Articles

Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues*

Joseph Monteiro**
Gerald Robertson***

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* The views expressed are those of the authors and are not necessarily those of the Competition Bureau or Industry Canada. The authors thank Margaret Sanderson, Jim Innes, Lilla Csorgo, Brian Rivard and Judith Carrigan for helpful comments or information. This article is a further development of our publication in LOGISTICS IN A CHANGING GLOBAL ECONOMY, Canadian Transportation Research Forum Proceedings of the 33rd Annual Conference, Edmonton, Alberta, May 25-28, 1998, at 286-314.

** Joseph Monteiro has a B.A. and M.A. from the University of Bombay in Economics and an M.A. from Queen's University, Canada in Economics. He has also completed his Ph.D. course work in the same field. At the moment he is employed with the Competitions Bureau, Industry Canada. His experience includes work as an investigative officer and experience in the regulated affairs area, together with research in various areas such a labor economics, antitrust economics, competition law, transportation economics, etc. Publications by Mr. Monteiro are mainly in the area of competition law and economics.

*** Gerald Robertson received an Honors B. Math. majoring in Applied Analysis and Computer Science from the University of Waterloo. His M. Sc. and Ph.D. are in Agricultural Economics from the University of Guelph. His current title is Senior Advisor, Coordination and Management Services, Industry Sector, Industry Canada. His areas of interest include competition, regulation, mathematics, and computer science which he applies to a number of different subject areas including transportation, telecommunications and agriculture. With the Canadian federal government he has worked for Agriculture Canada, the Patented Medicine Prices Review Board, the Competition Bureau, and Industry Canada.

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I. INTRODUCTION

Shipping conference legislation provides an exemption from the provisions of the Competition Act for certain ocean liner shipping practices. This exemption is a privilege which most industries in the economy do not enjoy. With deregulation being introduced in most of the regulated

sectors, the rationale and the need for continued exemption is being increasingly challenged.

In light of this disparity, a number of agencies have expressed dissatisfaction with the state of conference legislation. For example, in Canada, the National Transportation Act Review Commission expressed opposition to the intent of the Shipping Conference Exemption Act,[1] arguing that it runs counter to the general policy of encouraging competition. In addition, the Canadian Shippers' Council opposes the philosophy of continuing the exemption. Similarly, in Europe and Japan, Shippers' Councils are strenuously advocating an end to open antitrust exemption enjoyed by liner conferences. Pressures for change in the United States too have recently resulted in a new shipping act, as evidenced by numerous attempts for reform. The competition agencies in Canada, the European Union ("E.U.") and the United States prefer that the liner shipping industry, like any other industry, be subject to competition and not be protected by an outdated and antiquated system of shipping laws.

Everyone seems to agree that some change is necessary. The question is what kind and how much? In addition, fundamental changes in technology are occurring which are rendering these laws inappropriate, as the circumstances which first gave rise to them are no longer prevalent. New forms of organization, new business arrangements, and the demand for new services all accentuate the need for change. Under such circumstances, free market forces best determine the most appropriate policy. Facilitating and encouraging the role of market forces by eliminating the exemption could lead to greater competition among ocean liner carriers and ultimately to increased efficiency, lower prices, improved services and perhaps greater international trade.

In this paper, the emerging developments and trends in liner shipping and some of the associated issues will be briefly examined. Section two reviews the background to shipping conference legislation in Canada, the European Economic Community ("EEC") and the United States. The conference exemption legislation in each of these jurisdictions is examined in section three, with a schematic chart on its evolution in Appendix 1. This is followed by a brief examination of the two basic rationales for exempting ocean liner shipping from competition laws: the economic (i.e., the need to provide stability of rates and services) and the political (i.e., considerations of international comity) in section four. The theory behind the economic argument is elaborated in Appendix 2. Its purpose is to shed some light on why conference legislation developed and what were the justifications used to retain the exemption of conferences from the competition laws.

1. Shipping Conferences Exemption Act, R.S.C. § 3 (1987).

Section five examines the recent developments such as technological change (i.e., containerization, new mega-sized carriers, etc.), new forms of organizations (i.e., superconferences, consortia, etc.), new forms of agreements (i.e., capacity, space chartering, etc.), and new forms of service (i.e., global service, etc.) that have led to some of the emerging legislative developments. Thereafter, some of the ensuing issues from this debate such as intermodal rates, service contracts, independent action, tariff filing and antitrust immunity are briefly reviewed. The conclusion briefly examines the implications of the above developments for competition policy in the liner trade.

II. Background to Conference Legislation in Canada, EEC and the United States

A. Canada

Canada did not have any specific legislation governing shipping conferences until 1971. After World War I, the shipping policies in Great Britain dominated the Canadian approach to conferences. In the early 1920s, three separate inquiries in their reports strongly criticized shipping conferences.[2] After the 1920's, no formal inquiries were made into shipping conferences or ocean freight rates until 1959, nor did the government attempt to legislate the regulation of rates.[3]

In February 1959, the Industrial and Trade Bureau of Greater Québec invited the Helga-Dan, a ship specially fitted for winter navigation, to sail to and from the port of Québec. As the Helga-Dan belonged to a shipping line not a member of the shipping conference it was necessary for the shipper to obtain a release from their exclusive patronage contract with the Eastern Canada-United Kingdom Shipping Conference.[4] The Conference refused to release the shipper despite the fact that it did not provide winter service. This resulted in a complaint being filed with the Director of Investigation and Research and led to an inquiry under the *Combines Investigation Act*.[5] The investigation subsequently resulted in charges by the Director and hearings before the Restrictive Trade Practices Commission ("R.T.P.C.").[6] In 1965, the R.T.P.C. issued its report. Though the R.T.P.C. determined that the Conference did hinder competi-

2. Shipping Conferences Arrangements And Practices, Restrictive Trade Practices Commission, Department of Justice, Ottawa, 1965, at 15 [hereinafter Shipping Conferences].

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

4. A.I. Bryan & Y. Kotowitz, Shipping Conferences In Canada 81 (Consumer & Corporate Affairs Canada 1978).

5. *Id.*

6. *Id.*

tion and take advantage of shippers, it mainly criticized exclusive patronage contracts.[7] However, it declined to apply the Combines Investigation Act to shipping conferences. It maintained that "[a]lthough the member lines lessened competition within the meaning of the Combines Investigation Act, the public interest would not be served by excessive rate competition and instability in the liner trades."[8] The R.T.P.C. declined to regulate shipping conferences indicating that "governmental regulation of rates in ocean transport would not be feasible or conducive to the welfare of the Canadian public."[9] Based on the rationale and recommendations of the R.T.P.C., the Shipping Conferences Exemption Act ("Act") was passed in 1970.[10]

Despite the R.T.P.C.'s strong criticism against patronage contracts, the Act continued to allow them.[11] Further, the Act did not give any regulatory role to the Canadian Transport Commission.[12] Its sole responsibility was to ensure that agreements were properly filed with it. Furthermore, no specific provisions designated responsibility for the enforcement of the Act. The main penalty for prohibited practices of shipping conferences was that agreements lost their exemption from the Combines Investigation Act.[13] Other than the exemptions provided in the Act, shipping conferences continued to be subject to the Combines Investigation Act.[14] This led to the Shipping Conferences Exemption Act of 1979. However, it did not introduce any effective procompetitive measures. The provision to strengthen the position of the shippers through a shipper group, designated to represent shipper interest, was not very effective due to the vagueness of the provision on the meaning of "information sufficient for the satisfactory conduct of the meeting."[15] The 1979 Act further increased the power of the conferences by extending the scope of the exemption between one or more conferences and between conference and non-conference carriers. This led to the Shipping Conferences Exemption Act of 1987.

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7. *Id.*
8. SHIPPING CONFERENCES, *supra* note 2, at 100.
9. *Id.* at 101.
10. BRYAN & KOTOWITZ, *supra* note 4, at 82.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Joseph Monteiro & Gerald Robertson, *Conference Legislation – Emerging Developments, Trends and a Few Major Issues*, LOGISTICS IN A CHANGING GLOBAL ECONOMY, Canadian Transportation Research Forum Proceedings of the 33rd Annual Conference, Edmonton, Alberta, May 25-28, 1998, at 294.

B. EEC

In the early 1900s, Western Europe adopted the United Kingdom's laissez-faire approach to conferences.[16] Since then, conferences have enjoyed a peaceful existence in Western Europe. In general, conferences were excluded de facto or de jure from the application of competition laws as the European governments tolerated and even favored them.[17] When European shipowners wanted their governments to protect them from the United States antitrust laws, those governments wanted to know what would be done to protect shippers' interests. In 1963, a note of understanding was signed by the representatives of European liner conferences and shippers, which was considered the right way for taking into account shippers' interests.[18] As a result, the Committee of European National Shipowner's Associations was formed.

Simultaneously, developing countries were largely concerned with discriminatory practices of conferences.[19] This resulted in the adoption of the Code of Conduct for Liner Conferences by a number of Member States even though the Economic Community was not a party to the Code because of its incompatibility with the competition provisions of the EC Treaty.[20] As a compromise, EC Council of Ministers adopted the "Brussels Package" in 1979. The package recognized the stabilizing influence of conferences while implicitly establishing the principle of block exemption. As a result, a regulation on the application of competition rules to maritime transport was proposed. In addition, a regulation exempting liner conferences from Articles 85 and 86 of the Treaty of Rome was adopted and went into force on July 1, 1987.[21]

The principal regulation concerning the exemption of shipping conference agreements from the application of competition rules is Council Regulation No. 4056/86 of 22 December 1986, which set forth rules for the application of Articles 85 and 86 of the Treaty of Rome to Maritime Transport. In addition, a number of supplementary regulations on maritime transport were adopted.[22]

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16. The Right Honorable Sir Leon Brittan QC, Vice President of the Commission of the European Communities, *The EC's Competition Policy for Liner Shipping Set in its Commercial and Political Context*, Address before the European Maritime Law Organization (EMLO), at 4 (Oct. 23, 1992).

17. *Id.*

18. *Id.*

19. *Id.* at 5.

20. *Id.*

21. *See* The Right Honorable Sir Leon Brittan, QC, Vice President of the Commission of the European Communities, *The EC's Competition Policy for Liner Shipping Set in its Commercial and Political Context*, Address Before the European Maritime Law Organization (EMLO) London, at 3-6 (Oct. 1992).

22. Regulation (EEC) No. 4057/86, *On Unfair Pricing Practices in Maritime Transport*, OF-

C. The United States

Before the passage of the 1916 legislation on shipping, the United States Government brought legal suits under the Sherman Act against a number of international steamship combines. The House Committee on Merchant Marine and Fisheries under the chairmanship of J. W. Alexander investigated the problem of shipping combinations and published its findings in 1914.[23] Based on these recommendations, Congress decided in 1916 that with federal regulation, the shipping industry could provide public benefits not otherwise available.[24] It feared that if this industry was precluded from entering into anti-competitive agreements rate wars would erupt, resulting in increased concentration. Such concentration would make for a more effective monopoly than existed by agreement in a less concentrated environment.

Congress, however, recognized that the conference carriers had abused their power. It believed that it could prevent this industry from abusing its monopolistic power in several ways. First, it prohibited certain particularly anti-competitive or discriminatory practices. Second, it required all carriers to disclose to a federal agency, the Shipping Board, and to the public all multicarrier agreements. Finally, the carriers were required to obtain the agency's approval prior to implementing their agreements. Unapproved agreements were declared unlawful.

The United States Shipping Act of 1916[25] was largely based on the recommendations of the Alexander Report. It recognized certain benefits and shortcomings of the conference system and therefore provided for limited acceptance of the conference system with active government supervision. In 1960, two congressional committees investigated the industry and its regulations and noted the dissatisfaction with the operation of the system. Congress, however, remained persuaded that the conference system was necessary to avoid rate wars and monopoly.[26] Conse-

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FICIAL JOURNAL No. L 378, Dec. 31, 1986; Regulation (EEC) No. 4055/86, *Applying the Principles of Freedom to Provide Services to Maritime Transport Between Member States and Between Member States and Third Countries*, OFFICIAL JOURNAL No. L 378, Dec. 31, 1986; Regulation (EEC) No. 4058/86, *Concerning Co-ordinated Action to Safeguard Free Access to Cargoes in Ocean Trades*, OFFICIAL JOURNAL No. L 378, Dec. 31, 1986; and, *Amendments to the Proposal for a Council Regulation Laying Down Detailed Rules for the Application of Articles 85 and 86 of The Treaty to Maritime Transport.* Other regulations of interest are: Commission Regulation (EEC) No. 4260/88 of Dec. 1988, *On the Communications, Complaints and Applications and the Hearings Provided for in Council Regulation (EEC) No. 4056/86 Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to Maritime Transport*, OFFICIAL JOURNAL No. L 376/1, Dec. 31, 1988.

23. REPORT OF THE ADVISORY COMMISSION ON CONFERENCES IN OCEAN SHIPPING, Wash. D.C., at 5 (Apr. 1992).

24. *Id.* at 6.

25. This is the short title of the Act. *See* section 44 of the Shipping Act of 1916.

26. One point that was heavily emphasized in the Shipping Act of 1916 that was not relied

quently, the Shipping Act of 1916 was amended. A number of developments led to the United States Shipping Act of 1984:[27] Dissatisfaction with the regulatory process,[28] uncertainties about the outcome of regulatory decisions, the container revolution and development of intermodal services, and general dissatisfaction with the existing legislation.

III. Shipping Conferences Exemption Act of 1987, EEC Regulation 4056/86 and The United States Shipping Act of 1984

A. Shipping Conferences Exemption Act of 1987

The Shipping Conferences Exemption Act of 1987 ("SCEA") came into force on December 17, 1987.[29] This revised Act (formerly Shipping Conferences Exemption Act 1979) consists of 29 sections[30] and its administration is the responsibility of the Canadian Transportation Agency (formerly the National Transportation Agency).[31] The provisions of the Act can be classified into five categories: (1) exemptions from the Competition Act, (2) restrictions on the exemptions, (3) investigations, (4) availability of information, and (5) filing and administration. These are briefly reviewed hereafter.

1. Exemptions from the Competition Act

The Act continued to exempt certain shipping conference agreements or interconference agreements from the Competition Act, subject to certain restrictions or prohibitions.[32] It allowed the use of tariffs by

upon to any great degree in 1961 was that a strong conference system would benefit the American merchant marine. The Senate Report (#860, 87th Cong., 1st Sess., at 2 (1961)) in the 1961 amendments emphasized the fact that . . . the only nonconference lines today which desire to operate regularly on a basis of cutting conference rates are foreign flag lines . . . ." *Id.*

27. *See* section 1 of the United States Shipping Act of 1984 for title.

28. This was basically a result of delays in obtaining approval for conference agreements from the FMC. This was amplified in the Supreme Court Decision (Federal Maritime Commission vs. Aktiebolaget Svenska Amerika Linen, 390 U.S. 238 (1968)) which shifted the burden of proof to the conferences to show that agreements were not anticompetitive.

29. *See* CANADA GAZETTE, Part II, Vol. 122, No. 2, 20/1/88, SI/TR/88-9. Subsection 4(3) came into force on February 17, 1988. This is the short title of the Act, see section 1. The full title is now "An Act to exempt certain shipping conference practices from the provisions of the Competition Act, to repeal the Shipping Conferences Exemption Act and to amend other Acts in consequence thereof."

30. There are nine new sections, three sections of the previous Act were deleted, two earlier sections were combined into one and one earlier section was divided into two. The definitions in section 2(1) were increased to include definitions on conference agreement, loyalty contract, designated shipper group, independent action, interconference agreement, and service contract. It also contains definitions on contract rate, dual rate and non-contract rate previously in subsection 5(2) of the SCEA, 1979.

31. *See* Shipping Conferences Exemption Act, R.S.C. § 3 (1987).

32. *Id.* at §4(1).

member lines set by the shipping conference or interconference. It permitted the use of loyalty contracts provided that: all contracts may be terminated by either party at any time after ninety days notice, the differential between contract and non-contract rates would be a maximum of fifteen percent of the contract rate, rebates would not be prohibited by agreement among conference members, and there would be no requirement that a shipper transport 'all' its goods by the conference. It permitted the conference to establish the terms and conditions respecting the use of service contracts. It allowed for the allocation of ports in Canada among members, regulation of times of sailings and the kind of services which shipping conference members were allowed to supply for the transportation of goods, and legalized pooling arrangements, whether of revenue or of cargoes. It also allowed shipping conferences to regulate the admission of new members and the expulsion of members from the conference thereby sanctioning closed conferences.[33]

2. *Restrictions on the Exemptions*

The restrictions referred to above are: 1) Failing to file agreements with the Agency,[34] 2) agreements that do not provide for independent action,[35] 3) engaging in or conspiring, combining, agreeing or arranging to engage in predatory pricing described in section 50(1)(c) of the Competition Act,[36] 4) engaging in three specific predatory practices by shipping conferences — the use of fighting ships by conferences; refusal to transport goods for a shipper for his use of a non-conference vessel; and, preventing or limiting the use of port or other facilities and services relating to the transportation of goods by an ocean carrier in Canada or elsewhere, because that carrier was not a member of a shipping conference,[37] and 5) arrangements that cover agreed multimodal rates.[38]

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33. *Id.* at §§ 4(1)(a) –(g).

34. *Id.* at § 4(2).

35. *Id.* at § 4(3)(a). Any member of a conference may take independent action after giving fifteen days notice to other members of a conference, except with regard to service contracts. *Id.* at § 4(3)(a) (an earlier version of the Bill on this Act provided for independent action on service contracts). *Id.* at § 4(3)(b) (providing that the members of a conference shall publish the new rate or service within fifteen days). *Id.* at §4(3)(c) (providing for the adoption of independent action in response to independent action, on or after the first day that it is taken).

36. *Id.* at § 4(4). The predatory pricing offense under subsection 50(1)(c) pertains to engaging in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect.

37. *Id.* at § 5.

38. *Id.* at § 5(2). This section however does not prevent an individual member of a conference from agreeing with any carrier for inland transportation for a through rate.

3. Investigations

Notwithstanding the exemptions noted earlier, these exemptions had no effect on the investigative powers of the Director of Investigation and Research. As the Director could, on his own initiative, initiate an inquiry concerning the operations of shipping conferences and their effects on competition, and was to do so on direction from the Minister of Industry.[39] Such inquiries are pursuant to the Competition Act[40] and the Director may take any action pursuant to the Competition Act.[41] The Act also provides a new mechanism for investigation of complaints. The Director, like any other person, may file a complaint to the Agency.[42] The Agency can conduct an investigation of the complaint if it is warranted in its opinion. It may make an order if the agency finds that the conference agreement or practice has or is likely to have by a reduction in competition an unreasonable reduction in transportation service or an unreasonable increase in transportation costs. The order may require the parties or members of the conference to remove the offending feature of the agreement or stop the practice or any other order that the Agency considers necessary.[43] In conducting such an investigation, the Agency may consider the contents of any service contract or hold hearings or may decide the matter on the basis of documents filed.[44] Further, the Director has to be notified by the Agency of every complaint filed under subsection 13(1). Furthermore, the Director of the Agency may bring any evidence obtained in an inquiry under the Competition Act.[45] This however does not affect the operation of the Competition Act in situations where the agreement or agreements or practice of a conference or a member is not exempted under section 4 of the Act.[46]

4. Availability of Information

Members of a conference were to maintain an office in Canada where they operated and make available to the public copies of all docu-

39. *Id.* at § 16(1).
40. *Id.* at § 16.
41. *Id.* at § 16(3).
42. If there is reason to believe that any conference or interconference agreement is required to be filed, or any practice of a conference or member has or is likely to have by a reduction in competition an unreasonable reduction in transportation service or an unreasonable increase in transportation costs, see subsection 13(1)(b). However, such a complaint is precluded if an application has been made under subsection 26(2) of the National Transportation Act, see subsection 13(5). Section 26(2) deals with special appeal and investigation.
43. A decision must be rendered within 120 days after the complaint is filed unless the parties agree to an extension. *See* section 15.
44. *Id.* at §§ 13(3), 13(4).
45. *Id.* at §§ 13(1), 16(3).
46. *Id.* at § 13(6).

ments filed and in force (other than service contracts) with the Agency.[47] Further, copies of all current tariffs and any revisions or notifications filed with the Agency are to be made available at all their principal offices for inspection.[48] In addition, section 21 makes provision for a shipper group (i.e., Canadian Shippers' Council designated by the Minister of Transport).[49] The purpose of this group was to strengthen the bargaining position of shippers vis-à-vis the conferences. Members of a shipping conference were obliged to meet with a shipper group when requested in writing and to provide information sufficient for the satisfactory conduct of the meeting.[50] The Act also empowered the Governor-in-Council to make regulations requiring the production of information reasonably available by members of a shipping conference to the Agency, at such times and such forms, necessary for their effective supervision. Further confidential information made available pursuant to the regulations shall not be made available to any competitor.[51] The section on regulations was broadened to include access through an electronic network to documents to be filed and fees to be paid for the use of this service.[52]

5. *Filing and Administration*

Filing and administrative provisions are also contained in the Act. It requires all members of shipping conferences to file[53] a copy of their contracts and agreements or interconference agreements including a description of oral agreements, a copy of every service contract, changes in membership, tariffs, a copy of each loyalty contract and amendment to loyalty contracts in considerable detail with the Agency.[54] The tariffs to

47. *Id.* at § 18. "The documents filed under the previous Act shall be deemed to comply with the filing provisions under this Act if a certificate is signed by a member of the conference describing those documents and indicating that no modification has been made since the coming into force of the Act." *Id.* at § 25.

48. *Id.* at § 19.

49. *Id.* at § 21 (an organization or association of shippers designated by the Minister of Transport).

50. *See id.* at § 20.

51. Regulations under this section have to be published in the Canada Gazette at least sixty days before the effective date affording interested persons a reasonable opportunity to be heard, it need not be published more than once whether or not amended as a result of representation by interested persons. *Id.*

52. *Id.* at § 22(3).

53. Conference and non-conference agreements are to be filed on the day it becomes effective; service contracts, changes to tariff or loyalty contracts, and changes in membership shall be filed not later than thirty days after it becomes effective or after the change. *Id.* at § 7.

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

be filed do not have to provide the rates on any service contract.[55] Further, written notice of a proposed increase in a tariff shall be given to the Agency and to the designated shipper group thirty days before it becomes effective, and in the case of a surcharge or increase in surcharge, fourteen days before it becomes effective.[56] Furthermore, written notice of any proposed amendment to a loyalty contract or tariff other than a rate increase shall be given to the Agency not later than the date on which the proposed amendment becomes effective.[57] All the documents that had to be filed were to be certified as true by a person designated by the shipping conference.[58] The documents filed by the shipping conference with the Agency may be destroyed five years after they are no longer in effect and necessary for the administration of this Act.[59]

The Agency may direct an ocean carrier of a shipping conference to deposit with it a sum of $10,000 as financial security to ensure that the carrier would comply with this Act and could order seizure and detention of any vessel of the ocean carrier for failure. In case of conviction of an offense under this Act or the Competition Act and failure to pay any fine due to conviction, the deposit or sale of any deposited security could be used to pay the fine.[60] Shipping conferences that failed to comply with any obligation or regulation under this Act could be fined up to $1,000 for each offense on summary conviction.[61] Further, when the offense is committed or continued for more than one day it shall be considered as a separate offense. The time limitation for proceedings in respect of an offense for failure to comply under this section was now raised to less than three years from the time of the proceedings.[62]

Summarily, the Shipping Conferences Exemption Act of 1987 introduced substantive new features to promote competition. The Act pro-

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

56. *Id.* at § 9.

57. *Id.* at § 10.

58. *Id.* at § 8.

59. *Id.* at § 17(2).

60. *Id.* at §§ 23(1), (2) (describing return or cancellation of security).

61. *Id.* at § 24(1) (indicating that the member was "punishable" and then liable to a fine for failure to comply).

62. *Id.* at §§ 24(2), (3).

vided provisions for restricting agreements between conference members and independent ocean carriers, restrictions on loyalty contracts, a provision for service contracts, a provision for independent action on rates, a limitation of exemption in the case of conspiracy, combination, agreement or arrangement to engage in predatory pricing described in section 50(1)(c) of the Competition Act, and restriction of the exemption to agreements that do not cover multimodal rates.[63] However, it failed to deregulate the industry through its exemption of shipping conferences from the Competition Act.[64] Further, the provision to strengthen the position of the shippers through a shipper group, designated to represent shipper interest, continued to be ineffective due to the vagueness of the provision on the meaning of "information sufficient for the satisfactory conduct of the meeting." Finally, it failed to consider the appropriateness of the Act in light of the changing conditions such as superconferences and other types of agreements such as stabilization, discussion and bridging agreements.

B. EEC Regulation Laying Down Detailed Rules for the Application of Articles 85 and 86 of the Treaty of Rome to Maritime Transport

This regulation came into force on July 1, 1987. It lays down detailed rules for the application of competition to agreements which have as their object or effect the prevention, restriction or distortion of competition (Article 85) and the abuse by undertakings of a dominant position (Article 86) to international maritime transport services from or to one or

63. Corresponding to the above are subsections: 4(1) and the definitions of conference and interconference agreement; 4(b)(iv) which specifies that the loyalty contract not contain the requirement that a shipper transport all or one hundred percent of their goods under the loyalty contract; subsection 4(1)(c); 4(3)(a) - any member of a conference may take independent action after giving 15 days notice to other members of a conference, except with regard to service contracts. An earlier version of the Bill on this Act provided for independent action on service contracts. But this feature was later deleted in the final Bill. Further, subsection 4(3)(b) provides that the members of a conference shall publish the new rate or service within 15 days. Furthermore, subsection 4(3)(c) provides for adopting independent action, such as independent action in response to independent action, on or after the first day that it is taken; subsection 4(4) - the predatory pricing offense under subsection 50(1)(c) pertains to engaging in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect; and 5(2) - this section however does not prevent an individual member of a conference from agreeing with any carrier for inland transportation for a through rate.

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

more Community ports, other than tramp vessels.[65] The articles of the Regulation in Section I can be classified into four categories: (1) exemptions from certain Articles of the Treaty of Rome, (2) restrictions on the exemptions, (3) monitoring of agreements, and (4) conflicts with international law.

1. Exemptions From Certain Articles of the Treaty of Rome

Technical or cooperation agreements are granted exemption in Article 2 from Articles 85 and 86 of the Treaty of Rome.[66] This exclusion includes improvements such as the introduction or uniform application of standards or types for vessels, equipment, supplies or fixed installations; exchange or pooling for the purpose of operating transport services of vessels, space or slots, other means of transport, staff or equipment; the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations; the coordination of transport timetables for connecting routes; the consolidation of individual consignments; and the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.[67] Further, liner agreements, decisions and concerted practices are also exempted from Article 85(1) when it has the object of fixing rates and conditions of carriage.[68] This includes the coordination of shipping timetables, sailing dates or dates of calls; the determination of the frequency of sailings or calls; the coordination or allocation of sailings or calls among members of the conference; the regulation of carrying capacity by each member; and the allocation of cargo or revenue among members.[69] Furthermore, exemption is also provided for agreements, decisions and concerted practices between transport users and conferences, and between transport users concerning rates, conditions and quality of liner services as long as they are provided for in Articles 5(1) and 5(2).[70]

2. Restrictions on the Exemptions

The above exemption is subject to the condition that the agreements, decisions agreements, or concerted practices shall not cause detriment to certain ports, transport users or carriers because of the application of dif-

65. *See* Council Regulation No. 4056/86, 1986 O.J. (L 378)4 (defining tramp vessel services, liner conference and the transport user).

66. *Id.* at art. 6.

67. *Id.* at art. 2, (1)(a) – (f).

68. *Id.* at art. 3.

69. *Id.* at art. 3 (a) –(e).

70. *Id.* at art. 6.

ferentiated rates and conditions that cannot be economically justified.[71] In addition, certain obligations are attached to the exemptions provided for liner agreements, decisions and concerted practices.[72] These obligations include the right of consultation concerning rates, conditions and quality of scheduled services;[73] the entitlement to loyalty contracts which provide for safeguards;[74] free choice of inland transport operations and quayside services not covered by the freight charge;[75] the availability of tariffs covering all conditions and charges for service at reasonable costs or their availability in offices of shipping lines or agents;[76] and notification to the Commission of awards at arbitration and recommendations.[77] The loyalty contracts shall offer a system of immediate rebates or deferred rebates; and after consultation with users: inclusion and exclusion of any portion of cargo from the loyalty contract, non unilateral imposition of one hundred percent loyalty arrangements and circumstances of release from the loyalty contract.[78]

It should be also be noted that the prohibition of an abuse of a dominant position within the meaning of Article 86 of the Treaty of Rome is provided for in Article 8. Exemption of agreements may be withdrawn if it has effects which are incompatible with Article 86. Further, all appropriate measures may be taken for bringing to an end infringements of this article.[79]

3. *Monitoring of Agreements*

Article 7 provides for the monitoring of agreements. In the event of a breach of an obligation, conditions are laid down to put an end to such a breach.[80] Where the agreement which qualifies for exemption is incompatible owing to special circumstances with the conditions laid down in Article 85(3) of the Treaty of Rome, the Commission may take measures whose severity is in proportion to the gravity of the situation.[81] The special circumstances are created by acts of conferences or changes in market conditions resulting in the absence of actual or potential

71. The condition applies to the exemption granted in Articles 3 and 6 of Council regulation 4056/86.

72. *Id.* at art. 5.

73. *Id.* at art. 5(1).

74. *Id.* at art. 5(2).

75. *Id.* at art. 5(3).

76. *Id.* at art. 5(4).

77. *Id.* at art. 5(5).

78. *Id.* at art. 5(2)(b).

79. *Id.* at art. 8.

80. *Id.* at art. 7(1).

81. *Id.* at art. 7(2).

competition,[82] acts of conferences which may prevent technical or economic progress or user participation in the benefits and acts of third countries which prevent the operation of outsiders, impose unfair tariffs on conference member or impose arrangements which impede technical or economic progress.

4. Conflicts with International Law

Conflicts with international law are provided for in Article 9. Where as a result of this regulation, conflict arises with important Community trading partners, the Commission shall undertake consultations aimed at reconciliation.[83] Where agreements need to be negotiated, the Commission shall make recommendations to the Council which shall authorize the necessary negotiations to be undertaken.[84]

Section II of Regulation EEC 4056/86 addresses rules of procedure. It covers procedure on complaint or on the Commission's own initiative; the result of procedures on complaint or on the Commission's own initiative; objections to the application of Article 85(3); duration and revocation of the decisions applying Article 85(3); powers; liaison with the authorities of the Member States; requests for information; investigations by the authorities of the Member States; investigative powers of the Commission; fines; periodic penalty payments; review by the Court of Justice; unit of account; hearing of the parties and of third persons; professional secrecy; publication of decisions; implementing provisions; and entry into force of this regulation.[85]

In summary, Regulation EEC 4056/86 is the first regulation that the EEC has adopted providing explicit exemption to shipping conferences. Although initial reports indicate that it has been an effective means of ensuring compliance in shipping with Articles 85 and 86 of the Treaty of Rome, some commentators believe that it is outdated since it was based on studies in the mid 1960s.

C. The United States Shipping Act of 1984

President Ronald Reagan signed the United States Shipping Act of

82. The Commission may enter into consultation with the competent authorities of the third country concerned, if, actual or potential competition is absent or may be eliminated as a result of action by the third country. It can also withdraw the block exemption if the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85(3)(b). It shall also rule when an additional exemption should be granted to obtaining access to the market for non-conference lines.

83. *Id.* at art. 9(1).

84. *Id.* at art. 9(2).

85. *Id.* at § II.

1984[86] (the "1984 Act") into law on March 20, 1984.[87] The revised Act (formerly the United States Shipping Act of 1916) consists of 23 sections and its administration is the responsibility of the Federal Maritime Commission. The provisions of the 1984 Act can be classified into five categories: (1) declaration of policy; (2) exemptions from the antitrust laws, (3) restrictions on the exemptions or prohibited acts, (4) investigations, and (5) filing, tariffs and administration. These are briefly reviewed hereafter.

1. Declaration of Policy

The purpose of the 1984 Act was explicitly stated in Section 1701, and establishes three principle goals of regulation. It establishes a nondiscriminatory regulatory process with the minimum of government intervention, provides for an efficient economic transportation system, and encourages the development of an economically sound efficient United States flag liner fleet.[88]

2. Exemptions From Antitrust Laws

The 1984 Act provides antitrust exemption to ocean common carrier agreements (this includes not only conference agreements but also interconference agreements and agreements between a conference and independent carriers, etc.) that are filed with the Federal Maritime Commission (FMC) unless these agreements are rejected. These agreements can cover 1) discussing, fixing or regulation of transportation rates, including through rates, and other conditions of service; 2) pooling or apportionment of traffic, revenues or loses; 3) allocation of ports or regulation of sailings; 4) limiting or regulating the volume or character of traffic (cargo or passenger); 5) engaging in exclusive, preferential or cooperative working arrangements among themselves, marine terminal operators or non-vessel-operating common carriers; 6) controlling, regulating, or preventing competition in international ocean transportation; and 7) regulating or prohibiting the use of service contracts.[89] The exemption also covers agreements (which involve ocean transportation in US foreign commerce) among marine terminal operators or among marine terminal operators and ocean common carriers to the extent that it involves 1) discussion, fixing or regulating rates or other conditions of service; and 2) engaging in exclusive, preferential, or cooperative working

86. Shipping Act of 1984, 46 App. U.S.C. § 1701 (Supp. 1998) (International Ocean Commerce Transportation Act).

87. *Id.* (the act became effective 90 days after enactment, except §§ 1716-17 which became effective on the date of enactment).

88. *Id.* at § 1701.

89. *Id.* at § 1703(a).

arrangements.[90] The 1984 Act does not apply to acquisitions.

3. Restrictions on the Exemptions or Prohibited Acts

The exemptions noted above do not apply to any agreement with respect to other modes of transportation (including domestic waters), to any discussion or agreement on apportionment of inland of through rates within United States, and to any agreement among common carriers under the 1984 Act regarding establishing, operating or maintaining a marine terminal in the United States.[91] The prohibited acts are categorized into four groups: 1) General; 2) Common carriers; 3) Concerted action; and 4) Common carriers, ocean freight forwarders, and marine terminal operators.[92]

The first includes: attempting to falsely provide ocean carriage at rates less than those applicable; operating an agreement that has not become effective or has been rejected, disapproved or canceled; and operating an agreement not in accordance with the filed agreement or agreement modified by the FMC.[93] The second group includes: charging rates other than those shown in its tariffs or service contracts; providing rebates other than those in its tariffs or service contracts; extending or denying any privilege, concession, equipment or facility except in accordance with its tariffs; allowing a person to obtain transportation falsely at rates less than those in its tariff or service contracts; retaliating against a shipper because the shipper has patronized another carrier, filed a complaint or any other reason; engaging in unfair or unjustly discriminatory practices (regarding rates, cargo classifications, cargo space or other facilities, loading or landing of freight, and adjustment and settlement of claims) except for service contracts; employing fighting ships; offering or paying deferred rebates; using a loyalty contract in non-conformity with the antitrust laws; demanding, charging or collecting rates or charges that are unjustly discriminatory between shippers or ports; giving undue or unreasonable preference or advantage to any person, locality or traffic, except for service contracts; subjecting any person, locality or traffic to an undue or unreasonably prejudice or disadvantage; refusing to negotiate with a shippers' association; and disclosing any information that may be prejudicial to a shipper or consignee or common carrier or improperly disclosing a shipper or consignee business transaction to a competitor.[94] The third group includes: boycotting or unreasonable refusing to deal;

90. *Id.* at § 1703(b).

91. *Id.* at § 1706(b).

92. *Id.* at § 1709 (draws together the prohibited acts in §§ 1713, 1715-16 and elsewhere of the 1916 Shipping Act).

93. *Id.* at § 1709(a).

94. *Id.* at § 1709(b).

restricting unreasonably the use of intermodal services or technological innovations; engaging in any predatory practice to eliminate the participation or deny entry; negotiating with a nonocean carrier or group of nonocean carriers on rates and services; denying compensation to an ocean freight forwarder or limiting compensation to less than a reasonable amount; and allocating shippers to carriers or prohibiting a carrier from soliciting cargo from a particular shipper that are parties to the agreement.[95] The fourth group includes: failing to establish, observe and enforce just and reasonable regulations related to their business; agreements to boycott or discriminate unreasonably in the provision of terminal services to any common carrier or ocean tramp vessel, together with the last three factors mentioned in the second group.[96]

4. Investigations

Section 11 deals with investigations. The FMC, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this Act. The investigation remains in effect until the FMC issues an order. Within ten days after the initiation of a proceeding under this section, the Commission shall set a date on or before which its final decision will be issued. This date may be extended. Section 11 also covers complaints, reports, reparations and injunctions,[97] and section 12 provides for the utilization of subpoenas and the discovery procedures. Section 13 addresses penalties and, in addition, it provides for additional penalties and Presidential review of orders. Further, orders of the Commission relating to a violation of the Act or a regulation are dealt with under section 14.[98]

5. Filing, Tariffs and Administration

Section 1704 of the 1984 Act provides for filing of every agreement regarding ocean common carriers and ocean terminal operators involved in ocean transportation in United States foreign commerce. The filing provision also applies to oral agreements.[99] Such agreements become effective on the forty-fifth day of filing unless the FMC seeks additional information. The FMC may also seek injunctive relief if, after the filing or the effective date of an agreement, it determines that the agreement is

95. *Id.* at § 1709(c).

96. *Id.* at § 1709(d).

97. Shipping Act of 1916, 46 U.S.C. §§ 821, 823 (1975) (covering complaints, reports, reparations and injunctions).

98. *Id.* at § 822 (the 1916 act is similar to the 1984 act covering general orders, cover ups reversal or suspension of orders, enforcement of nonreparation orders, and enforcement of reparation orders).

99. 46 App. U.S.C. at § 1704(a).

likely to produce an unreasonable reduction in transportation service. Carriers and conferences must also file their service contract's confidentially with the FMC, however, those covering commodities excepted from tariff filing are not required to be filed. Further, these service contracts must provide the public with a statement of the contracts' essential terms and make them available to all other shippers similarly situated.[100]

Section 1707 of the 1984 Act covers tariffs. Tariffs of each ocean common carrier (for products other than bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste) shall show all rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established.[101] The inland division of through rates need not be stated.[102] The tariffs filed with the FMC shall be kept open for public inspection and copies of tariffs shall be made available to any person for a reasonable charge. Rates shown in tariffs filed may vary with the volume of cargo offered over a specified period of time.[103] Rate increases may become effective thirty days after filing unless otherwise authorized, however rate decreases may become effective on filing or publication.[104] The FMC may also allow refund of freight charges collected or waive a collection of a portion of the charges upon application of a carrier or shipper subject to certain conditions.[105] The FMC prescribes the form and manner of filing tariffs.

The 1984 Act also contains numerous administrative and other features. Section 1716 empowers the Commission to make rules and regulations to carry out the Act, it also enables the Commission to prescribe interim rules and regulations.[106] Further, the rules under which controlled carriers (i.e., government owned carriers) can operate are provided for in section 9. Furthermore, ocean freight forwarders are covered under section 19 of the Act, which deals with licensing, revocation or suspension of their licenses, exceptions, and compensation. Finally, section 23 provides for the bonding of non-vessel operating common carriers.

In summary, it should be noted that the 1984 Act introduced a number of substantial changes concerning agreement standards,[107] anti-

100. *Id.* at § 1707.

101. *Id.* at § 1717(a).

102. *Id.*

103. *Id.* at § 1717(d).

104. *Id.*

105. *Id.*

106. Section 1715 of the 1984 act is virtually the same as § 833(a) of the 1916 Act, except that it adds an additional condition to be satisfied, namely that the exemption will not result in a substantial reduction in competition. *Id.* at § 1715. Section 1716 of the 1984 act is similar to section 841(a) of the 1916 Act.

107. 46 App. U.S.C. §§ 1705, 1717 (regulating the assessment of agreements, the "public in-

trust immunity,[108] independent action,[109] service contracts,[110] common carriage,[111] tariff filing and enforcement,[112] and discrimination in foreign-to-foreign trades. The 1984 Act made several smaller changes as well. For example, the declaration of policy was explicitly stated, several new definitions were added, others were changed or deleted,[113] and the scope of agreements within the 1984 Act was reworded.[114]

IV. Rationale for Exempting Ocean Liner Shipping from Competition

Over the history of conferences, two basic rationales - the economic and the political - have been provided to justify the exemption of ocean liner shipping from competition. The economic rationale which has been developed under various theoretical models has been increasingly questioned and its justification for continuing the exemption for ocean liner shipping from competition has been challenged. This rationale is based on the argument that conferences are needed to provide stability of rates and services in an otherwise unstable industry which works to the benefit of users as well as carriers.[115] This rationalization has been advanced

terest" standard which was the most controversial aspect of the earlier Act was eliminated) (this test was removed from the first three subsections of § 814 of the 1916 act and sections 805, 809-10 of the 1916 act were introduced to deal with certain anticompetitive issues and as a compromise between the general standard prohibiting anticompetitive behavior and specific prohibitions).

108. 46 App. U.S.C. § 1706. This section was introduced to bring about clarity as to what activities fall within the scope of an agreement that is granted antitrust exemption. It provided for antitrust exemption for "any agreement that has been filed under section 1704 and has become effective under section 1704(d) or 1705, or is exempt under section 1715 of this Act from any requirement of this chapter." *Id.* at § 1706. Further, this section provides that carriers are immunized for conduct which they had a reasonable basis to conclude and which is covered in the filed agreement. It clarifies its application to nonocean carriers, the division of through rates and the operation of a marine terminal in the United States.

109. *Id.* at § 1714 (increasing the scope of independent action). Individual conference carriers have the statutory right to take unilateral IA on any rate or service item required to be filed in a tariff subject to a 10 day notice period and adopting the same action was made possible after its effective date. The right of independent action was also required in agreements between carriers not in the same conference and between interconference agreements.

110. *Id.* at § 1707 (allowing an exchange of service contracts for antitrust immunity of dual rates or loyalty contracts were removed).

111. *Id.* at § 1701.

112. *Id.* at § 1717.

113. *Id.* at § 1702 (containing 27 definitions).

114. *Id.* at § 1703(a) (describing in different subsections the agreements to which the 1984 Act applies and covers up marine terminal operators in § 1703(b) and excludes acquisitions in § 1703(c) (in the shipping act of 1916 these were summarized in one paragraph in 46 U.S.C. 814).

115. The RTPC stated: "The public interest would not be served by excessive rate competition and instability in the liner trades," see Shipping Conference Arrangements and Practices, Restrictive Trade Practices Commission, Department of Justice, Ottawa, 1965, at 100. *See*

under two basic models:[116] The monopoly-cartel model, and the theory of the core model.

The rationale for the monopoly-cartel theory is based on the presence of cream-skimming and fly-by-night entry by competitors. This leads to excessive entry and unrestrained competition, resulting in instability and destructive competition. This forces carriers to collude and erect barriers which prevent entry.[117] The above rationale and result has been subject to careful scrutiny. The literature generally concludes that in order for instability or destructive competition to occur, the industry must exhibit three major characteristics. One, sunk costs - costs which cannot be recouped - must represent a large portion of total costs. Two, the industry which is profitable in the short run must be vulnerable to entry of competitors even when it is inefficient from a social point of view. And three, there are extended periods of excess capacity - production at less than one's lowest cost - when demand falls.[118] In such circumstances, it is possible that firms may reduce prices to levels that are too low to cover their total costs.

Whether the above characteristics hold has been the subject of extensive discussion. In general, it is argued that liner markets do not exhibit the characteristics of markets that are subject to destructive competition. First, sunk costs do not appear to be a large proportion of total costs, as ships are mobile and firms can move their assets from one shipping route to another.[119] However, it is recognized that in some trades ships have been developed to meet special requirements of users and are therefore less readily transferable than in other routes. Further, some carriers may also have significant investment in port facilities on

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G. K. SLETMO & E. W. WILLIAMS JR., LINER CONFERENCES IN THE CONTAINER AGE: U.S. POLICY AT SEA 17-19 (1981).

116. In addition to the above models, there are two other models that have been used to justify the instability argument. The contestability market model and the normal cost based model of oligopoly.

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

118. REPORT OF THE FEDERAL TRADE COMMISSION - AN ANALYSIS OF THE MARITIME INDUSTRY AND THE EFFECTS OF THE 1984 SHIPPING ACT, 1990, at 16-20. *See also*, LESTER G. TELSER, ECONOMIC THEORY AND THE CORE 41-86 (1978).

119. JOHN L. PETTERMAN, DIRECTOR OF THE BUREAU OF ECONOMICS STATEMENT TO THE ADVISORY COMMISSION ON CONFERENCES IN OCEAN SHIPPING, Federal Trade Commission, Sept. 13, 1991, at 5.

particular trade routes some of which may obviously be saleable. Second, regarding inefficient entry, the danger is rather limited as firm level economies of scale on individual trade routes are not extensive.[120] This is suggested by the number of firms with varying capacities which exist on major trades in a Federal Maritime Commission report. It indicates that concentration on major routes is typically in the low to moderate range. Third, the purported risks associated with uncertain demand can be addressed through long term contracts between carriers and shippers.[121]

In view of the above, other economic models have been used to provide an alternative justification for the destructive competition argument which has received attention recently. One such model is the "economic theory of the core," which implies that in certain kinds of markets, there is no sustainable competitive equilibrium.[122] It has been argued in a paper in 1989 that liner shipping may be an example of such an "empty core" industry.[123]

However, it has been pointed out that the theory of the empty core is of questionable relevance as a justification for shipping conferences. The principal paper on which this view of conferences is based has been criticized on technical grounds.[124] More generally, the evidence indicates that in most trade routes, there are a large number of carriers operating at different levels of capacity. This is a condition that is unlikely to prevail if there is an empty core.[125] The existence of the empty core is most probable if an individual firm's capacity in the industry is large relative to the total demand, and if firms are homogeneous in their cost structures. This does not appear to be so in the liner industry.

It may also be noted that conferences have not, in practice, provided stability of rates and services. Indeed, in recent times, conference rates have tended to be volatile.[126] In 1990, conference rates were affected by significant increases in surcharges as well as base rates. Evidence of instability of services was provided in a number of submissions to the Industry Advisory Group Relating to the Review of the SCEA, which drew

120. *Id.* at 6.

121. *See* FTC REPORT, 1990, at 20. *See also* JOHN DAVIES, LEGISLATIVE CHANGE ON THE NORTH AMERICAN LINER TRADES: A STUDY OF CAUSES AND CONSEQUENCES, TP 10639, Policy and Coordination, Transport Canada 185 (Oct. 1990).

122. Lester G. Telser, *Cooperation, Competition, and Efficiency*, 28 J.L. & Econ. 271, 271-95 (1985).

123. William Sjostrom, *Collusion in Ocean Shipping: A Test of Monopoly and Empty Core Models*, 97 J. POL. ECON. 1160, 1161-62 (1989).

124. THE DEPARTMENT OF JUSTICE ANALYSIS OF THE IMPACT OF THE SHIPPING ACT OF 1984, U.S. Department of Justice, Antitrust Division, Mar. 1990, at 31-32.

125. *Id.* at 33-34.

126. *Id.* at 204 (stating that of the eighteen trades analyzed in the U.S., six trades were significantly more unstable in the post 1984 period).

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

The political rationale is based on the argument that conferences are required by considerations of international comity.[127] Conferences operate on all of Canada's major trading routes with Europe, the United Kingdom, Japan, Southeast Asia and South America. Their role has been sanctioned by specific legislation in many jurisdictions. In this context, a desire to ensure compatibility of Canadian maritime policy with our major trading partners appears to have been a consideration in adopting the present exemption for conferences from competition law under SCEA.

The argument that conferences should be accepted by Canada for reasons of international comity, while still important to consider, also seems less compelling than in the past. In 1991, the United States Assistant Attorney for Antitrust, James F. Rill, categorically rejected the view that acceptance of conferences is required by the traditional concept of comity in international law. In his remarks before the U.S. Advisory Commission on Conferences, Mr. Rill stated "[I]t takes a broad stretch of ingenuity to transform the comity doctrine to a justification for an outmoded and wasteful regulatory regime."[128] American jurisprudence indicating that the comity doctrine does not require nations to maintain policies which are fundamentally prejudicial to their national interests supports Mr. Rill's viewpoint.[129]

V. Emerging Developments and Trends, and a Few Major Ensuing Issues

A. Emerging Developments and Trends

Even as the rationale for exemption is being challenged, fundamental changes are occurring in liner shipping. The most significant of these changes is technological change. This, together with developments such as new forms of organizations, new forms of agreements, and new forms of services, are having a dramatic impact on liner shipping. These developments have become so noticeable that some authors refer to them as "the new paradigm." Though less important when viewed individually,

127. *See* G. K. Sletmo & E. W. Williams, *supra* note 115, at 269-70 (discussing how the comity of nations is the courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as it may be without prejudice to its own rights and interests).

128. *See Statement of James F. Rill, Assistant Attorney General, Antitrust Division, United States Department of Justice*, Before the Advisory Commission on Conferences in Ocean Shipping, Sept. 13, 1991, at 10.

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

these developments are quite significant when considered jointly, since they can be considered as enhancing the power of conferences. Some of the emerging developments and trends will hereafter be examined.

1. *Technological Changes, New Forms of Organizations, New Forms of Agreements and New Forms of Services*

   a. Technological Changes

Though containers were introduced into the shipping industry several decades ago, containerized cargo continues to grow and represent an increasing share of international cargoes handled at ports. For example, in Canada this is indicated in Table 1 hereafter which shows that containerized cargo has nearly doubled over the period 1981-1995. Though the total percent of containerized cargo (i.e., 6.0 percent) may not appear very large, in terms of value it is much more significant (i.e., 25 percent of the total value) than appears on the surface. The change in containerized cargo can also be seen in the growth of TEUs (twenty-foot equivalent units) at a few international ports shown in Table 2.

TABLE 1 - CONTAINERIZED TONNAGE LOADED AND UNLOADED IN INTERNATIONAL SHIPPING 1981-1995

Yr.	Loaded ('000 t)	%	Unloaded ('000 t)	%	Handled ('000 t)	%
1981	4,344	3.0	3,232	4.7	7,576	3.5
1985	4,546	3.2	4,547	7.6	9,093	4.5
1990	7,063	4.4	5,194	7.1	12,257	5.3
1995	9,242	5.2	6,354	7.6	15,596	6.0

Source: SHIPPING IN CANADA, Statistics Canada, Catalogue 54-205 Annual.

TABLE 2 - TEUS AT A FEW SELECTED PORTS 1970-1997

Ports	1970	1974	1978	1982	1986	1990	1994	1997	%
NY	930,000	1,700,000	1,800,000	1,900,000	2,300,000	1,900,000	2,000,000	2,518,000	171
Seattle	20,000	430,000	640,000	800,000	850,000	1,200,000	1,400,000	1,480,000	705
Long Beach		400,000	560,000	720,000	1,400,000	1,600,000	2,600,000	3,400,000	75
Hamburg	78,000	310,000	600,000	890,000	1,200,000	2,000,000	2,700,000	NA	3,361
Rotterdam	300,000	1,100,000	1,600,000	2,200,000	2,900,000	3,700,000	4,500,000	NA	1,400
Felixtowe	150,000	220,000	300,000	630,000	900,000	1,400,000	1,700,000	NA	1,033
Montreal	72,000	100,000	190,000	320,000	530,000	570,000	730,000	900,000	115
Halifax	30,000	170,000	190,000	170,000	270,000	450,000	310,000	450,000	1,400
GLOBAL	6.3m	16m	28m	43m	61m	86m	125m	NA	1884

Figures for 1997 are Estimates. Where figures are not available, the % change refers to 1970-1994.
Source: CONTAINERISATION INTERNATIONAL YEARBOOK DATA AND JOURNAL OF COMMERCE/PIERS AND PORTS.

This growth in containerization has had a tremendous impact on the entire shipping industry. It has led to developments such as new multimodal networks, new technologies in port infrastructure, sophisticated

logistical network systems, and new vessel configurations. This has not only led to dramatic operating efficiencies but has also led to an unprecedented improvement in services throughout the world.

The above noted developments have now also attracted greater attention. This can be seen in the increase in multimodal traffic which has been particularly pronounced in the United States. This is shown in the figures on trailer/container loadings in the following table.

TABLE 3 - ANNUAL TRAILER/CONTAINER LOADINGS 1982-1994

Year	Trailers	Containers	Total
1982			3,396,973
1985			4,590,952
1989	3,496,262	2,491,093	5,987,355
1990	3,451,953	2,754,829	6,206,782
1991	3,209,239	3,034,208	6,243,447
1992	3,350,506	3,359,926	6,709,732
1993	3,458,406	3,692,051	7,150.457
1994	3,763,799	4,280,589	8,044,388*

Source: ASSOCIATION OF AMERICAN RAILROADS. * 51 Weeks.

As one source noted: "To say that 1994 was really a good year for intermodal would be understating its growth. Bordering on the incredible would be a fairer description."[130] Perhaps what is noteworthy is that the growth in containers in the foregoing figures is more dramatic and relevant to liner shipping as containers are used basically in international and offshore trade.

The increase in intermodal traffic has also spread to Canada, as noted by the National Transportation Agency of Canada "Intermodal traffic increased more than any other major traffic segment in 1994."[131] In terms of magnitude, in 1992, intermodal rail traffic (i.e., containers and trailers-on-flat-cars) totaled 13m tons or 7 percent of total freight of Class I carriers (in terms of value this intermodal traffic is significantly more important). Of this total, 4.5m tons were domestic intermodal movements and 8.5m tons were international (i.e., it moved intermodally either through or from Canadian ports, or to or from the United States). This increasing trend was noted earlier by the NTARC in its statement: "The widespread implementation of an intermodal approach to the movement of domestic and export/import freight has been one of the most significant developments on the transportation scene in North America in re-

130. *Trends - 1994: Incredible Year for Intermodal*, INTERMODAL SHIPPING, Feb. 1995, at 10.
131. THE NATIONAL TRANSPORTATION AGENCY OF CANADA ANNUAL REPORT 97 (1994).

cent years."[132]

To accommodate the increase in intermodal traffic a number of strategic investments have also taken place. CP Rail undertook a 27.5 million-dollar investment to enlarge its Windsor-Detroit tunnel, which it opened in May 1994, and CN undertook a 155 million-dollar investment in its recently completed Sarnia-Port Huron tunnel. This would enable the railways to move tri-level railcars or double-stack cars, the latter has been described as the most important innovation in multimodal transportation. CN also undertook a 17 million-dollar investment in the Halifax intermodal terminal, and has set up a network of modern hub terminals across Canada equipped with top-lifting equipment. In keeping with the latest developments elsewhere, CN has offered an Internet-based shipment tracking system, becoming the world's first rail carrier to offer such a service.

Even in Europe, intermodalism is beginning to take hold, though it has not kept up with the pace of developments in United States and Canada. In terms of volume, the EU Transport Directorate calculated that intermodal transport moved about 5.6 million TEUs in 1993 compared to the 6.4m TEUs in 1994. This represents about 4 percent of the total European freight market. Maritime containers moving by rail to and from seaports were estimated to be about 2.5m TEUs. The interest in intermodalism has recently been renewed with the opening of the Channel Tunnel and EEC Directives 440/91, 18/95 and 19/95.

In addition to the foregoing changes, one of the latest technological developments that has attracted attention is a new vessel configuration. The size of containerships has evolved over the last two decades and has reached dimensions that have been termed "behemoth," as the quest to achieve economies of ship size continues.[133] This can be seen in the statistics on size of containerships of one company (i.e., Maersk) as an example. Other shipping companies are following in the footsteps of Maersk. For example, P & O Containers, NYK, Evergreen, OOCL, Neptune Orient Lines, Hanjin Shipping, Hyundai Merchant Marine and Cosco have ordered ships with capacities of nearly 5,000 TEUs or more. As if the new sizes were not enough, the concept of a 15,000 TEU ship was recently considered. Experts claim that further evolution in sizes may lead to ships of up to 8,000 TEUs.[134] Sizes beyond that have raised doubts as to whether further economies of ship size could be achieved and whether

132. COMPETITION IN TRANSPORTATION, POLICY AND LEGISLATION IN REVIEW, NATIONAL TRANSP. ACT REVIEW COMM'N. 123, Volume II (1993).

133. Recently it was reported that "Maersk Line has launched the world's largest containership, a behemoth that is the first to break the 6,000-TEU mark." Philip Damas, *The Scramble for Position*, AMERICAN SHIPPER, Mar. 1996, at 40.

134. Economies of size are basically achieved through savings on labor costs, not only

the present day size of cranes and terminal landside facilities could cope with this increase.[135]

TABLE 4 - SIZE AND SPEED OF A TYPICAL MAERSK CONTAINERSHIP 1968-1996

Year	Name of Vessel	TEU Capacity	Speed (knots)
1968	Weser Express	700	20.6
1969	Encounter Bay	1,500	21.5
1972	Liverpool Bay	3,000	26
1984	American New York	4,482	18
1992	CGM Normandie	4,425	24
1996	Regina Maersk	6,000	25

Source: AMERICAN SHIPPER, March 1996, at 40.

b. New Forms of Organizations

"Superconferences" constitute the first of these recent forms of organization. Superconferences are basically large entities formed from the amalgamation of existing smaller conferences. Their emergence in various jurisdictions did not occur simultaneously. In Canada, they began to emerge after 1987. At times, as many as nineteen smaller conferences joined to form one major conference.[136] In 1984, there were forty-four conferences. Ten years later, the number of conferences had fallen to twenty-five.

In the United States, the formation of superconferences began much earlier — roughly in 1984. This has been attributed to the United States Shipping Act of 1984 which moved away from a public interest standard. This provided the opportunity for the consolidation of smaller conferences into larger superconferences. For example, in 1984, nine conferences operating between the East Coast of the United States and Europe combined into one eastbound and westbound conference; and on the U.S. East Coast there were nineteen conference and rate agreements in the Pacific Far East trade which were replaced by one superconference and three small conferences.

through fewer crew but perhaps more TEU per crewmember. The larger container-size ships have also succeeded in maintaining their speed if not increasing it.

135. Philip Damas, *Big, Bigger, Biggest*, AMERICAN SHIPPER, July 1996, at 54-58.

136. The well known superconferences that have been formed are the US Atlantic-North Europe Conference, the North Europe-US Atlantic Conference, Asia North America Rate Agreement, Transpacific Westbound Rate Agreement, and the Mediterranean/USA Freight Conference. The FMC indicates that this development is the most apparent structural consequence of the U.S. Shipping Act of 1984. Professor Butz attributes the development to extended immunity to intermodal rate making which greatly increased competition.

While superconferences have attracted attention in Canada and the U.S., the development of consortia has been particularly noticeable in the EEC.[137] Of the fifty-seven consortia operating worldwide in 1990, forty consortia operated in Community liner trade.[138] The Competition Directorate of the European Commission believes that consortia are the wave of the future as these arrangements are generally based on the need for technical rationalization, an increase in the capital intensity of the shipping industry, the development of containerization, bigger ships and the need to compete.[139]

Another organizational form that has recently come into the limelight are global alliances. A global alliance is simply another consortium or carrier agreement. The basic difference is that a traditional consortium operates in a single trade lane and a global alliance is a multiple trade lane consortium. The significance of this new form of organization is shown in the formation of five alliances as of the beginning of January 1996 and in their total market share shown in the Table 5 below for the Asia/US West Coast market. Since the above data was published, a sixth alliance was formed between K Line and Yang Ming. These newly formed alliances deploy an armada of between 49 and 67 big boxships, each representing a shipboard capacity of between 189,000 and 230,000 TEUs. These numbers appear to be dwarfed in comparison to some of the big ships that have been ordered and are currently entering service.[140] In the words of one observer, "big is beautiful. Global alliances are another quantum leap in that direction and . . . they are here to stay."[141]

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137. In brief, a consortium is a joint-service agreement between liner shipping companies with the aim of rationalizing their operations by means of technical, operational and/or commercial arrangements. The European Commission in the first paragraph of EEC 870/95 has provided a more elaborate definition.

138. Of the 57 consortia operating worldwide, 40 consortia operate in Community liner trade. *Report on the Possibility of a Group Exemption for Consortia Agreements in Liner Shipping,* Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990; *Proposal for a Group Exemption for Consortia Agreements in Liner Shipping*, PRESS RELEASE IP (90) 482, Brussels, 20 June 1990; *Proposal for a Council Regulation (EEC) On the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Shipping Companies*, Commission of the European Communities, COM (90) 260 final, Brussels, 18 June 1990; *Proposal for a Council Regulation on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Shipping Companies*, OFFICIAL JOURNAL No. C 305/39, Nov. 25, 1991.

139. The concept of a consortia has alluded precise definition. Nevertheless, the Commission defines a consortium as "a joint-service agreement between liner shipping companies with the aim of rationalizing their operations by means of technical, operational and/or commercial arrangements."

140. The concept of 15,000 TEU has been considered too big since there are limits to economic size. Damas, *supra* note 135, at 54-58.

141. *Id.* at 36.

TABLE 5 - ASIA/US WEST COAST MARKET SHARES 1996

Alliance	Eastbound	Westbound
APL/OOCL/MOL Nedlloyd	23%	23%
NYK/Hapag/NOL/P&O	10%	10%
Sea-Land/Maersk	16%	12%
Hanjin/DSR-Senator/Cho Yang	12%	13%
K Line/Hyundai/Yangming	19%	20%
Total of 5 alliances	80%	78%

Source: OECD. Note these global alliances are changing in 1998 due to merger of NOL and APL, and the merger P&O and Nedlloyd.

This effect is rubbing off on shippers too, as shippers are forming global alliances. In 1994, the NITL, the European Shippers' Council (consisting of seventeen Shippers' Council from various countries in Europe) and the Japan Shipper's Council formed a Tripartite Shippers' Council. Though information sharing appears to be one of their major activities, they support each other in efforts such as shipping reform legislation, international agreements on maritime, shippers' changing relationship with ocean carriers, etc. This effort at shipper solidarity 'could well translate into cooperative joint ventures in educational opportunities and coordinated activities of a host of policy issues.'[142] The Tripartite was expected to expand its membership to shippers in Canada, Hong Kong and Korea in 1997.

c. New Forms of Agreements

Besides the foregoing developments, new forms of commercial agreements have emerged. For instance in Canada, discussion agreements, bridging agreements, space chartering agreements, etc. have evolved since SCEA, 1987. Table 6 shows the number and types of these new agreements. The significance of these new agreements is shown in the last row as a percent.

142. Tim Sansbury, *Shippers Group Follows the Fold, Starts an Alliance*, J. COM., Nov. 18, 1996, at 6C.

TABLE 6 - NUMBER AND TYPE OF AGREEMENTS IN CANADIAN SHIPPING 1988-1992

Types of Agreements	1988	1989	1992	1997
Discussion Agreements	0	3	6	5
Bridging Agreements	0	1	1	1
Capacity Reduction Agreements	0	1	1	0
Inter Conference Agreements	0	1	1	0
Space Chartering Agreements	0	0	4	2
Rate Agreements	32	30	25	23
Total Agreements	32	36	37	31
Other Agreements as a % of total	0	16.6	32.4	25.8

Sources: ANNUAL REVIEWS OF THE NATIONAL TRANSPORTATION AGENCY OF CANADA. *See* Reviews for the years 1988, at 71; 1989, at 91-92; and 1992, at 140.

These agreements have increased from zero in 1988 to 32.4 percent in 1992 or 25.8 percent in 1997. Discussion and bridging agreements provide a forum to discuss general conditions of liner trade. Space chartering and sailing agreements are formed for the purpose of rationalizing service through vessel space, including equipment interchange and scheduling of ports. Stabilization agreements attempt to reduce the available carrying capacity on a trade route in an attempt to stabilize rates and improve profitability.

In the EEC too, a number of new commercial arrangements have also emerged, some of which go beyond conference agreements.[143] They not only include agreements between conference and non-conference carriers but also consortia agreements. For example, the most notable agreements between conference and non-conference carriers are Eurocorde I, the Trans Atlantic Agreement and the Trans Atlantic Carriers Agreement. The importance of consortia agreements has been reflected in the EC Council Decision of December 1991, and later with the passage of Regulation 870/95 which provided shipping lines antitrust immunity to form operational consortia in ocean transportation. The first four consortia to have been approved under the new regulation are the St. Lawrence Coordinated Service between North Europe and Canada, the Joint Mediterranean Canada Service, the East African Container Service between Europe and East Africa and the U.K./Poland Joint Pool Agreement.

In the United States also, new types of agreements have increased in proportion to all agreements filed. This can be seen in the statistics on agreements filed with the Federal Maritime Commission which indicates that the proportion of other types of agreements filed in 1987 has risen to

143. For example, agreements between conferences and independents, stabilization agreements, discussion agreements, open rate agreements, etc.

37 percent from 15 percent in 1981; and that of all new agreements, as much as, 96 percent are other types of agreements (see Table 7).

In addition, the geographic scope of agreements have increased in several ways. Conference agreements typically now involve superconferences, whose geographic scope has been expanded. Further, a number of recent agreements also include independent carriers covering a significant share of a trade, for example the Trans Atlantic Agreement. Agreements also include intermodal rates covering other modes of transportation. These new developments have tended not only to increase the power of conferences, but also to provide more efficient and varied services.

TABLE 7 - NUMBER AND TYPE OF AGREEMENTS IN U. S. SHIPPING 1981-1987

Types of Agreements	1981		1983		1987	
	New	Mod	New	Mod	New	Mod
Rate Agreements	2	127	3	112	3	147
Joint Ser. & Con. Ag.	0	5	1	10	4	5
Pooling Agreements	0	1	0	15	0	25
Sail & Space Ch. Ag.	3	6	5	12	15	14
Coop. Work & Dis Ag.	2	3	1	3	14	28
Misc. Agreements	6	7	8	3	38	15
Total Agreements	13	149	18	155	74	234
Other Agreements as a % of Total	84.6	14.7	83.3	27.7	95.9	37.2

Mod=Modifications to existing agreements.

d. New Forms of Services

As a consequence of the above developments and in response to demand, new forms of services are developing for frequent, reliable, rapid service at a minimum cost so as to enable exported products to be competitive with domestic production. Over the last few years (1987-1994), the growth in conference landbridge services (i.e., the overland portion of international intermodal movements) has been spectacular (see Table 8).

TABLE 8 - NUMBER OF WEEKLY LANDBRIDGE SERVICES 1987-1994

Year	Eastern Canada to Far East		Western Canada to U.K./Continent	
	Conference	Non-Conference	Conference	Non-Conference
1987	9	3	2	
1988	10	1	2	
1989	12	3	3	
1990	14	3	3	
1991	17	6	5	
1992	23	6	4	3
1993	28	9	4	4
1994	24	13	8	3

Source: ANNUAL REVIEW OF THE NATIONAL AGENCY OF CANADA 159 (1994).

Besides the intermodal services shown above the new global alliances serving North America have established a number of services on the trades shown in Table 9.

TABLE 9 - SERVICE ROUTES OF THE GLOBAL ALLIANCES

Carriers	Routes
NOL-APL/MOL/Hyundai	Trans-Pacific, Asia-Europe, Transatlantic, Latin America
Sea-Land/Maersk	Trans-Pacific, Asia-Europe, Asia-U.S. East Coast, Europe-Middle East, Asia-Middle East/Mediterranean
P&O Nedlloyd/NYK/Hapag Lloyd /OOCL/Malaysia International	Trans-Pacific, Asia-Europe
Hanjin/DSR Senator/Cho Yang/UASC	Trans-Pacific, Asia-Europe, Transatlantic, Mideast
K Line/Yang Ming	Trans-Pacific, Asia-Europe

Source: *Will Mega-Alliances Mean Mega-Benefits for Shippers?* LOGISTICS MANAGEMENT, May 1996, at 65A-69A and *Twisting Alliances*, AMERICAN SHIPPER, Jan. 1998, at 8-11.

2. *Legislative Developments in Canada, EEC and the United States*

In an effort to ensure that conference legislation appropriately considers these emerging developments, attempts are being made to withdraw the exemption or to amend liner legislation in the major jurisdictions throughout the world. In particular, attempts are being made to restrict the scope of the exemption for liner conferences and to bring about a convergence in liner legislation which has often created friction between various jurisdictions. The legislative changes or developments in Canada, EEC and the United States are examined below.

a. Canada

In Canada, since the SCEA was enacted, three major developments on legislative proposals have occurred. First, an Industry Advisory

Group conducted hearings on the SCEA. The major issues recurring through the majority of the submissions submitted to the Group were whether there is a need for conference exemption from the Competition Act and what the major difficulties are with the SCEA. The majority of submissions indicated that the SCEA had little or no impact and that the potential repercussions do not provide any convincing reasons for the retention of the exemption. The discussion on the major difficulties with the SCEA focused on the interpretative difficulties of the Act pertaining to definitions, the ineffectiveness of the Canadian Shippers' Council, the dispute mechanism provision, the notice period provision, and how the SCEA should be interpreted in a changing environment. The roles and responsibilities of the National Transportation Agency and Industry Canada were also raised.

Second, in March 1993, the National Transportation Act Review Commission ("NTARC") reviewed transportation legislation and released its report.[144] It made three recommendations and a few proposals on conference liners.[145] The Commission noted that the exemption runs counter to the general policy of encouraging competition. In principle, opposition was expressed regarding the intent of the SCEA as it clearly conflicts with the competitive thrust of the NTA, 1987. Due to the possible uncertainty and the need for international action, the Commission recommended that "the Minister of Transport introduce legislation to repeal SCEA at such time as United States antitrust immunity for shipping conferences is withdrawn."[146] On the issue of multimodal rates, the Commission indicated that conferences should be allowed to negotiate with inland carriers for through freight rates. To encourage more carriers to set independent rates, the Commission recommended that "the federal Cabinet reduce to ten days the notice period for independent action by

144. COMPETITION IN TRANSPORTATION, POLICY AND LEGISLATION IN REVIEW, National Transp. Act Review Comm'n, Minister of Supply and Services Canada, Volume I, at 28-29, 106-10, 136-42, 242-43, Volume II, at 105-21 (1993) [hereinafter, COMPETITION IN TRANSPORTATION].

145. The recommendations are in line with the proposals put forward by the Director of Investigation in Research, other than the one pertaining to conference agreements with other transport modes. Should this latter proposal be accepted by the government, it is suggested that certain conditions be attached: the right of independent action with regard to the entire multimodal rate or the inland portion of the rate; and the freedom of shippers to demand carriage by other multimodal modes in the event of any form of ownership of inland modes of transport by the conference. The first condition will ensure that the agreement is the most efficient and shippers will also benefit. The second condition would avoid conferences using their own high cost inland carriers or foreclosing other inland carriers from overseas traffic, thus eliminating agreements as occurred in the FEFC complaint to the European Commission. SUBMISSION TO THE NATIONAL TRANSPORTATION ACT REVIEW COMMISSION, The Director of Investigation and Research Competition Act, June 30, 1992, at 27-30.

146. COMPETITION IN TRANSPORTATION, *supra* note 144, Volume II, at 139.

shipping conference members."[147] The Commission also listed a number of other proposals for considerations.[148]

Third, the Standing Committee on Transport in June 1993 commented on the recommendations of the Commission .[149] The Standing Committee agreed with two of the recommendations of the NTARC — to shorten the notice period to 10 days, and to permit intermodal conference contracts for "through freight rates for precarriage or onward land carriage."[150] Regarding the NTARC's recommendation to repeal SCEA when the United States repeals its legislation, the Standing Committee recommended that "[t]hat the Minister of Transport not accept the NTARC's recommendation to automatically repeal the SCEA when the U.S. government removes anti-trust immunity of shipping conferences, but undertake a review of the legislation at that time and refer it to the Standing Committee on Transport."[151] Since June 1993, no further major attempts at legislative reforms in conference legislation have been undertaken in Canada.

b. EEC

In the EEC regulatory reform has gradually begun to take off. This can be seen in the passage of the recent regulation on consortia and other developments regarding conference legislation. The Vice-President of the European Commission stated that "[t]imes are changing. Criticism is mounting against the conference system and efforts towards liberalization are being pursued worldwide. How can the European Community ignore this trend?"[152] Attempts at bringing about further regulatory reform are continuing.

On April 21, 1995, Regulation No. 870/95 pertaining to rules for consortia went into effect. The key elements of this regulation are: (1) A consortium formed from members within a conference will be exempt from EU competition laws if its market share is less than 30 percent; (2) a consortium of non-conference carriers can have a market share of up to

147. *Id.*

148. These pertain to a definition of a "conference" and a "service contract," the nature of the information conferences must supply for the satisfactory conduct of the meeting, and filing of tariffs by non-vessel operating carriers and independent action on service contracts. SUBMISSION TO THE NATIONAL TRANSPORTATION ACT REVIEW COMMISSION, *supra* note 145.

149. REPORT ON THE RECOMMENDATIONS OF THE NATIONAL TRANSPORTATION ACT REVIEW COMMISSION, REPORT OF THE STANDING COMMITTEE ON TRANSPORT, Robert A. Corbett, M.P. Chairman, June 1993, at 15-16.

150. *Id.*

151. *Id.* at 16.

152. The Right Honorable Sir Leon Brittan, QC, Vice-President of the Commission of the European Communities, Liner Shipping: Developments and Prospects for the Community, Address Before the Insitut Francais de la Mer, Paris, France (Mar. 8, 1994).

35 percent; (3) a consortium with a market share of between 30 percent or 35 percent and 50 percent must notify the European Commission and will be granted exemption if no objection is issued within six months; (4) members of a consortium must have the right to withdraw without penalty on six months notice, after an initial period of eighteen months. In the case of a highly integrated consortium, the initial period is thirty months.

The above consortium regulation does not address the issue of joint intermodal operations by alliances. Nevertheless, it is held that global shipping alliances wishing to cooperate on inland transportation or to negotiate jointly with inland transportation modes or to jointly determine intermodal rates must apply for individual exemption from the European Commission.[153]

Besides the recently adopted consortia regulation, an advisory group has been working on establishing guidelines to determine whether certain inland cooperation practices of ocean carriers should be exempted. Simultaneously, jurisprudence is evolving on the Commission's view of intermodal pricing, as several cases involving intermodal pricing are before the European Courts.

A more serious issue has developed regarding the applicability of EEC Regulation 4056/86 granting antitrust immunity to conferences. This regulation specifies that a conference must operate under 'uniform or common rates' sometimes termed as the 'uniform rates doctrine.' Taken literally, this could imply that a carrier agreement which allows its members to deviate from the conference tariff is not a true conference and consequently loses its exemption from the competition laws.[154] Thus according to a 1995 OECD report, "it is apparent that, with respect to tariff discipline, the idea of a common or uniform rate by conferences is a definition which no longer reflects the reality of ocean container shipping industry."[155]

Even as the interpretation of Regulation EEC 4056/86 is being challenged, the European Shippers' Council consisting of seventeen Shippers' Councils from various European countries are calling for a withdrawal of the block exemption for liner conferences. Other organizations are calling for a new regulation that would force shipping lines wanting to form a

153. Philip Damas, *Alliances' Inland Cooperation: Legal or Illegal*, AMERICAN SHIPPER, Oct. 1996, at 46-47.

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

155. Philip Damas, *Are Conferences Obsolete?*, AMERICAN SHIPPER, July 1996, at 12-13.

conference to apply for individual exemptions rather than obtaining automatic block exemption without having to notify the European Commission. Neither the EU Commissioner for Competition, Karel Van Miert nor other EU competition agencies have left any doubt they would prefer to see EEC Regulation 4056/86 disappear.[156] Unfortunately, recent reports indicate that EC is unlikely to revise this Regulation in the immediate future, since it is a new law and currently under judicial scrutiny.

c. United States

The developments on the legislative front in the United States since 1992 can perhaps be grouped under two major headings: The report of the Presidential Advisory Commission released on April 10, 1992,[157]and bills introduced to revise or repeal the United States Shipping Act of 1984. These developments are briefly reviewed below.

The Report of the Advisory Commission examined a number of issues in the shipping industries and in the absence of consensus, the Report did not provide any conclusions or recommendations. On antitrust immunity to conferences, ports and terminal operators, carriers believe that conferences are a necessary part of the liner shipping industry. Supporters of conference antitrust immunity indicate the absence of abuses of antitrust immunity, the increase in the level of service and lack of supra-competitive profits. Opponents point to the health of the U.S. flag fleet, the possibility of excessive service competition, new commercial arrangements that would arise to deal with rate fluctuations, and the development of superconferences and discussion agreements which have undermined competitive forces. Regarding need for retention of antitrust immunity for ports and marine terminal operators, a number of reasons were advanced, such as the absence of abuse of immunity, immunity resulting from other legislation and uncertainty due to non-uniformity.

On tariff filing and enforcement (TFE),[158] common carriage and service contracting, proponents of TFE contend that its benefits come largely from principles of access and nondiscrimination, in addition to its stabilizing influence on rates. Opponents of TFE see it as too bureaucratic, inflexible, expensive and, most importantly, incapable of ade-

156. Elizabeth Canna, *Global Pressure for Regulatory Reform*, AMERICAN SHIPPER, Jan. 1996, at 13-14.

157. Other discussions, such as U.S. Vice President's, Al Gore's, report entitled CONGRESS SHOULD DEREGULATE THE MARITIME INDUSTRY, and the FMC discussion of section 6(g) of the United States Shipping Act of 1984 have been excluded.

158. Under the TFE provisions, conference members must be permitted to take independent action on ten days notice; however, it does not require independent action on service contracts. Tariff rates and essential terms of service contracts are published and must be made available to similarly situated shippers. *See* Shipping Act of 1984, 46 App. U.S.C. § 1709(b), (c) (Supp. 1994).

quately protecting small shippers from unjust discrimination. The similarly situated shipper arguments are largely ineffective given the commodity specific nature of tariffs and the availability of point-to-point through rates. Further, it is pointed out that TFE permits price-signaling. Furthermore, the need to file tariffs by NVOCCs (i.e., non-vessel operating common carriers) has been questioned because it would disadvantage NVOCCs in attracting cargo of small shippers.

The 1984 Act embodies the principles of common carriage and nondiscrimination.[159] The 1984 Act does not, however, call for blanket "nondiscrimination." For example, FAK tariff, service contracts, time/volume contracts, etc. Most carriers, in their testimony before the Advisory Commission, argued for a system of common carriage as it ensures a nondiscriminatory shipping industry. Intermediaries and shippers presented more divergent views than the carriers.

Service contracts ("SCs") are being used in most trade lanes. The Commission noted a number of problems relating to SCs: Lack of independent action, the requirement that they must be negotiated by the conference, disclosure of essential terms, the inability to sign global SCs, the prohibition of percentage-based contracts, and restrictions on modifying contracts. Conferences viewed SCs as a mixed blessing. While opposing mandatory independent action on SCs, they favor retaining public availability of essential terms as it is consistent with common carriage principles.

Regarding relations of conferences with shippers and transportation intermediaries, intermediaries have differing views regarding the conference system. NVOCCs have expressed concern that they have not been granted antitrust immunity despite the fact that they also are common carriers. This enhances conference market power making it more difficult for NVOCCs to enter into contractual arrangements with ocean carriers. Further, NVOCCs are not given the discounted rates provided to "similarly situated shippers" as they are not "beneficial owners" of the goods shipped. Furthermore, some NVOCCs feel that they should be allowed to sign service contracts. Freight Forwarders pointed out that artificial distinctions between various kinds of forwarders be removed for purposes of determining carrier compensation.

A number of bills were introduced to revise or repeal the US Shipping Act of 1984. The first attempt to repeal the Shipping Act of 1984 was Bill H.R. 5841 introduced in Congress by Thomas R. Carper entitled the "Shipping Act of 1992." This Bill contained four new important features: confidential rate contracts with individual shipping lines; limiting

159. These principles include: (1) non-arbitrary refusal of a carrier; and (2) same compensation for the same service under similar conditions. *Id.* at § 1704(b)(8).

anti-trust immunity to a conference and placing conditions when conference market share exceeds 60% of liner capacity on a trade lane; long-term contracts without conference or FMC interference; and minimum "percentage" service contracts. This Bill was strongly opposed by carriers and died on the House floor.

The second attempt was a bill introduced by Senator Metzenbaum that would repeal antitrust exemption for ocean carriers.[160] The exemption, according to Senator Metzenbaum, raises costs to exporters, drives up cost of imports and increases transportation costs which consumers are forced to pay. Conferences also have the effect of neutralizing low cost non-conference rates through stabilization or discussion agreements. Further, the increase in costs will put U.S. exports at a competitive disadvantage. Furthermore, conferences can determine the fate of certain ports and US should not be protecting foreign dominated cartels due to the increasing number of lines seeking foreign registry. The Metzenbaum bill's thrust was weakened with the publication of the final version of Vice-President Al Gore's Report,[161] and it ultimately died due to lack of support.

The third attempt to repeal the United States Shipping Act of 1984 was put forward by the National Industrial Transportation League (i.e., NITL) in January 1995, who introduced a plan entitled the "Shipping Deregulation Act of 1995." According to the plan, the DOJ would take over the FMC's job of regulating shipping and DOT would be responsible for policing carriers operated by foreign governments and protecting U.S. flag carriers.[162] The NITL bill attempted to remedy some of the deficiencies of the Carper Bill. 'Simultaneously, in January 1995, Congress appointed a Subcommittee chaired by Representative Howard Coble to look into antitrust exemption provided under the United States Shipping Act of 1984 and the possibility of eliminating the Federal Maritime Commission. In March 1995, Chairman of the House Transportation Committee, Rep. Bud Shuster, said that his Committee will meticulously and slowly consider any legislation to deregulate shipping and eliminate the FMC. This led to the House Bill which was a product similar to the NITL and Sea-Land Service Bill. The major provisions of this bill known as the 'Ocean Shipping Reform Act' provided for: the elimination of the FMC; mandatory independent action on service contracts; elimination of tariff

160. *Bill Would End Antitrust Immunity Granted to Ocean Shipping Conferences*, ANTITRUST & TRADE REG. DAILY, Nov. 4, 1993, at 580-81.

161. *See* U.S. Vice President Al Gore's report, entitled CONGRESS SHOULD DEREGULATE THE MARITIME INDUSTRY [referred to as the Gore Report]. *See* Tim Shorrock, *Gore Study Calls for Deregulation of Ship Industry*, J. COM., Aug. 11, 1993, at 1A-2A.

162. Tony Beargie, *Congressional Agenda for '94,* AMERICAN SHIPPER, Jan. 1994, at 12-14; *NIT League Proposes End of FMC, Ship Act*, J. COM., Jan. 20, 1995, at 1A-2A.

and contract filings; and provided for the negotiation of confidential contracts between shippers and carriers.

On May 1, the House Transportation Committee passed the Bill. This initial success was however short-lived. A dual attempt to push the bill forward (as a stand alone Bill and as a Bill tacked to the Budget Conciliation measure through Congress) ended in failure. The Senate blocked the stand-alone Bill. It appears that certain provisions of the House Bill were unacceptable and that further hearings on the matter were needed so as to satisfy other vested interests such as port authorities, labor, etc. Some commentators believe that the true reason was because there were forces behind the Senate that wanted to see the Bill capsized.

In a sudden twist of events, to salvage what was left of the attempts to introduce regulatory reforms, three U.S. Senators - Larry Pressler, Trent Lott and John Breaux - introduced their own bill (known as the Senate Bill). The Senate Bill could be viewed more as a deregulation bill, it favors shippers, considers matters such as filing of individual contracts, retention of their confidentiality and endorses closed conferences.

In 1996, the House voted for a "second time" to overhaul the Shipping Act of 1984. The Bill cleared the House on May 1 by a vote of 239-182 and is identical to the earlier Bill that died in 1995. House Representative James L. Oberstar tried unsuccessfully to amend this House Bill by making contract terms publicly available and placing the FMC's functions under the independent Surface Transportation Board instead of the Transportation Department.[163] However, given the problems of reconciling views and the lack of time in the 1996 session, attempts to reform shipping legislation were not successful.[164]

Prospects of introducing reform in 1997 initially appeared bright when the Senate introduced a Bill in March 1997, which included several refinements to the previous bill. This Bill provides for individual confidential contracts, protection to US flag ships from foreign predatory pric-

163. Commentators indicate that even if the bill was passed by the Senate it would have been vetoed by the President as it would fall short of the two-thirds majority required as suggested by the House vote. *See* Tony Beargie, *Back to Senate for Shipping Reform*, AMERICAN SHIPPER, June 1996, at 16; Tony Beargie, *Senate Starts anew on Shipping Bill*, AMERICAN SHIPPER, Jan. 1996, at 15; Tony Beargie, *Lott Sidetracks Shipping-Reform Bill*, AMERICAN SHIPPER, Feb. 1996, at 15; Michael Berzon B., *Shipping Reform Compromise: A Resurrected Carper Bill?*, AMERICAN SHIPPER, Feb. 1996, at 22-23.

164. Peter Gatti, the NITL's policy director, indicated that "this issue is now ripe for consideration. We expect that to occur early in the legislative year." He further indicated that the old arguments (that not enough time has been spent by our legislators, that no debate or hearings have been held, nor have a wide variety of interest groups consulted) can no longer be used to stall action. *See* Tim Sansbury, *Ship Reform Inevitable, NIT League Chief Says*, J. COM., Nov. 18, 1996, at 1C-3C.

ing, merger of the FMC and the DOT, elimination of tariff filing, tariff enforcement by the Intermodal Transportation Board and the reduction of the notice period on independent action to five days from ten days.[165] After a one-day hearing in April and the markup in May, efforts to find common ground of interest were not successful. In mid July 1997, maritime officials reported that the reform Bill before the Senate was dead as the International Longshore and Warehouse Union would not support the Bill and political support was not forthcoming.

Late in 1997, hope was once again rekindled as a compromise Bill was agreed on by Senator Trent Lott and Senator John Breaux to deal with some of the criticisms. The three major revisions were with regard to service contracts, standalone FMC retention and permitting the ILWU to obtain some of the information it needed to ensure that collective bargaining contracts will be enforced. Regarding service contracts, the Bill would now also permit these contracts between the conference and shippers, and confidential multiple carrier and shipper contracts on segmented services besides the confidential contracts between a shipping line and shippers in the earlier Bill.[166] Initial concerns about the lack of uniform treatment on the confidentiality aspects of the two types of service contracts in the proposed revision have now been resolved. But freight consolidators are still unhappy. However, enthusiasts hope for a solution. The bill which was expected to be pushed forward in 1998 appears to be finally moving as everyone is coming to believe that some reform is necessary.[167]

On April 21, 1998, the U.S. Senate passed the Bill entitled "Ocean Shipping Reform Act" by a vote of 71 to 26. The key features of the Bill are: the FMC is retained as an independent agency; tariff filing at the FMC is eliminated and is replaced by electronic publishing; conferences are prohibited from restricting independent action of individual carriers and the notice period required for independent action has been reduced

165. The bill received mixed reviews. The FMC chairman supported the bill, but labor voiced its opposition. One of the major criticisms of the bill was that it did not permit confidential contracts between shippers and conferences and confidential contracts between shippers and consortia. Some of the key players in the reform bill were: Sen. Kay Bailey Hutchison; sponsor of the bill and chairman of the subcommittee; Sen. Trent Lott; Sen. John Breaux; Sen. John McCain; Rep. Bud Shuster; and Rep. Tom Delay. *See* William Roberts and Stephanie Nall, *New Bill Afloat*, J. COM., Mar. 7, 1997, at B1-B4.

166. It is worthwhile noting that the Administration is opposed to the bill's provision that allows service contracts between shippers and conferences or multiple carriers due to the possibility of undue discrimination against small shippers. The provision also allows conferences the right to restrict individual confidential shippers contracts and would require the merging of the FMC with the STB. See *Shipping Reform gets Boost from DOT*, AMERICAN SHIPPER, Nov. 1997, at 16.

167. Tony Beargie, *Ocean Shipping Reform Act of 1995, 1996, 1997, 1998?* AMERICAN SHIPPER, Dec. 1997, at 10-11.

to 5 days from 10 days; confidential contracting between individual lines and shippers are allowed; information on dock movement of cargo in conference contracts will be made available to longshore unions; shipping lines cannot discriminate against shipper associations or freight intermediaries by refusing to deal with them; and freight forwarders must continue to publish tariffs. The Bill does not extend confidential contract rights to non-vessel operating common carriers.[168] The Bill was sent to the House of Representatives, approved by it on August 4, 1998 with one minor change and returned once again to the Senate for approval. Following approval, the Bill was signed by U.S. President Bill Clinton on October14, 1998. It will take effect on May 1, 1999.[169]

B. A Few Major Ensuing Issues

From the above debate, the ensuing issues that have arisen are on (1) intermodal rates, (2) service contracts, (3) independent action, (4) tariff filing and (5) antitrust immunity.[170] These issues will be examined as their significance has been accentuated not only because of the recent changes in the industry but also because of their potential impact on competition.

1. Intermodal Rates[171]

Intermodal rates set by a conference in the United States that are filed and accepted by the FMC are granted immunity from the United States antitrust laws.[172] Antitrust exemption does not cover "agreements" between a conference and other transport modes.[173] Similarly, in

168. William Roberts, *Amendment on Consolidator Contracts Fails*, J. Com., N.Y., Apr. 22, 1998, at 1A-10A; Tim Sansbury, *How 2 Lawyers Pulled the Final Deal Together*, J. Com., N.Y., Apr. 22, 1998, at 1A-10A.

169. William Roberts & Tim Sansbury, *House Passes Ship Reform Legislation*, J. Com., Aug. 5, 1998, at 1A; William Roberts & Rip Watson, *Clinton Signs Ship-Reform Bill*, J. Com., Oct. 16, 1998, at 1A, 13A.

170. *See* Report of the Advisory Commission on Conferences in Ocean Shipping, Apr. 1992, at 37-39; R. D. Anderson, & S. D. Khosla, *Canada's New Shipping Conference Legislation: Provision for Competition within the Cartel System*, Canadian Competition Pol'y Rec., Vol. 9, No. 1, Mar. 1988, at 8-10.

171. In the US, intermodal rates are covered under section 7; in Canada it is covered under section 5(2). Intermodal rates are not covered under ECC Regulation 4056/86. Application for such exemption must satisfy the test of Article 85(3) of the Treaty of Rome.

172. Section 1709 of the Shipping Act of 1984 specifies that "no conference of group of two or more ocean c carriers may . . . negotiate with a non-ocean carrier or group of non-ocean carriers (for example, truck, rail or air operators) on any matters related to rates and services provided to ocean common carriers within the U.S." However, it concludes with "[f]or purposes of this section, a joint venture or consortium of two or more common carriers but operated as a single entity shall be treated as a single carrier."

173. Much of the confusion about antitrust immunity in this area has resulted from a failure to distinguish between intermodal rates or pricing, intermodal rate agreements or contracting,

Canada the conference loses its exemption if the multimodal rate is set by "agreement" between "the conference" and "another mode." In the U.S., "a member" of a conference (or a consortium acting as a single entity) can negotiate with another mode and offer multimodal rates, if approved. In Canada, such an agreement also does not lose its exemption. In the EEC, intermodal rates set by the conference (or an individual line) are not granted an exemption. This is the interpretation of Regulation 4056/86 by the European Commission, a matter being contested in the Court of Justice. Intermodal rates 'agreed' to between a conference (or individual shipping line) and another mode are not permitted.[174] However, intermodal agreements in the EEC can be exempted under section 85(3) of the Treaty of Rome.

It is believed that the provisions on intermodal rates in Canada and the EEC are more conducive to a competitive market environment than those in the U.S.[175] This has also been indicated in submissions to the U.S. Advisory Commission. It appears that the preference for intermodal conference rate making is their lower cost and convenience. However, this must be weighed against the disadvantages of less competition, the potential for technological change and the threat of collusion.[176] An example of the latter is the FEFC complaint to the Competition Directorate

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and joint intermodal operations. In the US, joint intermodal operations between an ocean line or lines (acting as a single entity) and a railway is permitted. However, it should be noted that this does not apply to the operation by several ocean carriers. In Europe, joint operation is illegal, unless specifically exempted from the competition laws. In Canada, the matter is not covered under SCEA, 1987. Shipping Conferences Exemption Act, R.S.C. § 3 (1987).

174. Sean Moloney, *FEFC Under Attack as Europe Outlaws Inland Rate Fixing*, LLOYD'S LIST, Dec. 22, 1994, at 1; *see also* Terry Brennan, *EC Rules TAA Has Operated Illegally Since '92; Follow-up Ruling on Successor Due This Week*, TRAFFIC WORLD, Oct. 24, 1994, at 12, 13 (concerning the European Commission's ruling against the TAA).

175. In the United States, whether an individual shipping line can offer intermodal rates is within the jurisdiction of the conference. In Canada, the offering of rates agreed to by an individual carrier or more than one (but not the conference) and other modes are encouraged. The recent recommendation of National Transportation Act Review Commission (NTARC) that SCEA be amended to permit intermodal rate making between a conference and other transport modes appears to be heading in the opposite direction. It appears that the NTARC's view is based on the belief that the gains from efficiency of such arrangements and the demand of shippers outweigh the potential benefits from competition. Shipping Conferences Exemption Act, R.S.C. § 3 (1987).

176. In considering lower short run costs resulting from intermodal agreements without competition, one should compare this state to another state where there is more competition and the potential for faster technological change. One of the criticisms of a monopolist is not that it is deliberately extortionist or predatory but that it retards progress by opting for lower prices and a quiet life. From a dynamic perspective a looser market structure is preferable to a tighter market structure especially if the gains resulting from a tighter market structure do not result from real cost advantages, for example if the lower costs results from a redistribution of income. In conjunction to the above, the increasing concentration in this industry and the increasing multimodal ownership have also raised concern. It is for these reasons that intermodal agreements between individual shipping lines and other transportation modes are preferable. This position

in the EEC, where intermodal rates were agreed to between the conference and its own trucking lines depriving shippers of the choice of alternative trucking.

2. Service Contracts[177]

Service contracts are agreements between a shipper and a conference for the transportation of a minimum quantity or a proportion of a shipper's goods, over a specified period of time, at a specified rate and level of service. In the United States, service contracts on a minimum quantity are permitted. The U.S. Shipping Act of 1984 permits the conference to regulate or prohibit the use of service contracts and can decide whether to permit individual members to contract with a shipper (i.e., to take independent action). In Canada, filed service contracts between conferences and shippers are exempt from the provisions of the Competition Act. Service contracts are for a minimum quantity and conferences determine the terms and conditions of service contracts. Further, loyalty contracts are permitted in Canada, but they must not specify all or 100 percent of the goods of a shipper. The EEC regulations on service contracts are more liberal. Shippers can enter directly into contracts with the shipping line of their choice. In other words, independent action on service contracts is permitted. There is no requirement that the service contracts be kept confidential. The regulations also provide for loyalty arrangements (that could be less than 100%) and deferred or immediate rebates. The terms of these arrangements are matters for consultation between the conference and transport users' organization.

The potential benefits of service contracts have been highlighted not only by the Canadian Conference Board study and the submission of the Canadian Manufacturers' Association to the National Transportation Act Review Commission but also by various studies in the U.S. As a result, there have been proposals in Canada and the USA to ensure that the conditions applicable to service contracts are more conducive to a competitive environment. For example, in the U.S., a private bill has proposed the alternative of a percentage to the existing minimum quantity requirement to increase their use. One of the conditions for accepting the TAA by the FMC was that the minimum TEU requirement for service contracts be dropped and that the notice period for service contracts be reduced to three days from five days with a provision for a fifteen-day window for unilateral action. Similarly in Canada, the National Transpor-

has not been supported by several organizations which has led the Agency to recommend conference rate-making agreement with intermodal transportation firms.

177. In the United States, service contracts are covered under sections 1709(c) and 1704 (b)(8); and in Canada it is covered under section 1703(1)(c). 46 App. U.S.C. §§ 1709(c), 1704(b)(8) (1984); Combines Investigation Act § 4(1)(c), (1985).

tation Act Review Commission has suggested that the definition of a service contract be amended to permit a shipper to contract a proportion of his business as an alternative to a specified volume.

Even the FMC has shown a preference for the EC provision by stipulating the requirement that service contracts be entered into by individual member lines of the TACA (i.e., Trans-Atlantic Carrier Agreement) as a condition to accepting the proposed settlement by the TACA to end the FMC investigation into the TACA.[178] These developments suggest a preference for the treatment of service contracts as is currently the situation in the EEC. This preference has recently been endorsed in the USA, as the reforms will now permit 'confidential' service contracts between an 'individual' conference line and a shipper.

3. *Independent Action*[179]

Independent Action enhances the competitiveness of intra-conference competition and also permits the members of a conference to compete with independents. In the United States, conferences must permit member lines to take independent action within ten days notice to the conference, on any rate or service item in its filed tariff. Members may adopt the same rate or service on the same day or after it becomes effective. Independent action on service contracts (i.e., service contracts between an individual shipping line of a conference and shippers) is within the jurisdiction of a conference. It is also permitted on inter-conference agreements, an action that was available even under the U.S. Shipping Act of 1916. In Canada, members of a conference are permitted to take independent action within fifteen days notice to the conference on any filed tariff or service item. Similar adopting action on the same day is also permitted after written notice is given to other members of the conference. SCEA does not permit independent action on service contracts. In the EEC, members of a conference may take independent action on any tariff and no notice period is required. Independent action on service contracts is also permitted.

178. Tim Sansbury, *TACA Lines Get Thursday FMC Deadline,* J. COM., Mar. 6, 1995, at 1A; *see also* Tim Sansbury *TACA Agrees to FMC Terms; Inquiry Dropped,* J. COM., Mar. 10, 1995, at A1. (Stating that the FMC has ended its investigation of TACA.) One of the conditions applicable for TAA to be legal was that a minimum of five member lines of a conference had to approve a service contract, in addition, shippers had the right to negotiate service contracts with any other members. Recently, members of TACA have accepted the FMC terms resulting in the inquiry being dropped. One of the conditions was that individual conference shipping lines would allow shippers to negotiate service contracts without requiring the approval of five shipping lines.

179. In the United States, independent action is covered under section 1714; and, in Canada it is covered under section 4(3)(a) to (c). Shipping Act of 1984, § 15, 46 USC 1701 (1984); Combines Investigation Act § 4(3)(a)-§4(3)(c) (1985).

Of the three jurisdictions, the legislative provisions on independent action in the EEC appear to be the most pro-competitive. The U.S. provisions are considered to be more competitive than the Canadian provisions because these provide for a shorter notice period. A shorter notice period discourages the conference from persuading their members to refrain from taking independent action and also gives greater flexibility to the conference to react spontaneously to changes in the market situation and to external competition. Most studies on the effect of independent action have indicated that it has positive benefits in that it has brought about lower rates. As a result, the NTARC has recommended that the notice period for independent action be reduced to 10 days, similar to the notice period requirement in the USA. Recently, the notice period requirement in the U.S has been lowered to 5 days bringing this provision nearer to the more pro-competitive provision of the EEC.

4. Tariff Filing[180]

In the United States, tariff filing by conferences and ocean carriers is required under the provisions of the U.S. Shipping Act of 1984 with exceptions for a few commodities. Service contracts, except for certain commodities, are also required to be filed; their essential terms, together with the filed tariffs, are available to the public. The FMC enforces the filed tariffs and service contracts. In Canada, only conferences are required to file their tariff rates, which are not enforced by the government. A copy of every service contract is required to be filed, this however is not available to the public. In the EEC, conferences and shipping lines are not required to file tariffs, service contracts and loyalty contracts.

The requirement to file and enforce tariffs is considered to be anti-competitive by the administrative authorities in the EEC. Tariff filing and enforcement in the U.S. has also been severely criticized by a number of prominent witnesses - DOJ, FTC, and Prof. Butz - before the Advisory Commission, who have indicated that the disadvantages appear to outweigh any possible advantages.[181] It is doubtful whether tariff filing in Canada, in the absence of enforcement, has any advantages, especially since carriers can provide rebates (except on loyalty contracts). The recent reforms in the U.S. eliminating tariff enforcement and filing indicate a preference for the existing regulatory regime in the EEC on tariff filing and enforcement.

180. In the United States, tariff filing is covered under section 1717. In Canada, it is covered under sections 6 and 10 Shipping Act of 1984, 46 U.S.C. § 1701 (1984). Combines Investigation Act §§ 6, 10 (1985) (Can).

181. The basic reason for tariff filing and enforcement is that it provides protection to the small shipper against possible discrimination.

5. Antitrust Immunity[182]

Of all the issues considered, the antitrust issue appears to be the most contentious. In the three jurisdictions – the United States, EEC and Canada — the scope of the exemption granted to the liner industry varies considerably. In the U.S., all filed agreements that are not disallowed between liner carriers and conferences are exempt from the provisions of the antitrust laws. As a result, the exemption is applicable to conference agreements and agreements between conferences and independents. The exemption is narrower in Canada and in the EEC. In both Canada and the EEC, the exemption is applicable only to agreements between conference liners. As a result, agreements involving independent liners and conferences are not exempted in Canada and the EEC. Further, whether other types of agreements (e.g., bridging agreements, space chartering agreements, etc.) are exempt, unlike the situation in the US, depends on the existing legislation. In Canada, the exemption status of these other types of agreements requires the consideration of other legislation and their exemption status is therefore a matter for the Court to decide. In the EEC, these types of agreements have to be considered under the exemption applicable to agreements in the competition laws or other regulations on block exemption that may be applicable.

The question as to whether the antitrust exemption should be continued has received increased attention recently. In the U.S., two major agencies – the DOJ and the FTC - have called for an abolition to conference immunity. However, the Advisory Commission has not made any specific recommendations to bring about change. In 1993, a private Bill in the U.S. and other proposals have sought to terminate anti-trust immunity to conferences,[183] however, subsequent Bills have not adopted this proposal. In Canada, both the Canadian Shippers' Council and other academic submissions have also called for an end to the exemption. The Vice President of the European Communities also holds this view for Competition Policy.[184]

The legislative developments regarding some of the major issues in Canada, EEC and the U.S. suggest that the three jurisdictions are gravitating towards introducing more competition either through adopting more competitive provisions or through consideration of removing the antitrust immunity that the conferences enjoy. Perhaps, the development

182. In the United States, antitrust immunity is covered under section 1706. In Canada, it is covered under sections 4 to 5. In the EEC it is covered under sections 3 to 5. 46 USC at § 1707; Combines Investigation Act §§ 4, 5 (1985) (Can.).

183. *See* Bill proposed by Senator Metzenbaum on October 29, 1993 and sponsored by Senators Orrin Hatch, Charles Grassley and Arlen Specter. *See also* Tony Beargie, *Congressional Agenda for '94,* AMERICAN SHIPPER, Jan. 1994, at 12, 14.

184. *See Conferences and Competition*, LLOYD'S SHIPPING ECONOMIST, Aug. 1991, at 22.

of uniform regulations on some of the major issues is a stepping stone to obtaining consensus on the fundamental issue of whether antitrust immunity should be continued or repealed multilaterally.[185] The harmonization of laws in various jurisdictions could lead to less international tension, reduce uncertainty, increase competition, reduce rates and create the potential for increased world trade.

VI. Conclusion

In a period when promoting international competition and facilitating the role of market forces have become the cornerstone of government policy throughout the industrialized world, it is appropriate to consider whether the present philosophy towards liner conferences is appropriate. Providing clear-cut uncontroversial policy proposals are often not easy, especially when different interests groups have different views. Yet some change is needed. The question now is what kind of change and how much?

An examination of the basic rationales for liner shipping sheds some light. The instability rationale indicates that the weight of evidence fails to support the proponents who argue that exemption is needed because of industry instability. As a supporting argument for the exemption, the international comity rationale has also been put forth. While there are differences in shipping practices and regulations among different nations, the overall goal is the same — to bring about stability in rates and service and an increase in trade. International comity may be served as well by joint consideration between trading nations to repeal outdated laws that are not beneficial to the welfare of trading nations.

Quite apart from the above, fundamental changes have been occurring in liner shipping which some observers have termed the 'new paradigm.' The most important of these are fundamental technological changes, new forms of organization, new forms of agreement and new forms of service. The confluence of all these developments has increased the potential for market control and abuse which could enable conferences to exercise too much power now with existing antitrust immunity. It has also opened up the possibility of relying more on market forces and competition enforcement.

185. Regarding the issue of jurisdiction, a good case can be made to support Canadian jurisdiction over agreements and practices that impact directly on Canada's foreign trading interests and are routinely implemented in Canada. It is possible, nonetheless, that alleged conflicts of jurisdiction could be raised in litigation if Canada acts unilaterally to eliminate competition law immunity for conferences operating in international trade routes. Many maritime countries also have blocking legislation that could be applicable in litigation relating to international conference activities. Foreign jurisdictions that remain committed to the conference system might also indicate their concerns to the government of Canada through diplomatic or other channels.

The above developments have implications for the applicability of competition law. First, both consortia and global alliances are not given explicit exemption in SCEA from the Competition Act. They may be exempt if they are between members of a conference. However, in the majority of cases, these agreements are between conference and non-conference members for which exemption is not provided. As a result, these consortia or alliances lose their exemption. Second, a number of new types of agreements have been filed by the conferences which have not been given explicit exemption under SCEA. Third, collectively determined multimodal agreements between the conference and inland carriers are not provided exemption under the Competition Act. In all the above cases, these agreements are subject to the provisions of the Competition Act. The most applicable sections of the Competition Act are the sections concerned with conspiracy, abuse of dominance and mergers or joint ventures.

It is important to note that though the above sections of the Competition Act are most applicable, it does not mean that these new agreements or arrangements are necessarily illegal. The conspiracy provision of the Competition Act applies to agreements that lessen competition unduly. This standard requires that agreements impact on a substantial proportion of the relevant markets. Other types of arrangements such as consortia that are not explicitly exempted under SCEA also are not necessarily in violation of the Competition Act. Although they sometimes give rise to competition concerns, such arrangements often make possible the provision of services that would not otherwise be available to users.[186] Factors that could be taken into consideration in assessing consortia include the market share of consortium members, the terms on which members may withdraw from the arrangement and provide service independently and any specific advantages for users created by the consortium.[187]

In the case of the abuse of dominance provision, a number of factors such as whether the consortium or alliance has substantial or complete control, whether it has engaged in a practice of anti-competitive acts, and whether these acts have had the effect of preventing or lessening competition substantially in a market will have to be considered to determine if the actions of these new organizations have run counter to this specific provision.

As the conference laws in the major jurisdictions are becoming more outdated and inapplicable, various attempts are being made to bring

186. The *Competition Act* contains a specific exception to facilitate pro-competitive joint ventures.

187. Submission to the National Transportation Act Review Commission, by the Director of Investigation and Research, Competition Act, June 30, 1992, at 26-27.

about legislative changes. For instance in Canada, the NTARC has expressed opposition in principle to the intent of SCEA and has called for its repeal as soon as the U.S. withdraws its antitrust immunity for shipping .[188] In the EEC too, serious problems have arisen regarding the applicability of the EEC regulation granting immunity to conferences and a OECD Report indicates that some of the important definitions no longer reflect the reality of ocean container shipping industry. Even in the U.S., numerous attempts are being made to revise the shipping laws granting antitrust immunity to conferences.

The new developments in the industry are also affecting shippers. Shippers in the major jurisdictions are calling for a repeal of the conference laws. In Canada, the Canadian Shippers' Council called for the outright abolition of SCEA, claiming that it "represents a clear trade hindrance and a tariff barrier . . . [and] [that] conferences have done everything possible to negate whatever few pro-competitive modifications were made to the Act in 1987."[189] In Europe too, the European Shippers' Council called on the European Commission to withdraw the automatic, open-ended antitrust immunity enjoyed by liner conferences serving the European Union. Even in the U.S., the President of the NITL indicated that shippers and carriers realize that reform is needed to make the global ocean liner trade consistent and that some form of shipping deregulation is going to occur. This is also having its effect as far as Japan, as the Japan Shippers' Council began lobbying its Ministry of International Trade and Industry to review its regulation and end anti-trust immunity. These developments have added to the increase in the power of conferences and have exacerbated shippers' concerns about market control by a few powerful alliances. As a result, opinions have been expressed that competition policy has failed.

These events have not gone unnoticed by the Competition Authorities in major jurisdictions. In Canada, the Director in his submission to the NTARC stated "the Commission might wish to consider whether Canada should explore possibilities for mutual withdrawal of competition law immunity for conferences with our major trading partners, before considering unilateral action."[190] Similarly in the U.S., the Department of Justice has explicitly recommended the abolition of existing immunity

188. Problems have also arisen in the interpretation of SCEA. For example: responsibility for administration of SCEA; the definition of a conference in SCEA; and multimodal rate setting under SCEA. For a further discussion, see Submission to the National Transportation Act Review Commission, by The Director of Investigation and Research, Competition Act, June 30, 1992. *Id.* at 23-27. Shipping Conferences Exemption Act of 1987 (1987) (Can.).

189. ANNUAL REVIEW OF THE NATIONAL TRANSPORTATION AGENCY OF CANADA 143 (1992).

190. SUBMISSION TO THE NATIONAL TRANSPORTATION ACT REVIEW COMMISSION, by the Director of Investigation and Research, Competition Act, June 30, 1992, at 22, 23.

for conferences from the U.S. antitrust laws, a view also shared by the Federal Trade Commission.

In light of the above, it appears that the time has come to eliminate the privilege of antitrust exemption that conferences have enjoyed for nearly half a century. Unfortunately, in light of the developments that have occurred in the U.S., antitrust immunity will continue, though additional conditions will have to be satisfied to obtain the immunity which will have the effect of reducing the power of the conferences. This implies that Canada is unlikely to revoke the exemption unilaterally though it will most probably adopt similar amendments to its conference legislation. Nevertheless, reducing the scope of the exemption will make the task of eliminating the reduced exemption much easier in the future, notwithstanding diverse vested interests. It will also enable various jurisdictions to bring about an increasing convergence of shipping conference exemption laws so that multilateral action will be facilitated. Facilitating and encouraging the role of market forces by eliminating the exemption could lead to greater competition among ocean liner carriers and ultimately to increased efficiency, lower prices, improved services and perhaps greater international trade. It will also bring about greater equity in the treatment of shipping versus other transport subsectors and other industries in the economy.

APPENDIX I - TABLE OF LEGISLATIVE CHANGES IN CONFERENCE LEGISLATION

Evolution of *SCEA* Legislation

1970 [14 Sections]	1979 [23 Sections]	1987 [29 Sections]
1. Short title	1. Short title	1. Short title
2. Interpretation	2. Interpretation	2. Interpretation
3. Non-Application of the Combines Investigation Act	5. Non-Application of the Combines Investigation Act	4. Non-Application of the Competition Act
4. Loss of exemption	6. Limitation	5. Limitation
5. Filing with the Commission	7. Filing with the Commission	6. Filing of Documents
6. Time for filing of Documents	8. Time for filing of Documents	7. Time for filing of Documents
7. Verification of Documents filed	9. Certification of Documents	8. Certification of Documents
	10. Inspection of Documents	17. Inspection and Destruction of Documents
8. Offence	18. Offence	24. Offense and Punishment
9. Limitation	19. Time Limitation	(deleted)
10. Security	17. Security	23. Security
11. Investigation of Shipping Conferences	12. Investigation of Shipping Conferences	16. Investigation of Shipping Conferences
12. Annual Report	20. Annual Report	(deleted)
13. Commencement	23. Coming into Force and duration	29. Coming into Force
14. Expiry	(deleted)	3. Administration
	3. Administration	(deleted)
	4. Investigation	(see section 17 above)
	11. Destruction of Documents	18. Office
	13. Offices in Canada	19. Inspection of Tariffs
	14. Tariffs	20. Meetings
	15. Meetings	21. Designated Shipper Groups
	16. Regulations	22. Regulations
	21. Transitional	25. Transitional
	22. Repeal	28. Repeal
		9. Giving of Notices (increase in rates/surcharges or increases)
		10. Giving of Notices (amendments to loyalty contracts or tariffs)
		11. Disclosure of Service Contracts
		12. Exceptions
		13. Investigation of Complaints
		14. Commission shall notify Director
		15. Commission must render decision with 120 days
		26/27. Consequential and Related Amendments

Major Provisions of the Shipping Act in the European Economic Community

1986 (EEC 4056/86) [27 Articles]	1986 (EEC 4057/86) [17 Articles]	1995 (EEC 870/95) [13 Articles]
1. Subject matter & scope of Regulation	1. Objective	1. Definitions
2. Technical Agreements	2. Major injury	2. Scope
3. Exemption for Agrements	3. Definitions	3. Exempted Agreements
4. Condition Attaching to Exemption	4. Examination of injury	4. Non-utilization of capacity
5. Obligations attaching to exemption	5. Complaint	5. Basic condition for the grant of exemption
6. Exemption for agreements between users and conferences	6. Consultations	6. Considerations relating to share of trade
7. Monitoring of exempted agreements	7. Initiation and subsequent investigation	7. Opposition procedure
8. Effects incompatible with Article 86 of the Treaty	8. Confidentiality	8. Other conditions
9. Conflicts of international law	9. Termination of proceedings where protective measures are unnecessary	9. Obligations attaching to exemption
10. Procedures on complaint	10. Undertakings	10. Exemption for Agreements between for transport users and consortia
11. Result of procedures on complaint	11.-12. Redressive duties	11. Professional secrecy
12. Application of Art 85(3) Objections	13. General provisions on duties	12. Withdrawal of block exemption
13. Duration & revocation of decisions applying to 85(3)	14.-15. Review	13. Final Provisions
14. Powers	16. Refund	
15. Liaison with the authorities of Member States	17. Final Provisions	
16. Requests for information		
17. Investigations		
18. Investigating Powers		
19. Fines		
20. Periodic penalty payments		
21. Review by the Court of Justice		
22. Unit of Account		
23. Hearing of the parties and of third persons		
24. Professional secrecy		
25. Publication of Decisions		
26. Implementing provisions		
27. Entry into force		

Evolution of the Shipping Act in the United States

1916 [44 Sections]	1961 [45 Sections]	1984 [23 Sections]
1.-2. Definitions.	1.-2. Definitions	2. Declaration of Policy
3.-4. U.S. Shipping Board	3.-4. Repealed	3. Definitions
5.-8. Powers of the Board	5.-8. Repealed	10. Prohibited acts
9. Operation of Certain Vessels	9. Operation of Certain Vessels	4. Agreements within scope of Act
10. Repossession of Certain Vessels	10. Repealed	5. Agreements
11. Establishment of Corporations to construct, etc.	11. Repealed	6. Action on Agreements Exemption from antitrust
12. Relative cost of construction and operation of vessels in US vs. abroad	12. Relative cost of construction and operation of vessels in US vs. abroad	7. Laws
13. Issuance of Panama Canal Bonds	13. Issuance of Panama Canal Bonds	8. Tariffs
14. Prohibited Acts and investigations	14. Prohibited Acts, and Investigations. Dual contracts, conditions, approval and legalization	20. Confidential information not to be released
15. Filing of Agreements, modifications, cancellation and antitrust approval	15. Filing of Agreements, modifications, cancellation and antitrust approval adding public interest standard	15. Reports and certificates
16.-17. Prohibits discriminatory actions and forbid rates other than the filed rates	16.-17. Prohibits discriminatory action and forbids rates other than the filed rates. FMC may adjust unjustly discriminatory rate	11. Complaints, investigations, reports and reparations
18.-19. Domestic rate regulation	18. Domestic rate regulation. Rates to be filed by carriers in foreign commerce; no prior approval for rate changes; prohibits other than filed rates and rates can be disapproved	14. Commission orders
21. Requirement to File	19. Domestic rate reduction below cost to drive out competitors and subsequent increase	12. Subpoenas and discovery
22. Filing of Complaint and Investigation	20. Confidential information not to be released	13. Penalties
23. Hearings before Order	21. Requirement to File	1. Title
24. Written Report of every investigation	22. Filing of Complaint and Investigation	17. Regulations
25. Reverse, suspend or modify orders	23. Hearings before Order	19. Ocean Freight Forwarders
26. Investigate discriminatory action of Foreign government against US vessels	24. Written Report of every investigation	16. Exemptions
27. Subpoena witnesses or records	25. Reverse, suspend or modify orders	9. Controlled carriers
28. Privilege against self-incrimination and immunity	26. Investigate discriminatory action of Foreign government against US vessels	20. Repeals and conforming amendments
29. Enforcement of Orders	27. Subpoena witnesses or records	22. Compliance and Budget Act
30.-31. Procedure and Venue	28. Repealed	23. Bonding of non-vessel-operating common carriers
32. Penalty for violation	29. Enforcement of Orders	21. Effective date
33. Jurisdiction	30.-31. Procedure and Venue	18. Agency Reports and advisory commission
34. Constitutional Severability clause	32. Penalty for violation	
35. Appropriation of initial expenses (Repealed)	33. Jurisdiction	
36. Refusal of Vessel Clearance	34. Constitutional Severability clause	
37.-42. Restrictions during national emergency	35. Repealed	
43. Termination of national emergency (Repealed)		
44. Short Title		

Evolution of the Shipping Act in the United States		
1916	1961	1984
[44 Sections]	[45 Sections]	[23 Sections]
	36. Refusal of Vessel Clearance.	
	37.-42. Restrictions during national emergency	
	45. Short Title	
	43. Making rules and regulations.	
	44. Licensing of forwarders.	
	3. Filing of Rates for barges	
	35. Exemption of agreements	

APPENDIX II - THEORIES OF SHIPPING USED AS A RATIONALE FOR ANTITRUST IMMUNITY

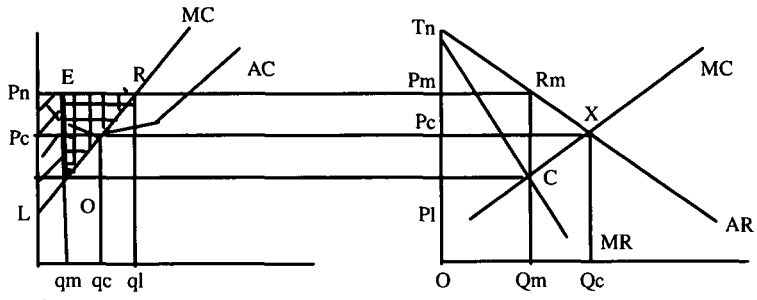
The Cartel-Monopoly Theory

The theory of cartel-monopoly views firms as having an incentive to coordinate their production and pricing activities to increase their collective and individual profits by restricting market output and raising market price. A firm's profits go up when it forms a cartel even though competitive firms may be "maximizing their profits."[191] Each firm in the competitive situation ignores the increase in profits to other firms from a reduction of its own output, which it believes to be insignificant as it cannot affect price. In contrast, a cartel is able to capture the benefits of a reduction of output by its members.

To illustrate the nature of this collective gain, consider two polar cases. First, consider a firm made up of many identical competitive firms having identical cost curves with each firm acting as a price taker. In contrast, consider the same situation, with the firms forming a cartel and acting as a monopoly. The industry's marginal cost curve, which is the aggregation of their individual marginal cost curves, is the industry's supply curve. The equilibrium output of the competitive industry is determined by the intersection of the industry demand and supply curves (i.e., the average revenue curve and aggregate marginal cost curve - where equilibrium output is Q^c in the figure 1b). The equilibrium output of the cartel is determined by the intersection of the industry marginal revenue curve and the supply curve (i.e., equilibrium output is Q^m in the figure). This equilibrium cartel output is less than the equilibrium output of competitive firms and it earns a profit $CR^m p^m p^l$.[192] The reason for the reduction in output of the cartel is that the cartel's marginal cost is greater than its marginal revenue at the competitive output. The reduction will take place till the above cartel equilibrium is reached.

191. Assuming a competitive case

192. The gain to the cartel from a reduction in output comes about because it faces a downward sloping demand curve. On the other hand, each competitive firm is considered to face a horizontal demand curve. More precisely, a nearly horizontal demand curve (i.e. with a small downward slope). While this small downward slope can be ignored for a single competitive firm, it cannot be ignored when taking all firms collectively or for the cartel. The competitive firms place no value on the gain that each other derives from a reduction in output of one unit by each firm because its effect is considered to be negligible. However, the gains to a cartel from a reduction of one unit is internalized, namely the cartel realizes the gain from its reduction.



INDIVIDUAL FIRM (FIG. 1A) INDUSTRY (FIG. 1B)

Firms in the competitive industry on its own do not reduce its output because the competitive firm sets its output where marginal revenue equals marginal cost. A lowering of its output will cause it to lose more than it gains, as the marginal revenue on the last unit exceeds its cost, i.e., at output less than Q^m, the marginal revenue is greater than marginal cost (see figure 1b). Competitive firms are maximizing their output at the competitive equilibrium indicated above namely at output Q^c and price P^c.

Once in a cartel, is there an incentive for firms to cheat? Firms would want to cheat by producing more than the cartel says they should, because at the higher price each member would like to sell more. This can be seen in figure 1a, where a firm's equilibrium output is q^m, at price p^m, but it would like to sell q^l, at price p^m. The crosshatched area indicates the gain from chiseling in figure 1a. At price p^m, figure 1a also shows that the individual firm in the cartel earns a profit of $LOEp^m$, the competitive firms in the cartel sells an output q^l, at price pm, and earns a profit of LRp^m. The profit LRp^m is greater than the profit $LOEp^m$. It is the above considerations that give rise to statements such as "firms would want to cheat by producing more than the cartel says they should: at every output, non members earn more than cartel members, because they produce more and sell at the same price."[193]

The cartel model can also be used to explain differential pricing by a discriminating cartel or monopolist in shipping. Cartels possess monopoly power because there are either institutional or economic barriers to entry. Shipping conferences, acting as cartels can subdivide the market for their services by differentiating between shippers according to the commodities they ship. In other words, the rates for shipping can vary based on the different elasticity of demand of the commodities for liner services.

193. DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 233 (1990).

Since the conference acts as a cartel or multi-plant monopolist, it may determine price and output simultaneously in each of the commodity sub-markets by equating respective marginal revenues with the overall marginal cost of production. This pricing produces a differential (discriminatory) rate structure. As a result, it is not only possible for the shipping lines to maximize profits but it is also not possible for the shipper to use the tariff on oranges to transport lumber which would render price discrimination unlikely. It thereby enables the lines to maximize their joint profit at the expense of the shippers by appropriating some of the surplus which otherwise would have accrued to the latter under a more uniform pricing structure or an FAK tariff structure.[194]

In terms of diagram 1b, if perfect discrimination has taken place, the marginal revenue curve coincides with the demand curve, and all the consumer surplus represented by the triangle P^cXT^m is captured by the conference. The minimum rate on some commodities charged by the conference is XQ^c. The highest rates charged by the conference on some commodities is T^m0.

This model has a number of implications. First, a conference which perfectly discriminates should be making the maximum profits. Second, in order to maximize their joint profit, the lines will price so as to operate on the elastic part of the respective demand curves for their services. Third, there is absence of entry, as entry would imply that the established carriers would not be able to have complete discretion over price. Finally, the model suggests that conference tariffs should be designed so that the lowest quoted tariff rate would make a full contribution to overhead (fixed) costs when a trade is in long-run equilibrium. This assumes that liner shipping is a constant cost industry.

The Theory of the Empty Core

The theory of the core is a theory that is supposed to represent the competitive process.[195] The core is basically a set of cooperative game solutions that are feasible under which players optimize their winnings. The core could be empty. In other words, there is no optimal solution and, therefore, no sustainable competitive equilibrium. Where markets have no sustainable competitive equilibrium, the theory of the core can be used to explain it. The existence of the empty core will be described hereafter under simplifying assumptions.

Assume that firms in the industry are identical, each having U shaped average cost curves where entry is free and exit is costless. Sup-

194. Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, Sept. 1989, at 403-10.

195. Telser G. Lester, Theories of Competition xiii (North-Holland 1988).

pose that the minimum average cost for each firm is Co for output Qo. If demand is not an exact integer multiple of the output produced at minimum average cost, there will not be room for all firms to produce at the minimum average cost. Some of the firms will have to exit. Since the output produced is less than the total demand, prices will rise. This will attract new firms who charge below the existing price, as exit is costless. This will drive out the existing firms and so on. Unless the quantity demanded at a price of Co is an exact integer multiple of Qo (output), there will be no competitive equilibrium or the core will be empty. This theory is illustrated in figure 1, where there are three firms, each with its supply curves s_1 , s_2 , and s_3 producing at a minimum cost C_o. As long as the demand curve (D) does not pass through Q_o, $2Q_o$ or $3Q_o$ there will be no equilibrium.

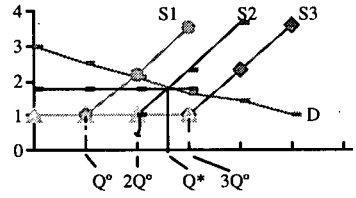


FIGURE 1

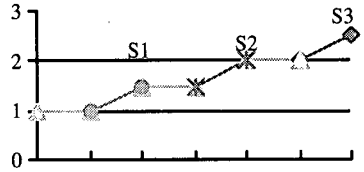


FIGURE 2

The assumption that the firms are identical, all having the same minimum average costs, is not necessary for the empty core to exist. Such a situation with different minimum average costs is shown in Figure 2, as a series of disconnected upward sloping supply segments. The length of the gap between the segments is equal to capacity. The empty core can still exist, if the demand curve passes through any of the disconnected segments. The existence of an empty core is more probable under the following conditions: (1) the greater is the homogeneity of firms in the industry; (2) the larger is an individual firm's capacity in relation to total demand (i.e., the smaller the number of incumbents); (3) the more an industry is in a slump; (4) the more variable is demand and/or supply; (5) the more inelastic is market demand; and (6) the more entry is legally restricted. These conditions are briefly described.

First, the more heterogeneous the firms, the more their minimum average costs differ and the more likely there will be competitive equilibrium. This is because the length of the parts of the supply curve depends on the heterogeneity of the firms. When each firm has the same minimum average costs, the possibility of the empty core is greater since the demand curve must intersect at a point, the minimum point on the average cost curve. However, when firms have different minimum average costs, the possibility of the demand curve intersecting the supply segment

is greater, as the probability of intersecting with a segment or series or points is greater than with one point. In other words, the possibility of an empty core is greater when firms are homogeneous.

Second, the larger the number of firms, the greater the possibility of competitive equilibrium or the absence of an empty core. For example, if there are a small number of firms, an increase in demand would need a larger increase in price and output than if there were a larger number of firms assuming that the increase in demand is equally divided among existing firms. With the introduction of contracting and recontracting costs, it is more likely that the shipper negotiate new contracts with entrants only if these costs are lower than the increase in price in response to the increase in demand. Therefore, with a larger number of firms, it is less likely that the increase in price due to a given increase in demand will outweigh the costs of contracting and recontracting. Therefore the greater these costs, the greater the possibility of an empty core.

Third, if sunk costs must be incurred, potential entrants may be unwilling to enter even if the existing firms are earning profits. The entry of new firms would drive down prices below average total costs (which now include sunk costs) and the new firms would not be able to exit costlessly. A small increase in demand will not attract a new entrant because a new entrant would drive price down below the minimum long run average cost (including entry costs) causing losses for the entrant as well as the existing firms. A small drop in demand (provided it stops above the minimum shortrun average cost) will not cause exit in the short run because entry cost is sunk. However, if demand should fall so much (i.e., below minimum shortrun average cost) that there is excess capacity in the short run, the core will be empty. Thus, the greater the slump in demand, the greater the probability that there will be no competitive equilibrium. (The slump would also be the result of an increase in avoidable costs that pushes the discontinuous part of the supply curve up to the demand curve).

Fourth, the greater is the variability of demand (or costs), the more likely that demand will fall into the region in which supply is discontinuous (or that the discontinuous part of the supply curve will rise to the demand curve). The reasoning above is also applicable in this situation — an implication of sunk costs. That is, if the demand curve shifts only slightly, that it does not fall below minimum shortrun average cost, there will be no incentive for firms to exit, whereas if it shifts significantly, a firm will exit and the supply curve would fall in the discontinuous region or where the core is empty.

Fifth, the more elastic the demand curve, the greater the probability of a competitive equilibrium. For example, in the extreme situation, if the supply curves are represented by vertical segments, the probability

that the demand curve passes through the disconnected segments diminishes to zero with a horizontal or perfectly elastic demand curve, as it must intersect one of the supply segments. Therefore, as the demand curve becomes more inelastic, the possibility of it intersecting with any one of the disconnected segments increases.

Sixth, legal restrictions on entry, also increase the possibility of an empty core. An equilibrium does not exist because the number of potential producers exceeds the number of active producers. If there are legal restrictions on entry, the number of potential producers will be smaller, making it less likely that the number of potential producers will exceed the number of active producers.[196]

Given these implications, it has been argued that core theory can be used to explain the existence of shipping conferences. In the words of one Report:

> Core theory offers a raison d'etre for the conference system — conferences exist to solve the problem of the empty core by imposing an equilibrium where none would otherwise exist. Market theory appears to offer a policy prescription rather than a raison d'etre — if liner markets are contestable, a conference presence can be safely ignored from the point of view of the efficient functioning of the market, although it too can explain most of the mechanisms established in the conference system (such as loyalty ties) in terms of the need for market sustainability.[197]

The Theory of Contestability

The principal focus of contestability theory is the competitive consequence of potential entry. The theory holds that the number of competitors in themselves are irrelevant as indicators of competition, for what matters is the relative position of the entrant vis-à-vis incumbents. "The message of the new theory is that the strength of competition should be judged not on a priori notions of structure or behavioral variables but on conditions promoting or inhibiting ease or exit."[198] In addition, it emphasizes the significance of multiproduct interrelationships and desirable pricing behavior under real world constraints.

Contestability theory highlights the risks of entry. It shows that such risks are determined by the ease or difficulty of recovering the investment costs incurred if firms exit after entry and not necessarily the magnitude of any investment. If on exit, those investment costs are completely re-

196. William Sjostrom, *Collusion in Ocean Shipping: A Test of Monopoly and Empty Core Models*, 97 J. POL. ECON. 5 1160, 1160-79 (1989).

197. SECTION 18 REPORT ON THE SHIPPING ACT OF 1984, Federal Maritime Commission, Sept. 1989, at 596.

198. J. E. DAVIES, PRICING IN THE LINER SHIPPING INDUSTRY: A SURVEY OF CONCEPTUAL MODELS, C.T.C. 63 (Ottawa 1984).

coverable, the risks of entry will be zero and entrants will exercise a disciplining force on incumbents in the market, sufficient to constrain their use of market power.

The costs of exit and the ability to compete are thus the key factors influencing the strength of competition by new entry. The former is determined by sunk costs;[199] the latter by the symmetrical placement of entrant and incumbent. This can be achieved by preventing the incumbent firms from taking price action that will lead to zero expected profits. This condition has been referred to as the "price sustainability" condition. Price sustainability is likely to be achieved if the firms existing in the market cannot change their prices as fast as the new entrant or if the entrant can secure a contract with customers that guarantee him fixed prices and positive profits.

There are thus three conditions necessary for perfect contestability: (1) the absence of sunk costs; (2) a symmetrical positioning of entrant and incumbent; and, (3) price sustainability.

This theory specifically emphasizes the significance of multiproduct firms and the problems arising from such cost structures. For multiproduct firms, the average cost curve is not a meaningful concept due to the presence of common costs.[200] Further, the costs of multiproduct firms are not only affected by economies of scale[201] but also by economies of scope which result from the composition of output. Economies of scope arise when it is cheaper to produce a combination of outputs than if each output was produced individually by different firms. The theory also emphasizes the cost of joint production. Joint production arises when the production of one product gives rise to the production of another, which results in lower costs than if the products were individually produced. Production may also be subject to economies of scale, and if the indivisible capital which gives arise to it can be fully utilized by producing other products, the cost of production would be lower from producing additional products than from producing products individually.

Contestability theory permits no inefficient method of production to exist in the long run. Consequently, if a market is contestable, a stable industry configuration has to be the most efficient configuration. Concerning natural monopoly,[202] in a multiproduct context, conditions of natural monopoly will occur if and only if the costs of joint production are

199. A sunk cost is an outlay that cannot be recouped without substantial delay.

200. Common costs are costs common in the production of several goods.

201. Economies of scale means a proportionately greater increase in output for a proportionate increase in input. There is no single measure of scale economies in a multi-product setting. They are measured in three ways.

202. A natural monopoly is defined as a situation where the industry is supplied by a firm or firms with decreasing long run costs.

less than the costs of separate production for any scale or any combination of outputs.

The policy implications of this analysis of costs are numerous. First, excepting natural monopoly, it is evident that if the conditions of contestability can be ensured, then in the long run the resulting industry structure is the most efficient industry structure. Second, it appears that natural monopoly situations are not nearly so obvious as normally assumed for in addition to scale economies, determination of such situations will require knowledge of cost complementarities and demand interrelationships.[203] Third, the existence of a natural monopoly will mean that the costs of producing a certain range of products will be lowest if production of those goods are concentrated in the hand of a single firm. This structure though socially desirable, is neither the inevitable result of market forces or necessarily sustainable;[204] wasteful and inefficient entry may nevertheless be forthcoming. Contestable markets in themselves do not guarantee social efficiency.

Contestability theory finally emphasizes the significance of desirable pricing behavior under real world constraints. Maximization of social welfare, in decreasing cost industries,[205] is not possible under marginal cost pricing.[206] However, Ramsey pricing, which involves adding a markup over marginal cost which varies inversely with the elasticity of demand, is capable of providing the allocation of resources which imposes a minimum welfare loss.[207]

In contestable markets, Ramsey pricing has several implications. First, sustainable prices which allow no profitable entry must admit to no cross-subsidization. Second, if a natural monopolist has a strictly subadditive cost function,[208] exhibiting both economies of scale and economies of scope, the maximum sustainable (non-entry inviting) set of prices will be the Ramsey optimal set of prices. Thus, it appears that the pursuit of maximal profit by the monopolist will simultaneously promote the (Ramsey) optimal allocation of resources, given perfect contestability. If natu-

203. DAVIES, *supra* note 198, at 71.

204. A sustainable industry structure means one where no outside potential competitor can enter by cutting prices and still make money, supplying quantities that do not exceed total market demand at those prices, given a feasible configuration (i.e., production equal to demand, no firm is losing money, and a firm's output is positive or zero).

205. A decreasing cost industry is one faced with decreasing costs as output increases.

206. Under decreasing costs, if the firm is to continue in production and bring about an efficient allocation of resources, it must receive subsidies, if it is to set price equal to MC. The imposition of subsidies are not considered an efficient way of achieving marginal cost pricing.

207. The basic idea in Ramsey pricing is to capture the consumer surplus so as to achieve an efficient allocation of resources. The consumer that derives the greatest consumer surplus pays the most, so as to avoid using subsidies to achieve an optimal allocation.

208. A cost function is subadditive at output y if it is more expensive for two or more firms to produce y than it is for y to be produced by a single firm.

ral monopolists do not have a strictly subadditive cost function, Ramsey optimal set of prices will not be sustainable. Market forces will not in themselves promote the most efficient allocation of resources; they may need to be assisted by some mechanism to restrict socially wasteful new entry competition.

The theory promises to provide a guide in respect of the general design of regulatory and antitrust policy that is much more relevant than the traditional yardstick of perfect competition. "Whatever the appearances . . . we can no longer accept as *per se* indicators of poor market performance evidence such as concentration, price discrimination, conglomerate mergers, or vertical and horizontal integration."[209]

209. *See generally*, W. J. BAUMOL, J. C. PANZAR, & R. D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 477 (1982).