factors, however, militate against the possible use and abuse of service contracts. First, there does not appear to be any limitation on the right of conference members to prohibit the use of service contracts, either individually or collectively.³²¹ If significant conferences bar service contracts or reserve them for conference determination, the potential

316. S. 47, *supra* note 2, § 9(c).

317. See CELLER REPORT, *supra* note 99, at 251.

318. THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 11 (E. Kintner ed. 1978); H. THORELLI, THE FEDERAL ANTITRUST POLICY, ORGANIZATION OF AN AMERICAN TRADITION 85-94 (1954).

319. S. REP. NO. 3, *supra* note 44, at 2; H.R. REP. NO. 53, *supra* note 200, pt. 2, at 2.

320. See 46 U.S.C. § 817(b)(3) (1982).

321. See S.47, *supra* note 2, §§ 5(c), 9(c). The 1984 Act does not place any limitation on the right of conference members to prohibit the use of service contracts. See Shipping Act of 1984, §§ 5(c), 8(c), 98 Stat. at 71, 75 (to be codified at 46 U.S.C. app. §§ 1704(c), 1707(c)).

bargaining strength of shippers will be diminished. Individual carriers, however, may act independently³²² or withdraw³²³ from membership to take advantage of an opportunity to capture the trade of a substantial shipper. Second, service contracts must be made available to "all shippers similarly situated."³²⁴ That this requirement will prevent carriers from entering into contracts favoring one or several shippers is unlikely. The level of service required by a large shipper would readily differentiate it from smaller firms to the extent that they are arguably not "similarly situated" within the meaning of the statute.³²⁵ Third, and perhaps most meaningful, the list of prohibited acts includes a limitation on the abusive use of service contracts.³²⁶ Common carriers may not "make or give any undue or unreasonable preference or advantage to any particular person . . ."³²⁷ The injured shipper has the burden of proving that this indefinite standard has been met.³²⁸ Finally, service contracts provide a new source of competition to an industry resistant to market forces. Carriers will no longer be able to refuse to negotiate with individual shippers because the law prohibits off-tariff rates or services.³²⁹ Shippers may therefore be able to use their large shipping orders to negotiate for better rates from the carriers, and liner firms will have a vehicle to compete for the trade of major shippers. This competition may produce lower overall rates and could ultimately destabilize liner cartels.

A healthy development under the proposed legislation is that service contracts would be filed and a summary of their significant provisions disclosed to the public.³³⁰ Efforts to provide favored shippers with special rates have produced numerous devices resulting in direct and indirect rebates.³³¹ Because rebating is a malpractice³³² and, at least in its

322. S. 47, *supra* note 2, § 5(d).

323. *Id.* § 5(c)(3).

324. *Id.* at § 9(c).

325. *See id.*

326. S. 47 (House Version), *supra* note 2, § 9(11). The Senate version of S. 47 eliminates this restriction, but it does prohibit "any unfair or unjustly discriminatory contract." S. 47, *supra* note 2, § 12(b)(6).

327. S. 47 (House Version), *supra* note 2, § 9(11).

328. S. 47, *supra* note 2, § 6(e).

329. S. 47, *supra* note 2, § 8(c).

330. S. 47, *supra* note 2, § 9(c). The 1984 Act requires the filing of a service contract and a concise statement of its essential terms. Shipping Act of 1984, § 8(c), 98 Stat. at 75 (to be codified at 46 U.S.C. app. § 1707(c)).

331. CELLER REPORT, *supra* note 99, at 253.

332. *See id.* at 249. The Celler Report defines *malpractice* as "an act, omission, or course of dealing in connection with commercial liner operations which violates a provision of the Shipping Act, a conference agreement or regulation, or commonly accepted standard of business ethics." *Id.*

more direct forms, a violation of the Shipping Act,³³³ these practices must be concealed. The availability of service contracts would allow the parties to negotiate directly about rates or services, and disclosure will ensure a more knowledgeable market for both carriers and shippers.

Service contracts introduce a new, or at least more overt, form of natural service competition to the ocean liner industry, but they also increase the risk that small shippers will be the victims of unreasonable discrimination. To strike a sound balance, adoption of the proposed legislation must be accompanied by sensitive and reasoned enforcement by the FMC of the prohibition against undue preferences.

C. Potential Impact on Ports

Several sections of the Shipping Act have been interpreted to prevent the diversion of traffic from its natural routing to a more distant facility. The FMC has held that sections 16 and 17 of the Act³³⁴ prohibit cargo diversion or activities that equalize ports by absorbing differences in land transportation costs.³³⁵ The FMC also has refused to approve agreements under section 15³³⁶ that would have these effects.³³⁷

The rules protecting ports against the loss of traffic are based primarily on statutory policies not administered by the FMC. Section 8 of the Merchant Marine Act of 1920 seeks to foster the full development of American port facilities,³³⁸ and section 205 of the Merchant Marine Act of 1936 prohibits carriers from agreeing among themselves to prevent another carrier from serving a port "at the same rates which it charges at the nearest port already regularly served by it."³³⁹ The Commission has incorporated the goals of these related statutes into its Shipping Act enforcement policies.³⁴⁰

Policies intended to ensure ports the right to handle cargoes from natural tributary territories have been strained in recent years by the growth of containerization and multimodal transportation systems.³⁴¹ The development of "minibridge" or "land-bridge" operations allows carriers to charge a single rate for transport from one inland point in the

333. 46 U.S.C. § 815 (1982).

334. 46 U.S.C. §§ 815-816 (1982).

335. *Dart Container Co. v. Fed. Maritime Comm'n*, 639 F.2d 808 (D.C. Cir. 1981); *Sea-Land Services, Inc. v. South Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966). *But see* *Delaware River Port Auth. v. Fed. Maritime Comm'n*, 536 F.2d 391 (D.C. Cir. 1976).

336. 46 U.S.C. § 814 (1982).

337. *Sacramento-Yolo Port Dist., Pacific Coast European Conference*, 15 F.M.C. 15 (1971).

338. 46 U.S.C. § 867 (1982).

339. *Id.* § 1115.

340. *See supra* notes 334-37 and accompanying text.

341. *See supra* notes 168-70 and accompanying text.

United States to another overseas.³⁴² Cargo can be packed in containers in the Midwest, for example, sent by rail or road to a designated ocean port, and shipped to a foreign destination without being repacked. Although the potential efficiencies are obvious, minibridge service alters prior concepts of natural tributary territories and diverts traffic to fewer ports.³⁴³ The FMC has struck a balance by permitting minibridge operations while continuing to protect ports against the diversion of *nearby* cargoes.³⁴⁴ The proposed act would likely disrupt that balance. It would retain much of the relevant language of sections 16 and 17,³⁴⁵ but the legislative history suggests that the existing interpretation should not survive. Despite the policies that so strongly oppose cargo diversion,³⁴⁶ the Senate Report states:

This section [prohibiting unjust discrimination against ports] *is not intended, alone or in conjunction with any other act, to equalize opportunity between shippers or ports, but rather to prohibit actions which are shown to be not justified by all relevant transportation conditions. Carriers and shippers should not be required by this subsection to engage in outdated and economically unsound practices; and rates, charges, and services should not be found to be unjustly discriminatory because they result in changes in transportation patterns.*³⁴⁷

The potential impact of the proposed act on those policies is not clear. Nor is there a consensus among ports regarding the desirability of continued protection. Representatives of some ports have expressed concern,³⁴⁸ while others have actively sought to eliminate "port protection" policies.³⁴⁹ The Chairman of the FMC believes that the policies of section 8 and section 205 will have some bearing on the interpretation of the proposed act's prohibition against unjust discrimination.³⁵⁰ The goals of the legislation — an efficient, nationalized, multimodal ocean transport industry — and its history, however, suggest that ports will not enjoy the protection they have had in the past.

342. Note, *Challenges to the Legality of Minibridge Transportation Systems*, 1978 DUKE L. J. 1233, 1237.

343. *Id.* at 1237-38.

344. *Dart Container Co. v. Fed. Maritime Comm'n*, 639 F.2d 808, 817 (D.C. Cir. 1981).

345. S. 47, *supra* note 2, § 12(b)(6); S. 47 (House Version), *supra* note 2, §§ 9(b)(6), (11). The 1984 Act amends little of the relevant language of sections 16 and 17. Shipping Act of 1984, Pub. L. No. 98-237, § 20(b)(7), 98 Stat. 67, 89.

346. *See supra* text accompanying notes 334-39.

347. S. REP. NO. 3, *supra* note 44, at 35-36 (emphasis added).

348. *See, e.g.*, Statement of the Massachusetts Port Authority and the Virginia Port Authority on H.R. 1878 "The Shipping Act of 1983", Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary 117-18 (May 19, 1983). This statement to be published in *H.R. 1878 Hearings*, *supra* note 300.

349. *See* Letter from Richard D. Ford, Executive Director of the Port of Seattle to Hon. Slade Gorton, Nov. 5, 1981, reprinted in *Hearings on S. 1593 and S. 125*, *supra* note 153, at 454.

350. Letter from Alan Green, Jr., Chairman, Fed. Maritime Comm'n, to Hon. Peter W. Rodino (Apr. 18, 1983), to be published in *H.R. 1878 Hearings*, *supra* note 300.

Policies that protect small ports may, of course, be unrealistic. There appears to be a shift in the entire transportation industry to fewer, but more efficient, multimodal firms.³⁵¹ Fewer ports will thrive as a consequence of this development:

Some port cities are in trouble because multimodal transportation companies will doubtless funnel traffic into a handful of ports, thereby cutting costs.

Nobody knows for certain which ports will suffer, but experts say the East, West and Gulf coasts may end up being served by only two or three major ports each, compared with a half dozen or more each right now.³⁵²

The proposed act would likely accelerate this change.

Ports that lose substantial traffic will be primarily the victims of a more efficient transport system, a natural and desirable consequence of a market economy. The impact of a port's failure, however, on economic development and employment in the area served by that port, as well as the potential national defense implications of an international transportation system dependent on a few large ports, would have made a more focused discussion of the issue desirable and appropriate.

D. *International Implications*

Many nations are rethinking their implementation policies concerning the competition rules governing their ocean shipping industry.³⁵³ Although the U.S. discovery procedures and treble damages irritate many foreign nations, basic U.S. antitrust standards are no longer alien to the international arena. Resistance by conference carriers to any procompetitive developments in Europe, Canada, or elsewhere on the basis of a new and strong commitment by the United States to international shipping cartels would be unfortunate. Consider the irony of the United States being perceived as a leading force in an anticompetitive international movement.

IV. PROPOSALS

A. *Study Commission*

Questionable premises³⁵⁴ underlying the proposed amendments to the Shipping Act of 1916 and their potential adverse impact on shippers, ports, and independent carriers suggest the need for a significant independent study prior to any major changes. There are substantial dif-

351. Wall St. J., Oct. 20, 1983, at 1, col. 6.

352. *Id.* at 18, col. 1.

353. *See supra* text accompanying notes 257-73.

354. *See supra* notes 58-81 and accompanying text.

ferences between the ocean shipping industries of 1916 and of today. Since 1916 the industry has experienced a technological revolution,³⁵⁵ the ratification of the UNCTAD code,³⁵⁶ and the increased use of bilateral agreements to share cargo between the parties' national-flag carriers.³⁵⁷ Containerization has increased the capital requirements of carriers,³⁵⁸ thinning the ranks of existing firms and creating new entry barriers for potential competitors.³⁵⁹ The power of conferences in this tightly oligopolistic industry, therefore, will be substantially greater than in the past.

The changing structure of land transportation systems, with increasing integration of firms into multimodal conglomerates,³⁶⁰ also renders reliance on stronger ocean shipping cartels problematic. If shippers come to rely on several strong "full service" firms that provide transport from pick-up point to foreign destination, the existence of a shared monopoly in the ocean leg of that carriage may have untoward effects. The existence of a "bottleneck monopoly"³⁶¹ in the center of an otherwise efficient multimodal system would distort performance throughout the industry. Monopoly profit-taking in the ocean sector would have unpredictable, but clearly adverse, consequences for land carriers and shippers alike. Moreover, if ocean carriers affiliate with multimodal conglomerates, there is a substantial risk that the monopolistic practices of liner firms will spill over into the domestic land transport sector. In short, viewing ocean shipping as a discrete international industry unrelated to domestic trucking and rail traffic is becoming less reasonable. This development calls for a careful analysis before an increased commitment to liner conferences is made.

During the 97th Congress, the House Committee on the Judiciary recognized the need for a comprehensive study and reported a bill that would have established a "Commission on the Deregulation of International Ocean Shipping."³⁶² The Commission was retained in the bill passed by the House³⁶³ and it represents sound policy. The Commis-

355. *See supra* notes 168-69 and accompanying text.

356. *See supra* note 271 and accompanying text.

357. *See supra* note 273 and accompanying text.

358. *See supra* notes 43-45 and accompanying text.

359. *See supra* notes 168-70 and accompanying text.

360. *See supra* notes 341-43 and accompanying text.

361. *See, e.g.*, *Municipal Elec. Assoc. of Mass. v. SEC*, 413 F.2d 1052 (D.C. Cir. 1969); *United States v. Terminal R.R. Assoc.*, 224 U.S. 383 (1912).

362. H.R. 4374, *supra* note 1, § 18.

363. S. 47 (House Version), *supra* note 2, § 17. The 1984 Act does not provide for the establishment of a "Commission on the Deregulation of International Ocean Shipping"; rather, it created an Advisory Commission to become effective five and one-half years after the date of enactment of the Act. Shipping Act of 1984, Pub. L. No. 98-237, § 18(d), 98 Stat. 67, 85-86 (to be codified at 46

sion, if created, should suggest ways to achieve three primary objectives: (1) provide a regulatory structure, if one is necessary, that interferes as little as possible with competitive forces in the ocean shipping industry; (2) ensure that the regulatory structure adopted will promote the most efficient organization of the industry; and, (3) harmonize, to the fullest extent possible, U.S. policy with that of our major trading partners.

B. *Flexible Review Standard*

If addressing the perceived problems of the current regulatory system without the benefit of a comprehensive, independent study is politically imperative, statutory provisions should be retained which allow the FMC to protect against conference overreaching. This protection could best be achieved by establishing a reasonably flexible standard and requiring the FMC to ensure the existence of a workably competitive structure in all facets of U.S. transportation. The FMC also should retain the authority to disapprove excessive or predatory rates.

The proposed legislation relies on a detailed, although vague, list of prohibited acts to protect public interests.³⁶⁴ The experience of ninety years of antitrust enforcement, however, has shown the impossibility of specifying all forms of conduct that unreasonably restrain trade. Chief Justice Hughes described the twin vices of reliance on a specific list of unreasonable conduct:

As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loop holes for escape.³⁶⁵

A general, flexible standard, one that would require the FMC to promote *workable* competition within the framework of the unique history and international structure of ocean shipping, would avoid this problem.

As long as the FMC is required to enforce tariffs established by carriers acting in concert,³⁶⁶ it should have the power to disapprove rates that are excessive or so low that they clearly evidence a predatory intent. A government regulatory body required to impose rates set by shipping

U.S.C. app. § 1717(d)). For a discussion of the establishment and duties of the Advisory Commission, see *infra* notes 401-04.

364. See *supra* note 219 and accompanying text. For the language of § 9, see *supra* note 223. The 1984 Act contains a similar provision. Shipping Act of 1984, Pub. L. No. 98-237, § 10, 98 Stat. 67, 77-80 (to be codified at 46 U.S.C. app. § 1709).

365. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

366. See 46 U.S.C. § 814 (1982).

cartels on U.S. consumers and shippers, without regard to the reasonableness of those rates, is almost inconceivable.

C. *Structural Controls*

Any modification of the Shipping Act also should continue to recognize the benefits of a structure that will support competition. The two provisions of section 15 that currently ensure a reasonably competitive market structure — open conferences and a limited right of independent action³⁶⁷ — would be retained in the proposed Shipping Act. Given the increasingly oligopolistic structure of the industry and high cost barriers caused by containerization,³⁶⁸ as well as the reduced FMC oversight that would result if the new legislation were enacted, two additional amendments are necessary to provide a structure that can support non-conference carriers by guaranteeing them access to ports and an adequate volume of goods. First, clear prohibition against agreements that foreclose ports to any carrier would provide access to needed terminal facilities. Second, limiting the volume of tonnage that may be bound to particular carriers or conferences through loyalty contracts would likewise ensure a market for independent carriers. A reasonable solution suggested is that no more than seventy percent of any shipper's goods be subject to loyalty contracts.³⁶⁹

These two restrictions would allow independent carriers to capture business from conferences charging excessive rates. Ports could not exclude independents nor charge them discriminatory rates. Furthermore, a limitation on the volume of goods subject to loyalty contracts would ensure sufficient trade to justify independent entry. These restrictions would not guarantee independent carriers any business. Shippers would still have an incentive to ship all their goods on the vessels of conferences or carriers with which they have contracts, because to seek out and negotiate with several carriers is inconvenient and likely expensive. Such restrictions would, however, ensure that independent carriers will not be precluded from competing if contract rates become excessive. Moreover, even if carriers were able to tie only a fixed percentage of each contract shipper's goods through loyalty agreements, carriers would be able to make future plans with reasonable certainty, while being encouraged to moderate their pricing practices.

367. *Id.*

368. *See supra* notes 168-70 and accompanying text.

369. *European Shippers Seek Narrow Exceptions, supra* note 261, at 739; *Maritime Antitrust Oversight Hearings, supra* note 49, at 65 (statement of George E. Garvey); *see id.* at 105 (statement of Thomas J. Campbell and Robert D. Tollison).

D. *Tariff Enforcement*

Finally, and perhaps most importantly, the Federal Maritime Commission should either assume the traditional role of a regulator, ensuring shippers and consumers reasonably competitive rates, or leave rate setting and tariff enforcement to private commercial means. The coercive power of the U.S. government should not be used to enforce a cartel's agreement.

V. CONCLUSION

For more than fifty years Congress has, through various federal maritime agencies, attempted to capture for U.S. shippers and consumers the perceived benefits of liner cartels.³⁷⁰ Experience has taught that the task is indeed difficult. Prior to 1961 the regulatory bodies were ineffectual and conferences behaved as economic theory suggests — discriminating against shippers, running roughshod over independent competitors, and battling among themselves for market share.³⁷¹

Since the Shipping Act was amended in 1961,³⁷² and the FMC was charged with protecting the public interest,³⁷³ the conferences have been more restrained.³⁷⁴ Advocates of closed conferences claim, however, that the introduction of competitive norms through the public interest standard has made the efficient organization of conferences impossible.³⁷⁵ The specter of antitrust liability allegedly prevents U.S. firms in particular from collaborating to form structures that can compete effectively in the ocean shipping industry.³⁷⁶

Regardless of the merits of the carrier's claims, the 98th Congress is almost certain to alter the Shipping Act substantially, and those changes will doubtless shift back in the direction of fewer regulatory constraints. Congress will reaffirm its belief that a largely self-regulated system of ocean liner cartels is beneficial to the American public. There is, however, reason to hope that this shift will not signal a return to the age of fighting ships and excessive rates.

Congress has been assured by the industry that self-regulation will strengthen U.S. flag carriers and bring about significant efficiencies that

370. *See supra* notes 82-92 and accompanying text.

371. *See supra* notes 106-11 and accompanying text.

372. Act of Oct. 3, 1961, Pub. L. No. 87-346, 75 Stat. 762 (amending various sections of 46 U.S.C. §§ 800-842 (1982)).

373. *Id.*

374. *But see supra* text accompanying notes 205-18. The *North Atlantic Container, Sabre Shipping and Rates on U.S. Government Cargoes* cases suggest that the conferences were not very restrained. *Id.*

375. *See supra* note 151 and accompanying text.

376. *See supra* notes 157-61 and accompanying text.

will benefit U.S. shippers and consumers.³⁷⁷ If the industry does not restrain itself under these circumstances, liner conferences will likely find this proposed legislation to be their "last hurrah." Monopolistic rates and aggressive predation surely would generate support for either rigid, detailed regulation or the total elimination of antitrust immunity.³⁷⁸ Moderation of their practices would, therefore, be in the interest of liner cartels, and U.S. flag carriers would do well to see that their foreign collaborators appreciate this U.S. sensitivity.

Some characteristics of the ocean carriage industry might make cartels inherently unstable. The great variance between liner firms' size, profitability, and technological capabilities, for example, will make it difficult to reach a consensus about optimal rates and services. The threat of increased reliance on bilateral agreements may also moderate conference practices. How this industry will organize itself in light of new shipping technology, multimodalism, and possible changes in national and international laws cannot be predicted. These new developments may facilitate agreement, but they also may frustrate them.

The proposed changes also call for vigorous and knowledgeable enforcement by the FMC. Fortunately, the current FMC Chairman has been committed to improving the enforcement practices of the agency, as was his predecessor. The FMC, however, would have little authority to disapprove agreements. It must, therefore, react with vigor and impose significant penalties when egregious prohibited acts are detected. As the enforcer of conference agreements, the FMC would have its limited resources strained, but it should set priorities to accelerate investigations and prosecute serious offenses.

The legislation under consideration represents a truly extraordinary U.S. commitment to cartels. The combination of market forces, aggressive enforcement, and carrier self-restraint may result in an efficient ocean shipping industry, with the benefits inuring to the U.S. public. The risks are high, however, and past performance suggests that carriers will revert to old and worn patterns.

ADDENDUM

The Shipping Act of 1984³⁷⁹ (hereinafter cited as the 1984 Act) was enacted by Congress on March 6, 1984 and became law on March 20, 1984.³⁸⁰

377. See *supra* notes 154-56 and accompanying text.

378. Cf. *Hearings on H.R. 6899*, *supra* note 99, at 61 (statement of the Hon. Paul N. McCloskey, Jr.).

379. Pub. L. No. 98-327, 98 Stat. 67 (to be codified at 46 U.S.C. app. §§ 1701-1719 (1982)).

380. The committee on the disagreeing votes of the two Houses on the amendments of the

to present a united front to the demands of shippers is likely to reduce the competitive impact of legalized service contracts. The congressional changes seem to have strengthened the positions of liner cartels and large shippers at the expense of small and medium sized shippers. The law as enacted, therefore, increases the likelihood of discrimination against less powerful shippers, while reducing the competitive advantages likely to flow from the use of service contracts.³⁹⁵

Loyalty contracts will be permitted only if they comply with the anti-trust laws.³⁹⁶ Non-compliance with the antitrust laws, however, will not result in antitrust liability,³⁹⁷ but rather give rise to an action for violation of the provisions of the 1984 Act.³⁹⁸ This restriction on loyalty contracts might eliminate a tying device that historically has strengthened conference power,³⁹⁹ but it is just as likely to shift conference energy to more discriminatory devices such as service contracts and time-volume rates. Under prior law, small shippers were assured an opportunity to obtain discounted rates when loyalty contracts were employed.⁴⁰⁰ The ability of carriers to obtain commitments from large shippers by providing special rates through service or time-volume contracts, however, may render loyalty contracts unnecessary and perhaps undesirable from the carriers' perspective.

Elimination of the "Commission on the Deregulation of International Ocean Shipping"⁴⁰¹ is the last major change in the law adopted by the conference committee. In its stead, the conferees created an "Advisory Commission on Conferences in Ocean Shipping" that will come into existence five and one-half years after the 1984 Act becomes effective.⁴⁰² During the first five years of implementation of the 1984 Act, the FMC will collect data regarding the impact of the legislation on the ocean

395. See *supra* notes 315-20 and accompanying text.

396. See Shipping Act of 1984, § 10(b)(9), 98 Stat. at 78 (to be codified at 46 U.S.C. app. § 1709(b)(9)).

397. See *id.* § 7(a)(2), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1706(a)(2)). For the full text of § 7(a)(2), see *supra* note 381.

398. See Shipping Act of 1984, § 11, 98 Stat. at 80-81 (to be codified at 46 U.S.C. app. § 1710). Section 11(a) states that "any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation." *Id.* § 11(a), 98 Stat. at 80 (to be codified at 46 U.S.C. app. § 1710(a)). For a discussion of the amount of the award that may be received under the 1984 Act, see *supra* note 384.

399. See *supra* notes 129-33 and accompanying text.

400. See 46 U.S.C. § 813(a). For a discussion of prior law dealing with the probability that conference members will abuse their collective power, see *supra* notes 135-48.

401. See *supra* note 362 and accompanying text.

402. Shipping Act of 1984, § 18(d), 98 Stat. at 85-87 (to be codified at 46 U.S.C. app. § 1717(d)).

shipping industry.⁴⁰³ The Advisory Commission will conduct a comprehensive analysis of the collected data and report its findings and recommendations to Congress.⁴⁰⁴

Under the new law there are limited checks on the power of carrier cartels to exact monopolistic profits. The FMC may attempt to enjoin those agreements that are likely to diminish service or unreasonably raise rates.⁴⁰⁵ Past performance,⁴⁰⁶ however, particularly when coupled with diminished authority and newly-created procedural hurdles,⁴⁰⁷ suggests that the Commission will not protect adequately the public interest.

The only realistic check on the monopolistic power of ocean shipping conferences is likely to be market forces. The desires of the most efficient liner companies to capture market share, together with competition for service contracts, might ensure a reasonable level of competition. The Shipping Act of 1984, however, offers liner firms the unique opportunity to form tight cartels free from antitrust liability. If conferences are unable to exploit their monopolistic positions, it will be convincing evidence that, regardless of the law, the competitive forces of the marketplace will not be denied.

403. *Id.* § 18(a), 98 Stat. at 85 (to be codified at 46 U.S.C. app. § 1717(a)).

404. *Id.* § 18(h), 98 Stat. at 87 (to be codified at 46 U.S.C. app. § 1717(h)).

405. *Id.* § 6(h), 98 Stat. at 73 (to be codified at 46 U.S.C. app. § 1705(h)).

406. *See supra* notes 112-14 and accompanying text.

407. *See supra* notes 385-86 and accompanying text.