FREE MARKET ANTITRUST IMMUNITY REFORM (FAIR) ACT OF 2001

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BEFORE THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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OPENING STATEMENT

FREE MARKET ANTITRUST IMMUNITY REFORM (FAIR) ACT OF 2001

WEDNESDAY, JUNE 5, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:43 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order.

The Committee on the Judiciary has exclusive jurisdiction over laws pertaining to antitrust that affect competition in the marketplace. As Chairman of the Committee, I have made it a priority to carefully examine the implementation and enforcement of our antitrust laws to ensure effective competition in our free market economy. This Committee also periodically considers competitive aspects of various industries, including those exempt from the antitrust laws.

Today we will consider H.R. 1253, the Free Market Antitrust Immunity, or FAIR, Act of 2001, a measure I introduced to remove the antitrust exemption presently accorded to ocean carriers.

The United States has the world's largest economy and its largest market. International trade represents close to 30 percent of the U.S. gross domestic product and accounted for nearly a quarter of U.S. economic growth over the last decade. Most of this trade was conducted over ocean-shipping lanes, and this industry forms the basis of an international commercial system upon which the strength of the American economy depends.

The Shipping Act of 1916 exempted ocean carriers from United States antitrust scrutiny. As a result, carriers have been free to jointly set open shipping rates in what are known as carrier conferences or discussion agreements. The shipping rates directly affect the international commercial opportunities of potential U.S. exporters and the consumer choices of all Americans.

Subsequent amendments to the 1916 legislation have helped remedy persistent competitive concerns within this industry, and the Ocean Shipping Reform Act of 1998 helped address some of these concerns by permitting independent shippers to enter into service contracts with ocean carriers on a confidential basis.

However, over the last 75 years, market conditions upon which ocean carrier antitrust immunity was predicated bears little resemblance to modern realities.

Today there are no major American-owned ocean carriers. As a result, this protection almost exclusively benefits foreign-owned carriers at the expense of Americans.

American shippers and companies which consolidate smaller shipments for import are given little choice but to pay rates that are collusively set by the carriers themselves. American corporations cannot avail themselves of export opportunities that would exist in the competitive marketplace. American workers who transport goods to and from ocean ports are required to accept trucking fees on what amounts to a take-it-or-leave-it basis. And ultimately, American consumers are forced to pay higher prices for a variety of imported goods.

If Congress were to consider granting antitrust immunity to ocean carriers in today's shipping environment, it would be hard-pressed to justify this policy to the American people.

International comity has traditionally been a factor Congress considers when passing laws relating to international trade. However, Congress has a continuing and affirmative obligation to periodically examine or repeal laws which have become detrimental to the well-being of American citizens.

Moreover, when maritime countries currently permit ocean carriers to evade competition laws, there's been a considerable movement away from this policy.

Canada is currently examining fundamental reform proposals, and a European Union court recently prohibited carrier conferences from collectively establishing inland transportation rates in Europe.

As a result, last April the Organization for Economic Cooperation and Development, an international organization comprised of the world's leading economies, issued a comprehensive report examining the international ocean carrier industry. This report, which will be included in today's hearing record, concluded that antitrust exemption for conference price fixing no longer served their stated purpose, if they ever did, and are no longer relevant. The report further recommended that member countries seriously consider removing antitrust exemption for price fixing and rate discussions.

H.R. 1253 would accomplish precisely this goal, and the American people deserve no less.

I would also like to acknowledge the leadership of former Chairman Henry Hyde, who introduced similar legislation in the last Congress and has long been a leading advocate for American shippers and consumers.

I note that Mr. Conyers is not here. So without objection, all Members will be allowed to submit opening statements at this point in the record.

[The information referred to follows in the Appendix]

Chairman SENSENBRENNER. Our first witness will be Charles A. James, the Assistant Attorney General for Antitrust at the Department of Justice. Before joining the Antitrust Division, Mr. James practiced law and served on the Federal Trade Commission.

The second witness is James P. Hoffa, who was elected general president of the International Brotherhood of Teamsters in 1998. Mr. Hoffa is a member of President Bush's Council on the 21st Century and serves on the Energy Secretary's advisory board.

The third witness is Robert Coleman, chairman of the Pacific Coast Council of Customs Brokers and Freight Forwarders Association. Mr. Coleman will also testify on behalf of non-vehicle-owning vessel operators, an important part of the shipping industry.

The last witness will be Christopher Koch, the president and CEO of the World Shipping Council, a trade association which represents the ocean carrier industry. Before joining the council, Mr. Koch served as Chairman of the Federal Maritime Commission, was chief of staff to Senators John McCain and Slade Gorton, and was counsel to the Senate Commerce Committee.

Gentlemen, would you all please stand and raise your right hand and take the oath? Do each of you solemnly swear that the testimony you are about to give this Committee shall be the truth, the whole truth and nothing but the truth, so help you God?

Let the record show that each of the witnesses answered in the affirmative.

Without objection, the written statements of all of the witnesses will be included as a part of their testimony, together with the OECD report that I referred to in my opening statement.

[The information referred to follows in the Appendix]

Chairman SENSENBRENNER. I would like to ask each of the witnesses to summarize their remarks in 5 minutes or so, and then we will go to questions under the 5-minute rule.

Mr. James.

STATEMENT OF CHARLES A. JAMES, ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, U.S. DEPARTMENT OF JUSTICE

Mr. JAMES. Thank you, Mr. Chairman. It's my great pleasure to be here this morning and to testify on behalf of the Department of Justice in support of your legislation.

A few introductory comments: The U.S. economy relies on competition to ensure economic efficiency. We recognize that competition provides for consumers the benefit of the lowest possible prices and the most aggressive level of innovation.

Against that background, we in the antitrust community obviously are quite dubious about antitrust exemptions. We certainly understand that there are circumstances where an exemption may be appropriate but only in the circumstance of very serious and persistent market failure. We understand, as you indicated in your introduction, that there has been an exemption from the antitrust laws for various forms of carrier cooperation since 1916.

Under the present state of legislation, carriers are free to engage in very explicit price-fixing arrangements in the form of conference agreements and, more importantly in the current environment, less formal discussion arrangements that are nonbinding in nature but certainly provide the carriers with an opportunity to discuss competitive conditions and their prospective responses to those competitive conditions in a very informal way, subject only to the requirement that those not take the place of binding agreements.

The rationale for the exemption has been really twofold over the years: One, that in the absence of the exemption, the carriers would engage in a form of ruinous competition; secondly, that the international nature of this particular enterprise provides a basis for an exemption in the sense that our major trading partners have some level of exemption in their own circumstance and the idea that it might not be possible for the U.S. antitrust laws to reach anti-competitive conduct that takes place by foreign actors.

I think both rationales do not stand up in the current environment. We understand that the concept of ruinous competition is something that is certainly alluded to by a number of industries, but we recognize the important discipline that competition can provide and certainly support the exercise of that discipline in this particular industry setting.

More importantly, on the international dimension, it's become clear over the last several years that the U.S. antitrust laws do have the reach to protect against anti-competitive conduct engaged in by foreign actors or in foreign venues that have an impact on U.S. commerce. Additionally, we would note, as you did in your introduction, that the overall trend in policy here is for our trading partners to take serious looks at the need for continuing exemptions in this area, and the OECD report is one indication of that. The fact that the European Union does not permit these discussion agreements is another indication, and the fact that the European Union itself has indicated an intention to look at whether an exemption is appropriate is yet a third.

We understand the very important benefits that competition can bring to consumers in this very critical area of our economic activity and think that it is about time that we allowed the true, full measure of competition to work in this industry setting. And, for all of those reasons, we at the Department of Justice strongly support the proposed legislation and the elimination of the exemption.

Thank you.

[The prepared statement of Mr. James follows:]

PREPARED STATEMENT OF CHARLES JAMES

Good morning, Mr. Chairman and Members of the Committee. It is a pleasure to appear before this Committee to state the Department of Justice's in support of H.R. 1253, a bill that would remove the antitrust exemption for ocean carriers from the Shipping Act of 1984. The bill would phase out the exemption for intercarrier agreements after one year, while not affecting the immunity for marine terminal operators.

The Department of Justice believes that competition under the antitrust laws is the way to provide consumers with the best products and services at the most affordable prices. That is the general rule applicable to virtually every sector of the American economy and has served our Country, its economy and its businesses and consumers extraordinarily well. In certain limited circumstances, more aggressive or less restrictive antitrust rules may be appropriate. We do not believe that the ocean shipping industry exhibits extraordinary characteristics that warrant departure from normal competition policy or the application of the antitrust laws.

Price fixing and other anticompetitive practices by ocean shipping conferences over the years have imposed substantial costs on our economy through higher prices on a wide variety of goods shipped by ocean transportation. In the current era of expanding globalization of trade, in which we are ever more dependent upon an efficient transportation system, it is important that our public policy promote full and open competition.

BRIEF HISTORY OF ANTITRUST EXEMPTIONS IN OCEAN SHIPPING

Since the Shipping Act, 1916, there has been an exemption, in one form or another, from the antitrust laws for ocean shipping carriers to engage in rate discussions and price-fixing agreements. Congress has revisited the issue at various times over the years, but thus far has not yet enabled the competition generally applicable to the rest of the economy to apply to ocean shipping. It is time to do so now.

While outlawing certain specified monopolistic conference practices, the 1916 Act expressly conferred an exemption from the antitrust laws for conference agreements on shipping rates, pooling arrangements, and shipping route allocations, as long as those agreements were first submitted to and approved by the newly created U.S. Shipping Board (the body that eventually became the Federal Maritime Commission).

Following enactment of the 1916 Act, conferences began making extensive use of "dual rate" contracts to bind shippers to the conferences and stave off non-conference carrier competition. These dual-rate contracts, also referred to as "loyalty contracts," offered discounted rates to shippers who agreed to use only conference carriers. The Supreme Court ruled in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), that dual rate contracts violated the Act.

In the wake of the Isbrandtsen decision, Congress amended the 1916 Act in 1961 to permit dual-rate contracts, though limiting the permissible discount to 15 percent. At the same time, Congress also amended the Act to require the filing of tariffs, transferred the Board's authority to an independent Federal Maritime Commission, and gave the Commission the power to disapprove agreements between and among carriers that were "contrary to the public interest."

In 1984, Congress substantially rewrote the 1916 Act. The Shipping Act of 1984 broadened the antitrust exemption for carrier agreements and streamlined the regulatory process for those carrier agreements. The exemption from the antitrust laws was expanded to cover not only agreements that had gone into effect under the Act, but also activities, "whether permitted under or prohibited by this Act," if they were undertaken "with a reasonable basis to conclude" that they were pursuant to an effective agreement. The antitrust exemption was further expanded to cover intermodal through rates incorporating rail, truck, and ocean legs. The 1984 Act abolished the Commission's public interest standard for reviewing carrier agreements. A carrier agreement would no longer require Commission "approval," but would go into effect—and thereby become immunized from the antitrust laws—45 days after filing or submission of any additional information requested by the Commission. As a result of the 1984 Act, once an agreement has been filed, the only way it can be challenged, as anticompetitive, is if the Commission seeks to have a court enjoin the agreement on grounds that it is "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." (To the best of our knowledge, the Commission has never filed such a challenge.) The 1984 Act otherwise retained the common carrier provisions of the 1916 Act, as amended in 1961, under which the conferences were required to file published tariffs with the Commission, as well as the list of specified prohibited acts. The Act provided for the use of service contracts in limited circumstances.

Next came the Ocean Shipping Reform Act of 1998. The 1998 Act took some notable competitive steps, but it stopped short in some important respects. On the procompetitive side, the 1998 Act guarantees that conference members can take "independent action" on service contracts—that is, can negotiate service contracts with a shipper at rates that differ from the conference tariff—and thereby compete for large volumes of business by offering discounted rates. The 1998 Act improves on the 1984 Act not only by requiring shipping conferences to permit individually negotiated service contracts, but also by helping protect carriers from anticompetitive pressure from the conferences by prohibiting the conferences from requiring carriers to disclose the rates in those service contracts and by eliminating the requirement that the negotiated rate be made available to all similarly situated shippers.

However, the 1998 Act also allows conference members to adopt so-called "voluntary" guidelines regarding individual service contracts, which a conference can use, along with its already significant influence over its members, to signal them as to expected behavior. At a minimum, this can be used to discourage vigorous competition with respect to individual service contracts.

These and other provisions of the 1998 Act perpetuate the conference system, either by facilitating intercarrier agreements that would be unlawful in the absence of an exemption or by restricting the ways in which conference members can meaningfully compete on an individual basis for the business of large and small shippers alike. The conference system could not exist in the absence of an antitrust exemption.

Such an exemption no longer makes sense, especially at a time when countries all over the world are turning to competition, rather than antitrust exemptions and regulation, as the best hope for economic prosperity.

THERE ARE NO GOOD RATIONALES FOR THE ANTITRUST EXEMPTION

We know the benefits of competition: low prices, innovative service, and efficient operations. Yet shippers—and consumers—have been denied the full benefits of competition because carriers have been able to persuade policy makers over the years that the ocean shipping industry has certain characteristics that make it necessary to protect carriers from competition.

Supporters of the antitrust exemption for ocean carriers have been reciting essentially the same rationales from the beginning. The rationales tend to fall into two categories: those based on the economics of shipping and those based on the international nature of the business. Whatever may have been the force of those rationales at the time the exemption was first enacted in 1916, they have become increasingly dubious in the years since, and are particularly so in the current economic and legal environment. They do not justify a departure from the competitive principles that other industries throughout our country—and much of the world—have come to live by.

A consistent theme of those supporting an antitrust exemption, rather than competition, has been that carriers need protection from the consequences of "too much" competition. Absent an exemption to allow collective decisionmaking by carriers, the fear expressed has been that carriers would engage in rate wars that might result in certain carriers being unable to cover their capital costs, which would ultimately drive these inefficient carriers out of the market.

In other words, carriers should be exempt from the antitrust laws because, absent the ability to collude, shipping costs would be lower. In our view, this is a seriously flawed public policy. As the General Accounting Office stated in a 1982 report to Congress, a primary objective of shipping conferences "is to increase the profits realized by their members as a group." This is why cartels form. But simply because competitors desire to collude in order to inflate their joint profits does not mean that it is good public policy to allow them to do so. In fact, the contrary is true.

Furthermore, this rationale is difficult to accept, even on its own terms. Arguments based upon concerns about "ruinous" or "destructive" competition are often made, but are virtually never substantiated. Congress has heard them many times before, often with respect to transportation industries such as railroads, airlines, and motor carriers. At one time or another, each of those industries was subject to pervasive federal regulation and enjoyed a broad exemption from the antitrust laws. Over time, however, each of them has been substantially deregulated and the applicable antitrust exemption has been curtailed or eliminated, with the result that competition has increased for shippers and consumers, and without the horrible consequences predicted by industry. In fact, economists have often found that a "regulated" cartel yields the worst of both worlds: high prices and low profitability, as companies over-invest in capacity and lose the incentive to innovate and operate efficiently. Certainly, the ocean shipping exemption has not saved U.S. carriers.

Another rationale for the exemption has been that the international character of ocean shipping somehow made it inappropriate to subject the industry to the antitrust laws. The notion has been that it would be unfair to apply U.S. antitrust laws just to U.S. carriers, but that attempting to apply them to foreign carriers as well would provoke our trading partners. Whatever may have been the validity of such a concern many decades ago, it has no continuing validity today. There has been no doubt for many years that U.S. antitrust laws can properly be applied to foreign persons engaged in commerce with the U.S. and that the transportation of freight between the U.S. and a foreign country falls well within that principle. Thus, foreign carriers serving the U.S., no less than U.S. carriers serving the U.S., are subject to our antitrust laws with respect to those activities. Furthermore, in the intervening years, foreign governments have made a pronounced shift to embrace free-market competition and to adopt and apply antitrust laws. Indeed, it is ironic to note that the most significant recent antitrust enforcement action with respect to ocean shipping in U.S.-Europe trades was taken by the European Commission a few years ago, when it imposed fines on U.S. and foreign carriers operating between the United States and Europe after determining that they had exceeded the scope of the applicable European exemption. This puts to rest any contention that it would be inappropriate, as a matter of fairness or comity, for the United States to apply its antitrust laws to carriers operating to or from the U.S.

Perhaps a final rationale—and one that reflects both the economics and the international character of shipping—is that some foreign countries subsidize their state-controlled carriers and operate them for reasons other than profit. This was a significant concern to U.S.-flag carriers in the 1970s, but Congress has already dealt with that. The Shipping Act of 1984 gave the Commission power to disapprove rates of such carriers that were below a just and reasonable level.

In our view, the case for a broad exemption from the antitrust laws has never been a strong one and is especially weak today. Congress has acted decisively over the past 25 years to deregulate other transportation industries—railroads, airlines, and motor carriers—and the predictions that ruinous competition would harm carriers and consumers alike never came to pass. The case for continuation of the antitrust exemption for ocean carriers is no stronger. Indeed, at a time when the U.S. model of deregulation—coupled with appropriate antitrust enforcement—is winning converts around the world, the antitrust exemption for ocean shipping is badly out of step with the times.

CONCLUSION

Mr. Chairman, the 1998 Act took an important but limited step forward toward more competition in ocean shipping. The Department of Justice believes that the proposed legislation would firmly establish competition as the touchstone for this important industry. We believe that the ocean shipping marketplace can benefit, no less than other industries, from healthy competitive market forces safeguarded by appropriate antitrust enforcement.

The Department of Justice urges Congress to enact your legislation and allow competition to flourish in ocean shipping—subject only to our antitrust laws. A competitive marketplace protected by the antitrust laws will do more than the most carefully constructed regulatory scheme to allow competitive forces in the ocean shipping industry to benefit consumers, shippers, the economy, and ultimately the ocean shipping industry itself.

Chairman SENSENBRENNER. Thank you, Mr. James.

Mr. Hoffa.

STATEMENT JAMES P. HOFFA, GENERAL PRESIDENT, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. HOFFA. Thank you. Mr. Chairman and Members of the Committee, my name is Jim Hoffa, and I'm general president of the International Brotherhood of Teamsters. It's a pleasure to be here today to support H.R. 1253, the Free Market Antitrust Immunity Reform Act.

On behalf of the 1.4 million members of the Teamsters Union and the 50,000 truck drivers who haul intermodal containers throughout the country, I urge you to eliminate the antitrust exemption for ocean carriers.

At present, these foreign-owned carriers reap billions of dollars in profits off the backs of American workers. Complete elimination of this exemption, as called for in Chairman Sensenbrenner's bill, is the only way to end the systematic exploitation of America's port drivers.

Under the current law, ocean carriers are permitted to meet and discuss the rates they charge for moving a container from the port of origin to its final destination. Included in this rate is the charge for moving a container from the U.S. port to the inland point. Based upon these collective set rates, ocean carriers then negotiate individual service contracts with shippers.

Once a service contract is finalized, the ocean carrier or its broker usually contracts out the inland segment of the move to an independent port trucking company. Unlike their relationship with shippers, ocean carriers enjoy tremendous leverage over port trucking companies, due to the carriers' ability to collaborate with one another with regard to freight rates.

Because the carriers know what the other carrier is going to pay for inland transport, they can present a take-it-or-leave-it rate to the trucking companies. Thus, there are no meaningful negotiations. Trucking companies are then forced to either accept or not haul the freight at all.

Since the ocean carriers dictate similar rates to all of their port trucking services providers, the latter is not a viable option. Thus, trucking companies routinely are left to provide these services at a rate that barely covers the cost, and sometimes they have to even operate at a loss.

To compete in this environment, many trucking companies offer incentives such as no charge for the long hours that port truck drivers have to spend in port in congested areas waiting for their loads. Trucking companies also offer additional free services, such as cleaning out, loading and unloading containers, or waiting for hours in long lines to interchange containers.

Ultimately, it is the port drivers who actually provide these free hours of service, not the trucking companies. The wages port drivers receive are unsustainable and below the standards we must have in this country. Trucking companies pay port drivers poverty-level wages to offset the losses they absorb from accepting below-cost trucking rates set by the ocean carriers.

On average, port drivers earn an average effective rate of $7 to $8 per hour before taxes, and that is during good times. Port drivers receive no health benefits for themselves or their families and no retirement benefits.

Faced with such hardships, many drivers are forced to choose between making their truck payments and repairs to their trucks or feeding their families. As a result, large numbers of port drivers are operating poorly maintained trucks. And more and more port drivers have been forced into bankruptcy, losing their homes as well as their trucks.

In the end, these hardworking men and women and their families are forced to rely on public assistance to survive. Their plight is directly caused by the multibillion-dollar cartel that has flourished at their expense. This is bad policy, and it must be stopped.

Ocean carriers assert that, without this exemption, the efficiencies of movement of freight would be compromised. Specifically, they are concerned that carriers will not be able to coordinate their need to carry the capacity that they believe they need. Their concerns are clearly unfounded.

First, if structured appropriately, carriers could enter into joint ventures or partnerships that would enable them to maximize their capacity without violating antitrust laws.

Secondly, even if this proved unworkable, nothing in this legislation would prohibit carriers from using third-party brokers to assist them in coordinating their capacity needs. Such arrangements are commonplace in the trucking industry.

Simply put, this legislation in no way threatens the ability of ocean carriers to move freight efficiently.

Mr. Chairman, there is a great imbalance in the economic forces at work here. We're talking about a David and Goliath fight, your average Joe out there driving a truck, who bought a third- or fourth-generation truck for $25,000, versus these giant ocean carriers. Something is seriously wrong with a system where the laws protect the multibillion-dollar foreign cartel but not the American citizen who drives the truck, the hardworking port driver.

We're still operating under a 1916 law that gives the economic giants of the steamship industry antitrust protection and prosecutes the driver if he meets with three other truck drivers in a church basement or union hall to consider the idea of getting together to make—set forth—set rates for themselves to protect their own existence.

I urge this Committee and the 107th Congress to correct this picture, to right this wrong, to eliminate this antitrust exemption that does more harm than good and that no longer serves America.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hoffa follows:]

PREPARED STATEMENT OF JAMES P. HOFFA

Mr. Chairman and Members of the Committee, my name is Jim Hoffa and I am the General President of the International Brotherhood of Teamsters. It is a pleasure to appear before you today to support H.R. 1253, the Free Market Antitrust Immunity Reform or "FAIR" Act of 2001, that proposes to eliminate antitrust immunity for ocean carriers. I am here today on behalf of the 1.4 million members of the Teamsters Union, some of whom are already employed in the ports. In addition, I am here representing the 50,000 truck drivers who haul intermodal containers in ports located throughout the United States and who, in the near future, will be Teamsters members. I thank you for the opportunity to address these important issues.

Notably, this is not the Teamsters' first appearance before Congress on behalf of port drivers. Two years ago, the Director of the Teamsters Port Division appeared before this Committee in support of Representative Hyde's 1999 Free Market Antitrust Immunity Reform Act. Soon thereafter, the Port Division's National Coordinator testified before the House Transportation Committee on the negative effects of the Ocean Shipping Reform Act of 1998 ("OSRA") on port drivers and on the deplorable wages and working conditions of those drivers. Our message was then, and remains today, a very simple one: By allowing ocean carriers to continue to collectively set rates, even through voluntary discussion groups, competition in the inland transportation segment will remain suppressed, and port drivers will suffer the results.

Most of the participants in the maritime industry ignore the plight of port drivers, and thus their interests are seldom mentioned in any discussion of maritime trade. Although widely disregarded, these workers play an integral role in United States trade. Ships and trains only can transport goods so far; nothing is delivered to or from a customer's dock unless it is delivered by a port truck driver.

In my testimony today, I will explain how the perpetuation of ocean carriers' antitrust immunity directly contributes to the poverty level wages and deplorable working conditions endured by port drivers. To do so, I will briefly describe (1) the economic growth in the maritime industry compared to the economic depression experienced by port drivers; (2) the manner through which the ocean carriers' antitrust exemption allows carriers to dictate rates and suppress competition in the trucking industry; (3) how this suppressed competition perpetuates unsafe and unsustainable working conditions for port drivers; and (4) why this exemption should be eliminated.

1. The Intermodal Industry Has Expanded And Ocean Carriers Have Enjoyed Increasing Profits, But Port Drivers Continue To Earn Poverty Level Wages

United States' ports and the shipping industry form the foundation for international trade on which the vitality of the United States' free market economy depends. Foreign trade accounts for one-fifth of the United States Gross Domestic Product. In 1996, port activities provided employment for over 1.4 million Americans and contributed approximately $74.8 billion to the U.S. Gross Domestic Product. Fueled by the advent of the global economy, this foundation has developed at a rapid pace. International trade experts reported that the global container trade rose from an estimated 83 million containers in 1990 to 198 million in 2000. In the Port of Los Angeles alone, container volume increased by over 20% in 2000. And despite the economic slowdown in 2001, the top 20 U.S. ports still experienced increases in container volume from 2000. Not surprisingly, experts predict that by 2010 at least 90% of all freight carried by ocean carriers will be transported by intermodal containers.

Consistent with this growth, the profits of these foreign-owned ocean carriers, on the whole have increased over the last three years. Hapag-Lloyd Container Line's operating profit for 2001 totaled $168 million, an increase of 17% from 2000. Similarly, P&O Nedlloyd Container Line Ltd. reported record profits of $201 million in 2000, from $7 million in 1999. Even with a decrease in profits for 2001, P&O Nedlloyd averaged a $40 million increase per year over the last three years. Based upon these promising statistics, one could easily assume that everyone associated with the flourishing shipping industry is reaping its rewards. This is certainly true for the large, foreign-owned carriers and the port authorities, which directly benefit from increased container traffic at their ports.

This has not been the case, however, for port drivers. Despite the financial success of the ocean carriers, port drivers earn substandard wages and have not received any type of pay increase in over a decade. On average, port drivers earn an effective wage of $7.00 to $8.00 per hour, before taxes. They are not provided health benefits—either for themselves or their families—nor do they receive pension or retirement benefits. As a result, many are forced to choose between making the payments and repairs on their trucks or buying groceries for their families. Faced with such hardship, many drivers have been forced into bankruptcy and have lost their homes as well as their trucks—their primary means of livelihood. Consequently, port drivers and their families are forced to rely on public assistance to survive. Their plight is directly caused by the multi-billion dollar cartel that has flourished at the expense of hard working men and women. This is bad policy and must be stopped.

2. The Ocean Carriers' Antitrust Exemption Suppresses Competition In The Trucking Industry

Under the Shipping Act of 1916, Congress allowed ocean carriers to enter into conference agreements (with other ocean carriers) to establish shipping rates, pooling arrangements, and trade route allocations. In the 1970s, a number of United States ocean carriers were prosecuted by the Department of Justice for exceeding the scope of their antitrust exemption. In response, Congress essentially rewrote the 1916 Act to broaden the antitrust exemption. Under the Shipping Act of 1984, Congress eliminated the Federal Maritime Commission's ("FMC") oversight of the rate-setting agreements established by the ocean carrier conferences. In addition, Congress broadened the exemption to permit conferences to establish intermodal "through rates" incorporating rail, truck, and ocean legs of intermodal transportation.

In 1998, Congress passed the Ocean Shipping Reform Act of 1998 ("OSRA"), with the hope of introducing a more competitive relationship among ocean carriers. Under OSRA, carriers are permitted to participate in voluntary discussion groups to discuss and collectively establish rate guidelines, including inland rates carriers will charge their customers. In addition, OSRA expressly does not prohibit discussion or agreement among ocean carriers regarding "the charge to the public by a common carrier for the nonocean portion of through transportation." [1] Thus, ocean carriers may discuss or enter into agreements regarding the rates they will charge shippers for inland transport and may set "joint through rate[s] by a conference, joint venture, or an association of ocean common carriers." [2]

The antitrust immunity provided by both the Shipping Act of 1984 and perpetuated by OSRA allows ocean carriers to dictate non-sustainable rates in the trucking industry. Through these agreements and discussion groups, ocean carriers collectively establish through rates, which include the aggregate cost of moving a con-

[1] 46 U.S.C. § 1702(11) and § 1702(12). We understand that certain ocean carriers have enterred into an agreement under which they "discuss, evaluate and reach agreement . . . [regarding] matters pertaining to the interchange of carrier equipment . . . for shippers and consignees." Ocean Carrier Equipment Management Association, FMC No. 202–011284–048, Art. 2. Under its terms, certain carriers agree that they are not authorized to "negotiate, agree upon, or jointly contract for freight rates or compensation to be paid by the parties to motor carriers and/or port truck drivers." *See id.* at Art. 5.8. Although the language in this agreement is a step in the right direction, it falls well short of protecting against rate setting for inland transportation. First, it is not binding on all ocean carriers. Second, even though the signatory carriers may agree not to set trucking rates, they are permitted to discuss information (including costs) "related to any aspect of inland transport." *Id.* at Art. 5.9. In addition, under this agreement, carriers are permitted to discuss charges for insurance, terminal handling, destination delivery, detention, and many other charges, all of which are used to establish through rate. Thus, albeit indirectly, a ceiling rate is placed on the amount an ocean carrier will pay a motor carrier for the cost of the inland move. Finally, the language of the Act does not expressly prohibit discussion among carriers of the "charge to the public by a common carrier for the non-ocean portion of through transportation." See 46 U.S.C. 1706(b)(2). Accordingly, under current law, carriers are permitted to discuss such issues.

[2] 46 U.S.C. § 1709(c)(4).

tainer from its port of origin to its final destination. Thus, the inland transportation charge—the charge for moving a container from a port to a customer's dock or other destination—is embedded in the established rate.

Based on these rates, ocean carriers negotiate individual and confidential service contracts with shippers. These rates generally include both the ocean voyage and the transport of the container from the harbor to an inland point. The ocean carriers then dictate set rates to trucking companies to provide the inland transport segment of the move. According to the trucking companies, ocean carriers try to use port trucking rates to "recoup" the losses they encountered as a result of underpricing the cost of the ocean voyage. To do so, the ocean carriers dictate rates to the trucking companies that are prohibitively low in order to reduce the ocean carriers' overall cost of transport.

Since the rate negotiated between the ocean carrier and shipper already has been established, the trucking company is forced to either accept the proposed rate or forego the work and lose business. As the latter is not a viable business option, trucking companies are left to provide service at a rate that barely covers their costs. After the trucking company covers its costs, the port drivers are left to work for substandard wages with no health or retirement benefits.

At first blush, one could think this market a competitive one. After all, this collective behavior is what keeps trucking prices low. The problem, however, is that the forces driving these prices are artificial. Neither supply nor demand influences these rates, nor does the cost of the service. As a result, port trucking companies are unable to compete effectively with one another or to improve their own operations when they are operating below cost. In the long run, the quality of the service for the customer is compromised. Most importantly, however, these conditions place the public at risk as veteran drivers leave the industry and are replaced with less skilled workers, who generally operate run-down trucks and are forced to pull unroadworthy chassis. At times, port truck drivers are pulling over 80,000 pounds of equipment and freight with vehicles that are at best marginally roadworthy and at worst, grossly unsafe. As a result, both they and the drivers with whom they share the road are at great danger.

In addition, these practices foreclose the possibility of any competitive movement in inland transportation rates. When ocean carriers increase their rates, no increase is passed along to the trucking companies or port drivers. For example, in May 1999, ocean carriers collectively implemented $400 to $900 (per container) shipping rate increases. Notably, neither trucking companies nor port drivers enjoyed the "trickle down" effect of that increase. Similarly, in March 2002, the Trans-Atlantic Conference Agreement implemented a $120 to $150 shipping rate increase (per container) for its eastbound trade lanes. Again, no rate increase was passed on to the trucking companies or port drivers. To the contrary, many port trucking companies on the East and West coasts recently have received notices from ocean carriers announcing a rate reduction for inland transport. One ocean carrier, Evergreen America Corp., informed its trucking company vendors that it would be reducing its inland transport rates by 5% effective April 15. These unilateral decreases show that it is the ocean carriers, not free market forces, that control inland transport rates. And because carriers have no incentive to increase those rates (to the contrary, low inland transport rates help carriers recoup losses from underpricing the ocean voyage), they will continue to set prohibitively low rates for inland transport.

Simply put, ocean carriers' antitrust immunity gives carriers the ability to establish through rates that are so low that the cost of inland transport is essentially treated as a pass-through. Meaningful competition in the trucking industry is eliminated because ocean carriers, rather than free market forces, prescribe inland trucking rates. Consequently, trucking companies are forced to provide inland transport services at rates that barely cover their costs and are left with little to pay port drivers.

3. The Rates Established By Conferences and Discussion Groups Cause Port Drivers to Endure Substandard Working Conditions and Earn Poverty Level Wages

The low inland transport rates dictated by the ocean carriers encourage trucking companies to squeeze every possible penny and cut every corner in dealing with port drivers. This dynamic, initially triggered by the ocean carriers' conference agreements, and perpetuated under voluntary discussion agreements, results in abusive conditions for port drivers and questionable, from a legal standpoint, practices on the part of trucking companies, ocean carriers, terminal operators, and shippers. For example, the following practices have become the norm in the container hauling industry:

- Port drivers are forced to spend an average of "3 hours per day" or 15 hours per week in ports, all unpaid, waiting in various lines to pick up chassis and containers.
- Port drivers are forced to choose between hauling unsafe chassis, which are owned by the ocean carriers, or taking their place at the end of a new line to wait while the maintenance and repair shop makes the chassis barely road-worthy.
- Port drivers are forced to choose between hauling overweight containers or receiving no work as a result of their refusal.
- Port drivers are forced to haul improperly labeled containers that often contain hazardous materials. In addition, port drivers sometimes are forced to clean out these containers without protective gear, proper training, and appropriate means of disposal, thus placing themselves and the public at risk.
- Port drivers are forced to purchase insurance from the trucking company or the trucking company's designated company. Trucking companies charge drivers exorbitant administrative fees for this service yet routinely fail to provide a copy of the policy nor an accounting of the premium payments.
- Trucking companies often withhold fuel surcharges they receive from customers rather than passing them onto the drivers who actually pay for the fuel.
- If a port driver complains about these conditions, he or she is likely to suffer some retaliation from the trucking company or ocean carrier, either by being denied future work or simply having their lease terminated with the trucking company.

Unfortunately, these practices have become standard in the port trucking industry. They are the direct result of the ocean carriers setting substandard inland transportation rates as permitted by the antitrust exemption perpetuated by OSRA. Because the ocean carriers set such a low ceiling for inland transport, trucking companies are forced to accept unreasonably low rates from both the carriers and the shippers. As a result, the trucking companies have done everything possible to recoup their losses from port drivers.

4. The Ocean Carriers' Antitrust Exemption Should Be Eliminated Because Its Original Purposes Are No Longer Relevant and the International Community Demands It

Congress granted ocean carriers antitrust immunity to place American ocean carriers on an even keel with their foreign competitors. Congress also provided this exemption based on the belief that in return for making the enormous capital investment in vessels and equipment, United States ship owners would earn a secure return on their investment and, in turn, develop new operations to build United States foreign trade.

These reasons, which were sound and rational at the time, are no longer valid. First, there is virtually no United States-owned fleet. In the last few years, ocean carriers owned and based in the United States have disappeared. Sea-Land has been sold to Maersk, a wholly owned subsidiary of Denmark's A.P. Moller. Crowley Maritime's South American services were sold to Germany's Hamburg-Sud, and American President Lines has been sold to Singapore's Neptune Orient Lines. Thus, protecting an American industry can no longer be used as a basis to support antitrust immunity. Second, the rationale of protecting ocean carriers' capital investment in vessels and equipment so they may preserve another domestic industry is no longer applicable. It would be one thing if the United States ship building industry was flourishing because these foreign conglomerates were building their new ships in the United States. That, however, is not the case.

Ocean carriers argue that without this exemption, the efficiency of the movement of freight will be compromised. Specifically, they are concerned that carriers will not be able to coordinate with other carriers to meet their capacity needs. At present, carriers often assist one another by sharing freight when an ocean liner is about to set sail below capacity. This concern however is unfounded. First, if structured appropriately, carriers still could enter into joint ventures or partnerships that would enable them to maximize their capacity. Second, even if that proved unworkable, nothing in this legislation would prohibit carriers from using third party brokers to assist them in coordinating their capacity needs. Similar arrangements are commonplace in the trucking industry. Accordingly, this legislation in no way threatens the ability of ocean carriers to move freight efficiently.

Moreover, the international community has recognized that ocean carriers no longer need, nor should they enjoy, the benefits of antitrust immunity. In the Spring of 2001, the Organization for Economic Cooperation and Development ("OECD")[3] issued a report—for "discussion purposes"—which recommended that countries "reviewing the application of competition policy in the liner shipping sector should remove anti-trust exemptions for common pricing and rate discussions."[4] The OECD explained that "[o]ne can reasonably expect that removing anti-trust exemptions for price-fixing and rate discussion, insofar as they contribute to more competition in the liner industry, would lead to an acceleration of current trends relating to service quality, decreasing rates, and increasing industry concentration."[5] The OECD also reported that it did not find "convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers and recommends that limited antitrust exemptions not be allowed to cover price-fixing and rate discussions."[6]

Based upon its considered deliberations, in April 2002, the OECD issued its Final Report calling for the elimination of ocean carriers' antitrust immunity. The OECD concluded that "anti-trust exemptions for conference price-fixing no longer serve their stated purpose (if they ever did) and are no longer relevant."[7] Further, the OECD stated, with regard to voluntary discussion groups, that the "ability for competitors to discuss sensitive market information regarding rates and to suggest pricing guidelines potentially serves to distort the market pricing mechanism, despite assurance from carriers to the contrary."[8] Finally, the OECD noted that while many countries "at first, supported the principle of rate-fixing within conferences" they have since "increasingly sought to reduce the power of liner conferences and provide shippers with countervailing powers."[9]

Based in part on OECD's recommendations, the European Union recently announced that it has launched an extensive review of its own antitrust exemption for ocean carriers. In addition, the European Union recently prohibited ocean carriers from jointly setting inland transport rates under the European Union's antitrust laws.[10] The European Commission held, and a European court affirmed, that the members of the conference had infringed upon their ocean carrier antitrust exemption by "agreeing [on] prices for inland transport services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the Far East."[11]

The ocean carriers' argued that the establishment of inland rates among the conference members' in-house or contracted trucking companies produced no appreciable effect on trade between Member States of the European Union.[12] The court rejected this argument and found that although ocean carriers were establishing inland rates for only some portion of port trucking providers, the practice produced an anti-competitive distortion of the inland transport market. As in Europe, ocean carriers in the United States dictate the inland rates for the majority, if not all, of port trucking providers. As a result, the market for inland transportation services is distorted because it is dictated by the ocean carriers, rather than by the natural forces of supply and demand. The European Union now prohibits ocean carriers from establishing rates for the inland transportation segment of intermodal freight. Congress should follow this important decision and eliminate antitrust immunity for ocean carriers and allow inland transport rates to be determined by a free market.

In conclusion, by allowing ocean carriers to continue to collectively set rates, even through voluntary discussion groups, competition in the inland transportation segment will remain suppressed, and port drivers will suffer the results. Mr. Chairman, in 2000, critics of Mr. Hyde's bill argued that we should wait two more years and give OSRA a chance to work before stripping the ocean carriers of their antitrust immunity. In 2000, we argued against waiting because we feared that, in that time, too many American port drivers would lose their trucks, their homes, and

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[3] The OECD represents 30 member countries that all share a commitment to democratic governance and a market economy. Principally, the OECD conducts research and issues reports, statistics, and publications on trade, education, and science and development.

[4] Organization for Economic Co-Operation and Development, Draft Liner Shipping Competition Policy Report, dated November 6, 2001, ("OECD Draft Report") at 72.

[5] *Id.*

[6] OECD Draft Report at 73.

[7] Organization for Economic Co-Operation and Development, (Final) Liner Shipping Competition Policy Report, dated April 16, 2002, ("OECD Final Report") at 77.

[8] OECD Final Report at 78.

[9] OECD Final Report at 74.

[10] *In Case T–96/95*, Judgment of the Court of First Instance (Third Chamber), ¶ 12. Inland transport includes "inland transport to the port, and inland transport from the port of destination to the place of final destination." ¶ 15.

[11] *Id.* at ¶ 23.

[12] *Id.* at ¶ 83.

their livelihoods. The decision to wait, in hope for increased competition among ocean carriers, only has brought 50,000 port drivers closer to poverty and that many families closer to despair. Our message is a simple one. We asked you then, and we ask you again today, to end the systematic exploitation of port drivers by foreign-owned ocean carriers.

Mr. Chairman, thank you again for the opportunity to address this important issue. I truly hope that Congress will take action to create a fair and sustainable market place for the port trucking industry. Thank you.

Chairman SENSENBRENNER. Thank you, Mr. Hoffa.

Mr. Coleman.

STATEMENT OF ROBERT COLEMAN, CHAIRMAN, PACIFIC COAST COUNCIL OF CUSTOMS BROKERS AND FREIGHT FORWARDERS ASSOCIATION

Mr. COLEMAN. Thank you, Mr. Chairman.

My name is Robert Coleman. I am chairman of the Pacific Coast Council of Customs Brokers and Freight Forwarders Association. This is an organization that represents people in the business of providing international trade services to companies who manufacture products for export and who grow agricultural products for export. We also represent importers who import component parts. In addition, I am speaking on behalf of the National Customs Brokers Association of America and the Agricultural Ocean Transportation Coalition.

We are all small businesses providing international trade services to American manufacturers and American importers. We generally represent small- and medium-sized businesses who manufacture products, who grow products, and importers who bring in component parts and finished products. These businesses that we represent are the backbone of our U.S. economy. They pay taxes, they provide payrolls, they provide employment in every one of your districts.

Giant companies rise and fall, as we have all seen in the past few months. It's the small- and medium-sized business and entrepreneur who provides and helps maintain our economic stability.

This is not a case—as Mr. Hoffa alluded to, this is not a case of a giant U.S. company versus a small U.S. company who simply can't be competitive in the marketplace. This is the case of foreign and, in many cases, State-owned cartels who manipulate pricing and capacity in regards to ocean transportation. In effect, they control my customer's ability to sell his product, his U.S.-made product, into the foreign marketplace.

It also affects the U.S. marketplace, because most things today tend to be imported. And when you and I go to the cash register, the cost of ocean transportation has a very, very large role in the price that we're paying when we purchase products.

I think that my testimony has been submitted, but I wanted to cover just a couple of new developments that have taken place since I testified 2 years ago before Chairman Hyde then.

It's important to note that Congress is not the only one looking at this issue. You alluded to the OECD, who just issued a report urging member countries to review antitrust immunity laws. The European Community has continued to limit the exemption of antitrust carriers serving Europe. Ocean steamship carriers can no longer collectively set rates for European inland cargo movements.

We've had recent cases where carriers have once again abused the antitrust immunity for discriminatory purposes. The Transpacific Stabilization Agreement is a cooperative working agreement among 14 ocean carriers serving inbound transpacific trade, which incidentally covers 80 percent of the capacity in the eastbound trades. These carriers are protected by antitrust immunity.

They have recently assessed nonvessel operating common carriers—which in layman's terms are simply cargo consolidators, which is what we do. We represent small businesses who do not have the wherewithal to generate large container loads. And so we provide that service to them, and then we deal with the steamship lines.

They have added surcharges of more than $300 a container over a direct cargo shipper, which is a discriminatory practice against every one of my clients. The National Customs Brokers and Freight Forwarders Association have filed a formal petition with the Federal Maritime Commission to look into this policy.

This spring is an example. We encountered a threat via the Westbound Transpacific Stabilization Agreement specific to refrigerated containers. There was a scheme concocted that would basically penalize a carrier $1,000 per container if they released any more refrigerated containers in 2002 than they did in 2001. This has a devastating effect on any agricultural shipper.

I think that we just have to remember that transportation is a huge component of the landed cost of U.S. products, both in the United States and anything that's sold abroad. We need to also recall that antitrust immunity has done nothing to protect the U.S.-flag merchant marine. Antitrust immunity, which has existed since 1916, has declined and, in the past year, has disappeared completely.

The people who are testifying before you on behalf of former U.S. companies are now employees of Dutch and Singapore companies, which together with a Canadian company now own what is left of the U.S. container fleet. Antitrust immunity didn't save these companies.

Because of that, we support your act, sir.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF ROBERT COLEMAN

PACIFIC COAST COUNCIL OF CUSTOMS BROKERS & FREIGHT FORWARDERS ASSN.

ROBERT COLEMAN, CHAIRMAN

BEFORE THE
JUDICIARY COMMITTEE, U.S. HOUSE OF REPRESENTATIVES

HR 1253, FAIR MARKET ANTITRUST IMMUNITY REFORM (FAIR) ACT OF 2001

JUNE 5, 2002

Good morning, my name is Robert Coleman, President of Total Logistics Resource, and speaking as President of the Pacific Coast Council of Customs Brokers & Freight Forwarders Association. The PCC is the organization that represents the independent customs brokers, freight forwarders and NVOCC's along the West coast. We are comprised of five local associations: San Diego, Southern California, Northern California, Columbia River and Washington State. In total, we represent 8,000 individuals engaged in facilitating international trade along the nation's largest trade gateway.

I am also speaking today on behalf of the National Customs Brokers & Forwarders Association of America and the New York/New Jersey Foreign Freight Forwarders and Brokers Association. My biography and statement that neither my company nor these organizations received federal grants, contracts, or subcontracts, is attached to this statement. I am pleased to appear before this Committee again, for the first time under your Chairmanship, to endorse your legislation which would level the playing field, and help assist US manufacturers and farmers be competitive in the global marketplace, by eliminating ocean carrier antitrust immunity. This is not just theoretical. Your bill would have measurable benefits.

The global and US economy is weak, and the US dollar remains strong relative to foreign currencies; thus demand for US exports remains weak, and American consumer demand has not yet recovered. Further, the ability of US industry/agriculture to sell into foreign markets is severely constrained by the high value of the US dollar, making it difficult for US exporters to offer a competitive landed cost. To the extent that ocean transportation is a very significant component of the landed cost, it is incredibly important that US ocean transportation services be as competitive as possible. I'm not just talking about the price of those services, but their predictability and stability. We believe that HR 1251 if enacted, would go far to assure that ocean transportation services serve the best interest of the overall US economy.

NEW DEVELOPMENTS

Mr. Chairman, there are a number of developments which have occurred since the previous hearing on this legislation.

First, the Organization for Economic Cooperation and Development (OECD) issued a report, just this spring, which urges member countries to review the ocean carrier antitrust laws and seriously questions their value, specifically making the recommendation that the antitrust immunity be lifted.

Second, the European Community has continued to limit the exemption from antitrust laws for ocean carriers serving Europe. Ocean carriers can no longer collectively set rates for European inland cargo movements. In the past, one of the arguments for maintaining ocean carrier antitrust immunity here in the US was that we wanted to assure that our laws were compatible with those of our trading partners. Well, it appears that our trading partners are moving forward, without us, to protect their own manufacturing and agriculture industries and their consumers, from the collective ocean carrier pricing.

Third, the carrier's have once again abused the antitrust immunity for discriminatory purposes. The Transpacific Stabilization Agreement is a cooperative working agreement among 14 ocean carriers serving the inbound transpacific trades covering in excess of 80% of the capacity in the east bound trade, which is America's primary import trade lane. These carriers are protected by the antitrust immunity. Under cover of that protection, they have determined to arbitrarily discriminate in their service contract agreements between cargo owners and NVOCCs. They have done this by assessing NVOCCs two surcharges totaling more than $300 a container while allowing cargo owners to sign similar service contracts without these surcharges. Some NVOCCs ship far higher volumes of containers than the cargo owners but they are still being assessed the two surcharges.

The National Customs Brokers and Freight Forwarders Association and International Association of NVOCCs, Inc. have formally petitioned the Federal Maritime Commission to investigate and take action against this collusive activity.

Fourth, we have seen here in this country what I would frankly consider a really poorly conceived scheme which demonstrates why the injuries to US industry and agriculture which collective carrier actions are contrary making can impose. Simply put, while this country is trying to work its way out of a recession, largely by producing and exporting more products, the ocean carriers developed a scheme which would punish any carrier which increased the amount of US refrigerated exports it would carry.

This spring we encountered an example of the threat to dependability of US ocean transportation services posed by collective activities of ocean carriers. The Westbound Transpacific Stabilization Agreement proposed to manipulate the availability of containers carrying refrigerated products to foreign markets. The export of refrigerated products such as beef, grapes and tree fruit, processed foods such as frozen french fries, is critical to sustaining our economy and bringing us out of the current recession. The ocean carriers which control most of the container space for US shipments destined for Asian markets formulated a scheme to reduce growth in export capacity. Specifically, carriers which had invested in new equipment to more efficiently carry US exports would be penalized in the amount of $1,000 per container for every container they carried in 2002 above the containers carried in 2001. Carriers which reduced their carriage of refrigerated exports would be financially rewarded. I know this sounds amazing, but its true. The WTSA's proposal was in fact submitted to the Federal Maritime Commission and I ask that it be included in the record of this hearing.

If we are to bring this country out of recession, we need to do it through international trade and by exporting MORE. I thought that in the current debate over Trade Promotion Authority, everybody, including those who voted against TPA believed that the US industry and agriculture should be able to export and sell MORE US products overseas. How does penalizing a carrier which invests in new equipment so that it can more effectively carry more US exports, serve the interests of this country? This is the kind of collective manipulation of the marketplace that we find so contrary to this country's interest. This collective carrier activity will not be possible once your legislation is enacted.

The Committee should recognize that I am representing organizations comprised overwhelmingly of small businesses. Our companies are almost all based here in the U.S. and owned by U.S. citizens. Our business is the facilitation of international trade, particularly for the U.S. importers and exporters who are themselves small businesses and do not have the volume or wherewithal to employ their own in-house export or import departments. We as freight forwarders serve essentially as the export department for most U.S. small business exporters. Transportation is a huge component of the landed cost of U.S. products sold abroad. We are the ones who negotiate on behalf of U.S. exporters for transportation arrangements which will allow them to sell competitively abroad. If we as forwarders and NVO's are not able to successfully negotiate or arrange international transportation, then many U.S. exporters are locked out of foreign markets.

CARRIERS USE ANTITRUST IMMUNITY TO INJURE U.S. SMALL BUSINESS

We should emphasize that we see no problem with continuing the antitrust immunity accorded to port authorities and marine terminal operators. We appreciate the fact that your legislation distinguishes between port authorities and ocean carriers and would maintain the antitrust immunity for port authorities.

In contrast, antitrust immunity for ocean carriers is simply bad for the economy of the United States. We know, because we are engaged in facilitating virtually all import and export transactions to and from this country. I am not speaking about a hypothetical problem. There are many many instances which demonstrate that the ocean carriers can and do use their antitrust immunity in a manner which is detrimental to the U.S. economy, and to the thousands of small businesses I am representing here today.

Collective Carrier Actions To Deny Freight Forwarding Services To Small U.S. Exporters

For example, utilizing their antitrust immunity, the ocean carriers during the early 1980's agreed upon and set rates of compensation for ocean freight forwarders at levels sufficiently low as to literally drive some companies out of the export business. The carriers' presumption, I take it, was that by cutting out the freight forwarder, the exporter would deal directly with the steamship line. The difficulty is that the small U.S. exporter does not have the capability of learning about ocean transportation, of determining the optimal routing, of deciding whether cargo should go by air or ocean, whether it should go by break bulk or containerized vessel, who should make arrangements for trucking and warehousing, how to handle documentation, and how to have the product delivered to the customer on the other end. And the small shipper who calls the conference carrier, may or may get a return phone call, particularly if the customer only has one or two containers to ship.

But customer service is not the first reason ocean carriers form conferences; the reason is clearly to increase revenue. By agreeing to reduce the compensation to the freight forwarder, there was no consideration of the impact on the U.S. exporter, particularly the small companies. In fact, it took an Act of Congress, vigorously opposed by the ocean carriers, to prevent carriers from collectively setting forwarder compensation rates below unreasonable levels. Keep in mind, that at no time did Congress say that an ocean carrier was required to pay a certain amount of compensation to a freight forwarder, Congress only said that the ocean carriers could not act collectively to set rates below reasonable levels. Even so, carriers fought hard against this provision.

Collective Carrier Actions To Discriminate Against The Small U.S. Exporter/Importer

The ocean carriers have used their antitrust immunities to injure American business in ways that are quite subtle. For example, NVOCCs have experienced blatant discrimination, which hurt not only our own businesses, but the relatively smaller U.S. importers that we assist. NVOCCs acquire cargo space from the carriers and then resell portions to the small importer or exporter. These importers and exporters come to us, because the big steamship lines are not interested in selling 1/4 or even 1/8 of a container load. So we do that. If we did not, these small importers and exporters simply could not engage in international trade.

Relatively recently, the carriers, even though required by law to treat all shippers equally and not to discriminate, imposed an unwritten policy charging NVOCCs $250 per container more than if they sold the container space to the cargo owner. In other words, a large importer, say a national discount chain, which imports numbers of container loads, could negotiate a low per-container price directly with the steamship lines. But the small bicycle shop which only imports enough bicycles to fill half a container requires the service of an NVOCC who, in many cases, offers the ocean carriers cargo volumes matching - - or exceeding - - those of cargo owners. In this way, both the NVOCC and the small importer were penalized, discriminated against. Who pays for this? The small U.S. business who might lose the ability to import or export profitably, and her customer, the U.S. consumer, pays more. Not every bicycle is sold at chain stores, there are independent bike shops. They are small businesses. The many challenges they face , should not be, in my view, include discriminatory treatment by foreign ocean carriers who are allowed to collectively discriminate against them because Congress has given them immunity from U.S. antitrust law.

Carriers Collectively Police And Restrict The Rates Paid By Small Shippers

As NVOCCs, we serve the small U.S. exporter and importer. We purchase transportation from an ocean carrier and resell it to the small importer and exporter who does not have the volume or the negotiating clout to interest or attract the attention of the ocean carrier itself. Under the Ocean Shipping Reform Act of 1998, ocean carriers are allowed to negotiate confidential transportation contracts with their shippers customers, and that includes contracts with the NVOCCs. However, we the NVOCC are not allowed to keep the terms of transportation that we are providing to our customers (again generally the smaller importer and exporter) confidential. So while the big shipper can keep its terms confidential, the freight rates paid by small U.S. business are exposed. Once exposed, they become more easily policed by the carrier cartels. All businesses should benefit from confidentiality.

All Carrier Agreements Requiring Antitrust Immunity Injure U.S. Small Business

Let me note that the carriers do not like the term "cartel," so they use other terms such as "conferences" or "talking agreements" or "stabilization agreements." In fact the objective and impact of these arrangements is always the same: to share pricing information, agreeing on what services will be offered, ports served, commodities carried. But, they do not require antitrust immunity.

We have found that when carriers do not participate in these collective activities, they are much more willing to work with the small exporter and importer, and with the freight forwarder and NVOCC. But when they gather together in these collective arrangements, they become much more adverse to the interests of the small importer and exporter and to the freight forwarder and NVOCC who facilitates their cargo movements. In our view, all carriers should be "independent" just as all our NVOCCs and freight forwarders are independent, just as every domestic and international airline and trucking company, and every U.S. business is today.

Carriers can and do engage in efficiency and enhancing agreements, such as space sharing, slot charters, vessel sharing. We encourage these arrangements. They do not require antitrust immunity. They can be organized much as joint ventures are organized by companies in every other sector of the economy, which must adhere to U.S. antitrust laws.

ANTITRUST IMMUNITY BENEFITS FOREIGN CARRIERS---SERVES NO U.S. INTEREST

It is devastating to recognize that we have given a complete exemption from U.S. antitrust laws to a handful of foreign companies who control virtually all of the U. S. waterborne import and export shipments. To be captive of foreign companies providing transportation services is one thing, but to grant them an exemption from the rules of competition which control all other components of the U.S. economy (except major league baseball) is quite another.

Antitrust immunity has done nothing to protect the U.S. flag merchant marine. Antitrust immunity has existed since 1916 and sine that time the U.S. ocean liner industry has declined and in the past year has disappeared entirely. The people who will be testifying before you today on behalf of two former U.S. companies, are now employees of Dutch and Singapore companies, which together with a Canadian company now own what is left of the so called U.S. container fleet. Antitrust immunity did not save their companies.

Nor has antitrust immunity, which allows the carriers to jointly set prices, produced any stability. In fact the carriers may even say today that some rates are at an all time low. If that is the case, where is the stability provided by antitrust immunity? We can point out that antitrust immunity has made ocean transportation services less dependable, less predictable and less stable. Even with antitrust immunity many ocean carriers have gone out of business, others have consolidated, and as I have said, there are no U.S. companies left. And the carrier conferences use their antitrust immunity to drive rates through the ceiling, as they have done just recently and in the U.S./South America trade by suddenly announcing a $1000 price increase for each container moving between the U.S. and South America.

In the future, as there are fewer companies left, their ability to act collusively, to jointly agree on transportation prices and services is made even easier. There are essentially no more (independent) carriers. Those independent carriers in the past were generally more favorably disposed to the small U.S. importer and exporter and to the NVOCC and freight forwarder who facilitates their shipments. But even those carriers are now part of these collective carrier groups.

Absent any benefits for U.S. carriers, there are simply no justifiable rationales for retaining antitrust immunity. Many of the arguments you will hear from carrier representatives today will be repeats of the same points made by carrier representatives in the trucking, rail, and aviation industries prior to their deregulation. Yet, each of those industries is far more vibrant, and serves their customers far better, now that they are exposed to the rigors of free market competition, than they were when protected by the dead hand of antitrust immunity. Like other capital intensive industries that survive--and thrive--in the free market, ocean shipping should be released from the failed economic dogmas of the last century.

Carriers Act Without Restriction--The TSA Experience

History has shown that the law which grants antitrust immunity to the steamship lines has not provided the FMC with the authority or resources to adequately oversee the steamship activity.

While the ink was not yet dry on Ocean Shipping Reform Act (OSRA) the carriers in the Pacific trades, under the TransPacific Stabilization Agreement, engaged in patently anti-competitive abuses and discriminations against smaller shippers and NVOCCs that would in any other industry have resulted in civil and perhaps criminal enforcement actions. Ignoring contracts and tariff obligations, those carriers collusively acted to force shippers and NVOCCs to pay substantially higher rates or face the reality of having their cargo languish on the loading docks in the various Pacific ports. Yet, at the end of its lengthy investigation of the matter, the FMC elected not to proceed against the TSA or the individual carriers nor to take any formal action, other than to levy a nominal $50,000 fine against the carriers for not having recorded what they were doing in their minutes. The result? This discriminatory activity against NVOCC's continues today.

As noted above, even as I speak, the TSA carriers are engaged in unfairly discriminatory actions against NVOCCs by imposing on them surcharges and rate increases that are not being imposed on cargo owners, some of whom ship even less volumes of cargo than the NVOCCs.

CONCLUSION

Theoretically, we can do very nice business by keeping our mouths shut and simply booking cargo at the rates set by the carrier cartels, and collect our compensation. But our interests are that of the U.S. small importer and exporter. And we have seen, first hand, that the ocean cartels do not care about the small U.S. exporter and importer; in fact they take every opportunity to put them at a competitive disadvantage, even driving them out of business. Our industry is interested in maximizing the import and export business opportunities of the U.S. small business importer and exporter. It is precisely because the ocean carriers using their antitrust immunity act in a manner which is adverse to the interests of U.S. exporters and importers, that we feel compelled to speak today and are united in support of HR 1253, the FAIR Act.

Chairman SENSENBRENNER. Thank you, Mr. Coleman.
Mr. Koch.

STATEMENT OF CHRISTOPHER KOCH, PRESIDENT AND CEO, WORLD SHIPPING COUNCIL

Mr. KOCH. Thank you, Mr. Chairman.

The Shipping Act we are discussing today just recently went through an exhaustive review up here on the Hill. Four years of congressional effort successfully produced the Ocean Shipping Reform Act, which just came into play in 1999. The bill was formed with the complete involvement and agreement of American shippers, the port industry, carriers, seagoing labor, longshore labor, and marine terminal operators.

That regulatory regime, administered by the Federal Maritime Commission, is working as Congress intended. The FMC's 2-year report on the act confirms that, and the marketplace confirms that.

The OSRA regime does have a limited antitrust exemption, but it is hardly blanket immunity, as our testimony points out. It is limited and is part of an entire regulatory system administered by the FMC. It is internationally understood and accepted. No nation in the world applies its national antitrust laws to international liner shipping.

It does not, as Mr. Hoffa said, provide antitrust immunity for carriers to set trucking rates. And it has been identified by the OECD as a model worthy of emulation around the world in a successful demonstration of how to get around the impasse over theoretical debates about the antitrust law's application to this industry.

More importantly, the Shipping Act has successfully produced exactly what you would want from this international transportation industry. There are no regulatory barriers to entry. There is a huge array of carriers and services from which to choose. There are no switching costs. There is intense price competition, which I'll come back to. There's ample capacity to handle all importers' and exporters' needs at any time of the year. There's high-quality service. There's an expert Government agency to deal with any problems. And there are regulatory policies that work internationally, are accepted, and result in no conflict of laws. And it's sufficiently stable, where carriers continue to invest in this business.

Let me come back to one of those characteristics, which is intense price competition. As our testimony shows, there can be no question that competition is fierce in this industry, that rates are at historic lows, and that lines are losing hundreds of millions, if not billions, of dollars this year.

Mr. Coleman has talked about the devastating effect on agricultural shippers, about the rates. The Department of Agriculture—and this is a Department of Agriculture report issued just a couple of months ago, and the Agriculture Department is not a historical supporter of the maritime industry—said that rates are lower now than they were in 2001 when they were perceived to be, "extraordinarily low," that they are "remarkable," and at times they are below variable cost.

Shippers are increasingly worried also about the viability of shipping lines, according to the Department of Agriculture. One head of a shippers' association recently said: If I were a shipping line, I would not accept some cargo. It's not commercial.

Mr. Chairman, there is no shortage of competition in this industry. There is no problem that H.R. 1253 would fix in the port industry. The carrier, seagoing labor, and longshore labor do not support undoing the Shipping Act. The bill would further destabilize an industry that needs to have confidence in what kind of regulatory environment it will be conducting its business in. That was the reason for OSRA, and OSRA is working.

Several of my colleagues on this panel today have criticized the Shipping Act. The Justice Department criticizes it, saying there is not adequate competition but provides not a single fact to buttress that argument. And they cannot identify any nation in the world that applies antitrust laws to this industry.

Regarding the Teamsters' issue, let me be clear again, ocean carriers do not have antitrust immunity under the Shipping Act to agree on the rates they pay truckers. Mr. Hoffa criticizes the carriers' limited antitrust immunity, ironically saying not that the system is insufficiently competitive but that it is too competitive and that carriers' antitrust immunity is resulting in carriers charging their customers too little, and as a result, the carriers are taking it out on the port drivers by trying to cut costs. The logic that antitrust immunity results in carriers charging U.S. importers and exporters too little is, at its very best, inconsistent with Justice's view and is plainly illogical.

Further, if H.R. 1253 were passed, it would do nothing to address Mr. Hoffa's fundamental concern except make it worse; H.R. 1253 would, amongst other things, destabilize an already highly competitive business, produce destructive competition, discourage investment, drive people out of business, and put more pressure on rates paid to truckers not less.

Furthermore, even if the bill were enacted, ocean carriers would still provide their customers with the through rates he talked about, that Mr. Hoffa said are too low, even if they don't have antitrust immunity, because that's what the customers demand of the ocean carriers.

The real difficulty that Teamsters have, which they testified to 2 years ago, is that U.S. labor and antitrust laws prevent the organization of port truck drivers, who are predominantly owner-operators rather than employees; H.R. 1253 doesn't address that issue.

In conclusion, today the Shipping Act is working. Ocean carriers and shippers under OSRA can now operate under individual confidential service contracts and do so. The system is intensely competitive. It does allow carriers to get together and have operating agreements amongst themselves, which have lowered costs, improved efficiency and frequency of service, and provide for more efficient utilization of capacity.

Those agreements also do allow limited rate-stabilization discussions to try to help stabilize an industry plagued by overcapacity and ruinous competition. It is internationally accepted, and it provides all the desired characteristics I mentioned earlier.

We appreciate the Committee's interest in the industry, Mr. Chairman. And we hope that a close analysis of the facts about the industry and the Shipping Act will show the Committee that no further legislation is needed in this area.

[The prepared statement of Mr. Koch follows:]

Prepared Statement of Christopher Koch

SUMMARY AND OUTLINE OF WORLD SHIPPING COUNCIL TESTIMONY

I. INTRODUCTION

Congress just recently concluded an intense four-year review and reform of the Shipping Act, which regulates international liner shipping. The Ocean Shipping Reform Act, which became effective in 1999, was developed by Congress with the support of shippers, ports, seagoing and shoreside maritime labor and carriers, and it is working well. H.R. 1253 would repeal that successful compromise and is not supported by America's ports, maritime labor or carriers.

II. CURRENT INTERNATIONAL LINER SHIPPING REGULATION

No nation applies its national antitrust laws to international liner shipping, nor is there any need to do so (pp. 4–5). OSRA has fostered those industry characteristics that any effective economic regulatory system, however structured, should provide American commerce. Under the Shipping Act, as amended by OSRA, there are:

- No regulatory barriers to entry, and a wide array of carriers and competitive services from which to choose (pp. 6–9)
- Intense price competition, and commercial freedom for carriers and shippers to agree on mutually beneficial business arrangements (pp.6, 9–14)
- Ample capacity to handle normal trade flows, peak season or surge demand, and the long-term growth of demand (pp.14–17)
- High-quality service, including reliable ocean and intermodal transportation, and value-added logistics services (p. 18)
- Technological and organizational innovation, and adequate investment in the continuous improvement of transportation infrastructure (p. 17)
- An expert government agency, the Federal Maritime Commission, to handle any complaints or problems (pp 18–19)
- Regulatory policies that are internationally accepted and understood, so as to minimize international conflict of laws (pp 19–20)
- A sufficiently stable regulatory environment to encourage the high levels of capital investment required to meet the future needs of America's trade (p.20).

III. THE VALUE AND IMPACT OF THE INDUSTRY'S LIMITED AND REGULATED ANTITRUST IMMUNITY

The regulatory system for this international transportation business must be internationally accepted, and international comity must be respected. The Shipping Act does that (p. 21). The existing regime also addresses the unique structural features of the industry which include (p. 22–25):

- High fixed costs to operate a regularly scheduled service
- Relatively inelastic demand for services (meaning that rate reductions very rarely can increase the market demand for services)
- Significant mismatches in demand arising from chronic bi-directional trade imbalances (import and export volumes often differ widely) and significant fluctuations in demand
- Inelastic supply (carriers must maintain supply at consistent levels sufficient to meet peak demand, yet are very limited in their ability to rapidly "flex" supply because of their large fixed sunk costs and the nature of liner shipping which requires regular service and strings of vessels that call numerous different ports in a single voyage)
- "Lumpy" supply (capacity must be added or withdrawn in large units—namely entire strings of vessels, unlike a railroad which can add or subtract cars from a train based on variation in demand)
- No regulatory barriers to new entry or capacity expansion
- Distortive government subsidization of shipping and shipbuilding.

The Shipping Act does not provide carriers with unrestricted antitrust immunity, but a carefully constructed regulatory system with ample safeguards and protections (pp. 25–28). Under this system, carriers may operate under agreements filed and overseen by the Federal Maritime Commission that enable and promote operational cooperation and efficiency, and market discussions and diminished market volatility (pp. 27–31).

IV. CONSEQUENCES OF REPEALING THE SHIPPING ACT'S SUCCESSFUL REGULATORY SYSTEM

H.R. 1253 proposes radical surgery on a regulatory system that Congress just reformed and that is working well. The Antitrust Division of the Justice Department has theoretical arguments for the benefits of antitrust law and has a preference for it being the agency to regulate the industry, rather that the Federal Maritime Commission; but, it has no facts showing defects in the results of the present system. The rationale for antitrust law—namely low prices, innovative service, and efficient operations—is completely fulfilled under the Shipping Act. Prices are so low that carriers are losing hundreds of millions of dollars. Service innovations and improvements are numerous and described in this statement, but continued improvement will require lines to make profits that can be reinvested. Operational efficiency and cost cutting have been a continuous quest for the industry; in fact, the industry uses its immunity extensively in efficiency enhancing operational agreements. It is noteworthy that one consequence of the carriers' constant, intense pursuit for efficiency and lower costs—lower trucking rates—is the basis of the Teamsters' erroneous complaint about the Act (p. 14). The Shipping Act is a proven, internationally accepted regulatory regime. There is no reason to believe that H.R.1253 would produce a superior system; in fact, if enacted, it would (pp. 32–36):

- Cause destructive competition, industry concentration, and fewer competitors
- Discourage investment and disrupt a reliable, efficient, and smoothly operating international transportation system, and
- Create a discordant, international regulatory dilemma.

STATEMENT OF THE WORLD SHIPPING COUNCIL

The World Shipping Council thanks the Members of the Committee for the opportunity to provide its views today on H.R. 1253, a bill to amend the Shipping Act of 1984, as amended.

I. INTRODUCTION

The World Shipping Council is a non-profit trade association of over forty international ocean carriers, established to address public policy issues of interest and importance to the international liner shipping industry. The Council's members include the leading ocean liner companies from around the world—carriers providing efficient, reliable, and low-cost ocean transportation for goods reaching billions of people. The members of the World Shipping Council are major participants in an industry that has invested over $150 billion in the vessels, equipment, and marine terminals that are in worldwide operation today. The industry generates over a million American jobs and over $38 billion of wages to American workers. The industry provides the knowledge and expertise that built, maintains, and continually expands a global transportation network that provides seamless door-to-door delivery service for almost any commodity moving in America's foreign commerce. The Council's member lines [1] include the full spectrum of carriers from large global lines to niche carriers, offering container, roll on-roll off, and car carrier service as well as a broad array of logistics services.

The existence of an efficient and innovative international shipping industry, operating under maritime regulations that enjoy broad international acceptance, is of critical importance to our member lines, to the international trading system as a whole, and to the American economy which benefits from the smooth flow of international commerce. Governments around the globe periodically undertake reviews of liner shipping regulatory policy. Those reviews, including those recently concluded by Australia, Canada, Japan, Korea and the United States, have all affirmed that limited antitrust immunity, subject to appropriate safeguards and regulatory

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[1] A list of the World Shipping Council's member companies is provided as Attachment A. Pursuant to the Rules of the House, the World Shipping Council states that it has received no federal grant or contract which is relevant to this testimony.

oversight, remains the most effective and widely accepted regulatory regime for international liner shipping. That remains the case.

In particular, the liner shipping industry worked closely with the Congress, American shippers, the U.S. public port community, and American maritime and shoreside labor to develop the broad consensus that led to Congress' passage of the Ocean Shipping Reform Act of 1998 ("OSRA"). OSRA was designed to achieve a dynamic balance—one that initiated important and far-reaching changes in the way liner shipping operates in U.S. international trades while preserving a stable, internationally accepted regulatory system. The agreement on which OSRA was based involved three foundational principles for reforming liner shipping regulation: (1) the ability of an ocean carrier and its customers to negotiate individual, confidential contracts of their choosing without a carrier conference or discussion agreement inhibiting the parties' ability to agree; (2) the removal of the former U.S. regulatory requirements of public disclosure of contracts' terms and "me too" requirements, which prevented carriers from tailoring contracts to particular shippers' needs; and (3) continued limited, antitrust immunity for ocean carriers regulated by the Federal Maritime Commission.

Unlike industries such as aviation, trucking, rail service, telecommunications and public utilities, which have been subject to governmental entry and pricing restrictions, or enjoy government-sanctioned monopoly status, the liner shipping industry has always been characterized by free entry and abundant price and service competition. Consequently, the savings and efficiencies that resulted from the elimination of governmental restrictions and protection in these other industries cannot be obtained by repealing the limited antitrust immunity that applies in liner shipping. Indeed, the forces of supply and demand dominate the economics of liner shipping, and, in conjunction with the present maritime regulatory regime, ensure that the inefficiencies that have existed in those other regulated industries are not present in liner shipping.

II. CURRENT INTERNATIONAL LINER SHIPPING REGULATION

No country applies its national antitrust laws to international liner shipping.

Nor is there any need to. There is no shortage of competition, innovation, efficiency or investment. There are no government or regulatory barriers to entry that need to be removed. There are no route regulations to remove. There are no rate regulations to remove. There are no government monopolies to break up. There are no restrictions on marketing to be removed. There are no nationality investment requirements. There are no bottlenecks or chokeholds that warrant regulation. There are no significant "switching costs" to address. There are no captive customers to protect.

In 1999, the Shipping Act's regulatory regime governing this industry underwent significant reform pursuant to the Ocean Shipping Reform Act (OSRA). That law took four years of Congressional effort to enact, and it achieved a hard-won, but broad, consensus among labor, port, shipper and carrier interests. That effort has been a success.

OSRA has fostered industry characteristics that any effective economic regulatory system, however structured, should provide American international trade. Specifically, in liner shipping today, one finds:

- No regulatory barriers to entry, and a wide array of carriers and competitive services from which to choose
- Intense price competition, and commercial freedom for carriers and shippers to agree on mutually beneficial business arrangements
- Ample capacity to handle normal trade flows, peak season or surge demand, and the long-term growth of demand
- High-quality service, including reliable ocean and intermodal transportation, and value-added logistics services
- Technological and organizational innovation, and adequate investment in the continuous improvement of transportation infrastructure
- An expert government agency, the Federal Maritime Commission, to handle any complaints or problems
- Regulatory policies that are internationally accepted and understood, so as to minimize international conflict of laws
- A sufficiently stable regulatory environment to encourage the high levels of capital investment required to meet the future needs of America's trade.

The existing liner shipping regulatory regime is remarkably successful and is providing American commerce with excellent choice, service and value. Today a VCR can be transported from Hong Kong to the West Coast of the United States for 70 cents; a bottle of beer can be transported from Europe to North America for 3 cents; a pair of athletic shoes can be moved from Asia to North America for 40 cents. As global trade has flourished, expanding faster than our domestic economy, the liner industry has consistently provided a reliable, efficient global transportation network to handle America's trade growth at lower per unit costs.

The efficiency of liner shipping has helped American exporters from every state develop and maintain markets around the world for a variety of commodities, ranging from paper and forest products, to pharmaceuticals, from fruits and vegetables to chemicals, from poultry and beef to cotton, and from machinery and automobile parts to frozen fish.

The industry has also provided American consumers and businesses with inexpensive access to a vast array of goods from around the world, including 75% of the apparel and 95% of the footwear worn in this country, food products and beverages from around the world, electronic goods and bicycles, furniture and household appliances, auto parts and tires, machinery and tools, marble and tile, computer equipment and copiers, flowers and kitchenware, coffee and beer, manufacturing components and supplies, and thousands of other goods. Last year, the liner shipping industry transported roughly $500 billion worth of American commerce, or $1.3 billion of goods per day, through U.S. ports. That represents roughly 4.8 million containers of export cargo, and 7.8 million containers of import cargo.

Although most Americans never stop to think about it, their homes are filled with an enormous array of products that liner shipping has transported from abroad at exceptionally competitive shipping rates. Last year, the cost of transporting all of these goods—all of America's oceanborne liner imports, including industrial and non-consumer goods—was only $133 per American household. That's an amazing bargain.

The benefits to American commerce of the existing regulatory regime are considerable.

1. No Regulatory Barriers to Entry and a Wide Array of Service Choices

Ocean carriers are able to offer international service without governmental restriction on entry. Compared to other modes of international transportation, such as aviation with its bilateral treaties and agreements that restrict air carriers as to where they can fly, how frequently, and how much capacity they can offer, liner shipping markets are impressively open and efficient. This freedom of market entry helps promote an extensive array of carrier services at competitive prices. New entrants and established incumbent carriers can expand and reconfigure their services as they believe the market warrants.

It is worth keeping in mind this comparison between the relative freedom of liner markets and the bilateral regimes and attendant restrictions of international aviation when considering what alternatives might result from a decision to repeal the industry's limited antitrust immunity. Atomistic competition among individual lines, with the most efficient carriers being the "winners", is neither the inevitable outcome of such a step, nor necessarily the most likely.

Free entry in liner shipping minimizes the risk that any carrier or group of carriers can dominate the market and impose above-market rates. Open trades help ensure that rates reflect the existing, and expected, market conditions of supply and demand. With no restrictions on new entrants or on the ability of incumbent carriers to adjust their capacity or service, as they deem appropriate, unmet demand for vessel space is at worst a rare and short-lived phenomenon at peak seasons.

Despite the continuing and rapid growth in demand for liner service, overcapacity is far more common in the industry than are space shortages.[2] Even in those rare instances where unforeseen economic circumstances result in a strong sellers' market, new entry and/or expansion by incumbent lines provides the additional capacity needed to ensure adequate service. For example, when the Asian export boom to the United States produced unexpectedly high demand for vessel space and equipment during the trans-Pacific trade's 1998 peak season, and demand that strained available vessel space, the dramatic entry by more than a half-dozen lines in 1999 eliminated the space shortage. Indeed, in 1999, there was an increase in capacity deployed in the Asia/North America route of more than 23 percent.[3] That strong capacity growth also reduced the upward pressure on rates. Furthermore, those new entrants have remained in the Asia/North America trade, and some lines that had

[2] See, for example, the supply, demand and capacity utilization data provided in the March 22, 2000 Mercer Management Study in "Hearing on the Free Market Antitrust Immunity Reform Act of 1999". Pages 17 through 20 of that study contain figures for the major U.S. trades.

[3] Drewry Container Market Quarterly, September 2000, p. 15.

virtually no presence in that trade prior to 1999 have announced plans to introduce enough new tonnage to make them leading carriers in the trade in but a few years.[4]

In spite of some industry consolidation, the liner industry is still far from concentrated. The shipping public has a wide array of carriers and variety of shipping services from which to choose. For example, only one carrier has a market share above 7.5 percent, and the top ten carriers combined account for only 57.5 percent of the total containerized cargo carried (exports and imports combined) in U.S. trades.

MARKET SHARE IN U.S. LINER TRADES (1st Quarter 2002)

Lines	TEUs carried Jan.–March 2002	Market Share	Combined Market Share
1.Maersk-Sealand	572,106	13.2%	13.2%
2. Evergreen	307,382	7.1%	20.3%
3. APL	280,932	6.5%	26.8%
4. Hanjin	264,420	6.1%	32.9%
5. Cosco	217,990	5.0%	37.9%
6.P&O Nedlloyd	186,405	4.3%	42.2%
7. Hyundai	171,274	3.9%	46.1%
8. OOCL	166,379	3.8%	49.9%
9. Yang Ming	164,828	3.8%	53.7%
10. MSC	164,382	3.8%	57.5%
All Lines (over 100)	4,340,611	100%	100%

(Source: JoC/PIERS)

In addition to the existing competition among ocean carriers, non-vessel-operating common carriers (NVOCCs) provide an additional element of price competition, and are gaining in market power. NVOCCs dominate the less-than-container-load business and are increasing their share of the full container load business. A recent FMC review of a random sample of service contracts showed that NVOCCs were parties to approximately 25 percent of the contracts filed with the Commission.[5] NVOCC's control roughly 30 to 40% of the cargo moved. NVOCCs directly compete against ocean carriers for the business of proprietary shippers, creating another source of competition in addition to the intense competition among shipping lines, by purchasing space from ocean carriers on a "wholesale" basis and reselling the space to shippers on a "retail" basis.

Another important factor in making the existing open system even more competitive are the minimal "switching costs" involved in a shipper's decision to move its business from one ocean carrier to another. Mercer Management, in its analysis of the industry, found that "100 percent of the shippers surveyed consider switching costs to be insignificant or zero" and that shippers "are ready to switch carriers

[4] For example, *Containerization International*'s November 2000 issue noted that the president of China Shipping Group has stated his intention of growing its container line, China Shipping Container Line, into one of the top five carriers in as many years. The *CI* article points out that CSCL had expanded it slot capacity 70 percent in the previous 12 months, and would likely double its fleet over the next two years. Today, CSCL ranks number 15 in total cargo carried in U.S. trades. Similarly, Sinotrans announced last week that it will launch its first string of containerships in the trans-Pacific beginning in late June. *Journal of Commerce*, May 28, 2002.

[5] FMC OSRA Impact Final Report, September 2001, p. 18.

without hesitation."[6] As a practical matter, a shipper can easily move its cargo to the carrier offering the combination of rates and service that best fits the shipper's current needs.

In short, the absence of regulatory barriers to entry, the large number of liner services available, and low switching costs, ensure an open trade in which shippers enjoy an abundance of competitive choices.

2. Market-Driven Price Competition and Freedom of Contract

Supply and demand play the determinative role in establishing liner shipping rates and promoting customer-responsive service. The evolution of traditional conferences into more flexible organizational forms in recent years, and the attendant dramatic increase in one-to-one contracting, have produced a more efficient and responsive negotiating process that results in business arrangements that are better tailored to the needs of individual shippers.

Past empirical studies of U.S. liner trades, even in the pre-OSRA environment, confirmed that market forces operate effectively in liner markets, producing competitive rates that are driven by supply and demand. An FMC study using quarterly rate data for the major commodities moving in eighteen U.S. trades between 1976 and 1988 found that fluctuations in the supply of and demand for liner shipping services were the basic cause of rate changes that occurred after implementation of the Shipping Act of 1984.[7]

A Federal Trade Commission staff report[8] produced by economists from the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission's Bureau of Economics, was a subsequent econometric study using the same FMC data set. That study found no statistically significant relationship between freight rates and the market share of the conference serving the route—demonstrating that conferences did not act as effective cartels. The authors further observed that "it is also possible that conferences provide some offsetting benefits, such as increased efficiency in providing a network of ocean transportation services."

Two other findings from the FTC staff report's analysis of U.S. trades are worthy of attention in light of current regulatory policy and industry practices.

- The level of freight rates is significantly lower on routes where conference members are free to negotiate directly with shippers.
- Increases in market concentration are associated with statistically significant, but economically small, increases in freight rates.

Today, as the FMC's two-year study on OSRA's impact makes clear, carriers and shippers enjoy full commercial freedom to negotiate freight rates and terms of service. According to the FMC's study, service contracting has more than doubled since OSRA took effect, with reports that 80 percent or more of the cargo moves under contracts. And 98 percent of the contracts in the FMC's sample study were individual, confidential contracts.

Thus, OSRA's contract reforms have eliminated just the sort of conference and regulatory control over members' ability to negotiate individual, confidential contracts that concerned the authors of the FTC study.

The other potential issue identified in the FTC study is that substantial market concentration, while currently not an issue in the industry, could increase freight rates. As discussed in Part IV of this testimony, if the Shipping Act's limited antitrust immunity were repealed, destructive competition and market instability would, among other things, lead to rapid industry concentration and higher costs for shippers.

Any review of shipping trade publications will show that the liner industry is constantly focused on supply and demand interactions, and the economic pressures of highly competitive rates.

An examination of the change in average freight rates in the 20 years prior to the passage of OSRA in our two major East/West trades gives some sense of the chronic financial challenges that the liner industry faces.

[6] Statement of Mercer Management Consulting, Inc. before the U.S. House Committee on the Judiciary, Hearings on the Free Market Antitrust Immunity Reform Act of 1999, March 22, 2000, p.16.

[7] Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, September 1989.

[8] Clyde, Paul S. and Reitzes , James D., "The Effectiveness of Collusion Under Antitrust Immunity," Bureau of Economics Staff Report, Federal Trade Commission, December, 1995. The study expands on work that began when the authors were DOJ and FTC staff serving with the Advisory Commission on Conferences in Ocean Shipping.

Changes in average freight rates in US east-west trades 1978 – 1998*

	Current Dollars	Real Terms
Trans-Pacific		
Eastbound	-32.1%	-72.1%
Westbound	-20.8%	-67.5%
Trans-Atlantic		
Westbound	-4.6%	-60.9%
Eastbound	+18.2%	-51.5%

*Drewry Container Market Outlook, October 1999, page 103.

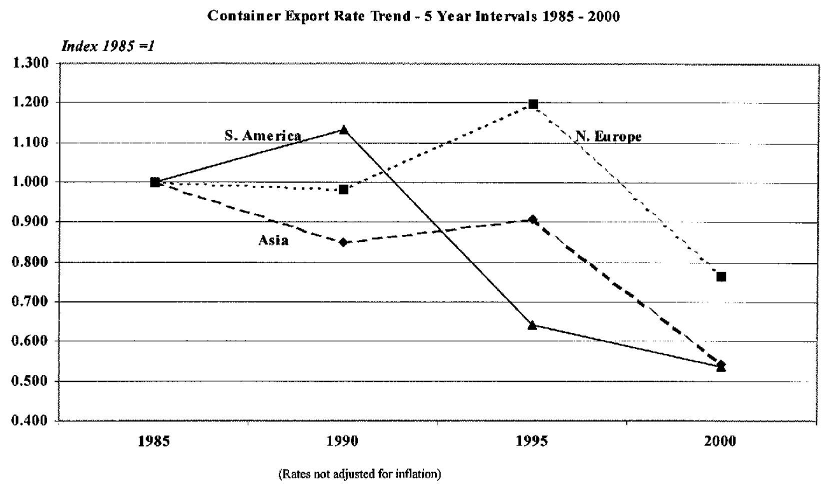
Similarly, a 1999 study of the major U.S. trades from 1985–1998 found that, with the exception of the eastbound trans-Atlantic trade, all of the major U.S. markets recorded losses, with rates declining approximately 25 percent (even before being adjusted for inflation) over the fourteen-year period. Carrier losses on the major trade lanes for 1998 alone were estimated to exceed $3 billion.[9]

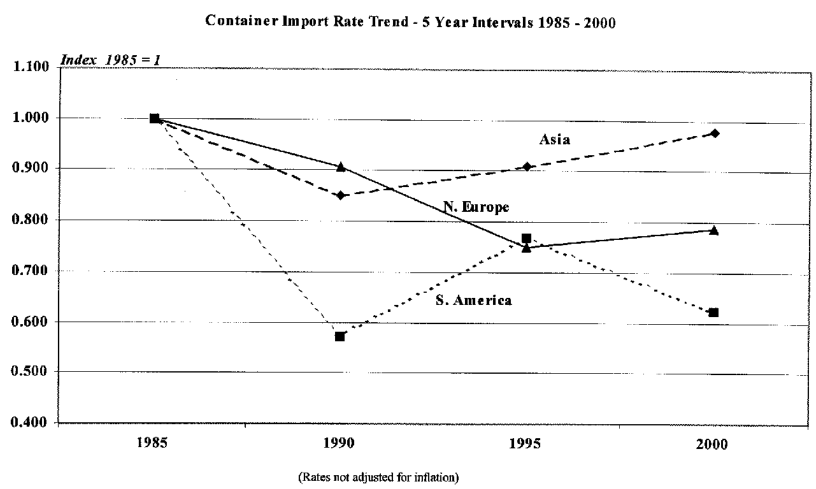
During 1999 and 2000, trade conditions supported the carriers' revenue recovery efforts. In 1999, the recovery mainly was assisted by the combination of a general rate increase in the eastbound trans-Pacific trades and a 13 percent increase in cargo volume, on top of the two previous years' cumulative volume growth of over 33 percent. A strong recovery in the intra-Asia trades also contributed. In 2000, there were also improvements in the Europe-Asia-Europe trades and other routes.[10] Unfortunately, the recovery didn't last long. By 2001, deteriorating international economic conditions, and especially the unpredicted slowdown of the U.S. trades, led to a sharp decline in international trade.

The following charts illustrate rate trends in various U.S. trades in the period from 1985 to 2000. They show an overall reduction of ocean transportation costs. The surge in 1999 and 2000 eastbound trans-Pacific cargo resulted in an upturn in rates in that trade due to high capacity utilization, but the unbalanced westbound direction of that trade (with poorer capacity utilization) saw rates fall. That is what one would expect from supply-demand dynamics.

[9] Paul F. Richardson Associates, Inc. "Pricing Dilemma in the Global Container Industry", May 5, 1999, pages 9–15.

[10] For additional details see *Containerization International*, October 2000, "On the Mend," pages 53–57.

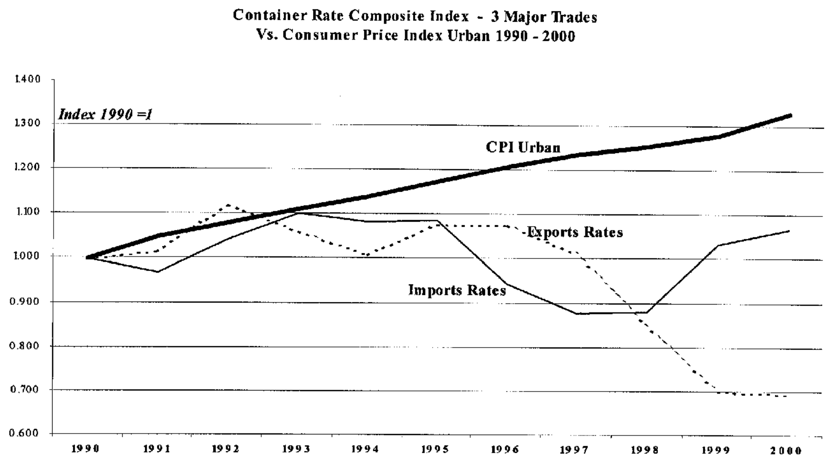




These charts[11] show rates for ocean transportation in 2000 lower than they were 15 years ago, even without adjusting for inflation. The following chart[12] compares import and export rates in the major U.S. trades (not adjusted for inflation) with the consumer price index, a general measure of economy-wide inflation.

[11] Source: Paul F. Richardson Associates (2001)

[12] Id. The three major U.S. trades are the trans-Pacific, the trans-Atlantic and the East Coast United States-East Coast South America.



And when one looks at what has been happening to rates since 2000, it is clear that the historical downward trend continues. The current imbalance between the supply (available capacity) and demand for liner shipping has generated a deep decline in rates. Lines ordered new capacity based on the projected double-digit growth of U.S. container volumes. However, the value of U.S. liner imports actually declined slightly in 2001, and the already imbalanced, "backhaul" export trades grew by less than 3 percent, while available capacity grew by nearly 11 percent. Drewry consultants reported that in the main east/west trades carriers were reporting average decreases in freight rates of between 15 and 50 percent in 2001.[13]

In the trans-Pacific inbound trade, average revenue per forty-foot container in March of 2002 was approximately 24 percent below what the rate was in March 2001.

According to a semi-annual survey conducted by the U.S. Department of Agriculture, American shippers of agriculture goods have reported that they are able to obtain most of the service elements they are requesting in contract negotiations, and rates are so low that they are not an issue. Well over 90 percent of containerized agriculture shipments are moving under service contracts, as envisioned by OSRA.[14] Specifically, the USDA's December 2001 report on "Agricultural Ocean Transportation Trends"[15] states that:

- "The rates for U.S. outbound dry containers, particularly westbound transpacific rates, are approaching historically low levels. Virtually all U.S. agricultural exporters are paying less for transportation than they were in early 2001 when rates were already perceived to be extraordinarily low."
- "It is remarkable that commodities are reportedly moving in certain transpacific, westbound trades at $225 per 40-foot equivalent unit. Shippers appear increasingly concerned as to the continued viability of these trade lanes."
- "Rates are so uniformly low, they are no longer the primary determining factor for carrier selection. There is a presumption that rates will hit "rock bottom," so, while agricultural shippers continue to keep an eye on the overall rates (the base rate plus the surcharges), carriers are now primarily selected according to service capabilities."

In fact ocean freight rates in the major east-west trades were so low by the end of 2001 that the general manager of the Unaffiliated Shippers of America was

[13] The Drewry Container Market Quarterly, March 2002, page 1.

[14] "Service Over Rates: With freight rates at historic lows, US agriculture exporters are demanding—and receiving—expanded service terms from ocean carriers," JoC Weekly, February 11–17, 2002, pages 30–31.

[15] Agricultural Marketing Service, "Agricultural Ocean Transportation Transportation Trends," December 2001, at www. ams.usda.gov/tmd/AgOTT/December%202001/Dec2001—content.htm.

quoted as saying: "If I were a shipping line, I would not accept some cargo. It's not commercial." [16]

There is no lack of intense competition in the liner industry.

Teamster Allegations

Before concluding this discussion of the marketplace, it is appropriate to address the International Brotherhood of Teamsters' arguments against the limited antitrust immunity provide under the Shipping Act. Ocean carriers do not have antitrust immunity to collectively negotiate or set the rates they pay truckers or railroads. [17] The Teamsters, however, complain that ocean carriers are using antitrust immunity to agree to through rates (a rate that includes the ocean and inland transportation, such as between Shanghai and Chicago) with American importers and exporters that are too low, and then, as a way to deal with these low rates, don't pay port truck drivers enough. It is true that port truck drivers are not highly compensated. It is simply not true that carriers' limited antitrust immunity is the problem or results in carriers charging their customers too little or in mistreating truckers. The Teamsters' allegations before this Committee two years ago were thoroughly reviewed by the Federal Maritime Commission, which found them to be without merit.[18] It is also worth noting the irony that the Justice Department, with no facts, today argues ocean carriers' rates are too high, while at the same time the Teamsters argue that ocean carriers' rates are too low. Ocean carriers' rates are in fact too low and currently are resulting in large losses for the lines. But the problem is the imbalance in supply and demand, not antitrust immunity.

3. Ample Capacity to Meet Demand

There is today no international liner trade without adequate capacity to serve the trade's needs. And because of the lack of barriers to entry and the industry's confidence in today's regulatory system, there is no market that will not see capacity added as market conditions warrant. As nations around the world have liberalized their trade policies, international cargo movements have increased dramatically, with the growth rates being even more rapid for cargo carried by the liner shipping industry. This has created a large demand for additional shipping capacity. The liner industry has succeeded in increasing its capacity to service this increase in demand.

	World Fleet Capacity (000 teu)	**Annual Increase** (000 teu)	**Annual Percentage Increase**
1999	4,335	303	7.5%
2000	4,799	464	10.7%
2001	5,311	512	10.7%
2002 forecast	6,105	794	15.0%

How the liner industry has increased the capabilities of its international transportation infrastructure to handle the 112% percent growth in the international liner trades in the last ten years is a story of quiet success. More to the point for purposes of this hearing, the regulatory system that fosters that achievement—the Shipping Act of 1984—is an essential part of that success.

Worldwide, it has been estimated that over the last seven years (1995–2001) the liner industry has grown the capacity of the dedicated containership fleet on an average of about 12.3% per year. In the last three years (1999–2001), approximately 1.3 million TEUs of new capacity have been added, [19] and the forecast for capacity

[16] "Carriers' Winter of Discontent," JoC Week, December 10–16, 2001, p 19.

[17] Section 10(c)(4) of the Shipping Act of 1984, as amended (46 App. U.S.C. 1709(c)(4)).

[18] FMC's OSRA Report, September 2001, p. 41–42. The Teamster's complaint that U.S. labor laws make it difficult to organize independent owner-operator truckers is beyond the scope or competence of the shipping or antitrust laws.

[19] These capacity numbers, while substantial, do not convey the full impact of the new vessels placed into service. In fact, each new vessel is employed many times over in the course of a year. For example, in the trans-Pacific trades a vessel in a string of 5 ships makes approximately 10.4 roundtrip voyages per year. Thus, one new 5,000 TEU vessel deployed in the trans-

to be delivered this year (which was ordered before the economic slump and September 11) indicates a larger increase.[20]

These large increases in capacity were all added by the industry to meet the remarkable rate of actual and projected growth of America's foreign trade. Consider the example of the eastbound (U.S. imports) trans-Pacific trade, which is the largest trade in the world; it experienced the following recent double-digit year-to-year growth of container volumes:

YEAR	PERCENTAGE GROWTH OVER PREVIOUS YEAR*
1997	15.1 percent
1998	18.1 percent
1999	12.6 percent
2000	14.2 percent

*Drewry Container Market Quarterly, June 2001, p. 47.

At the Committee's last hearing on this issue, there was discussion of the period in 1998 when trade growth was so rapid in the eastbound trans-Pacific trade that demand temporarily exceeded supply. The industry, in fact, committed to build the capacity that was projected necessary to handle America's booming trade growth, adding 34 percent additional capacity in 1999 and 2000,[21] and with the long lead times required for ship orders, receiving additional capacity in 2001 and 2002. Unfortunately, the economy suffered an unexpected slowdown and foreign oceanborne trade volumes exhibited virtually no growth. As a result, the industry has been struggling with the resulting overcapacity that it had committed to bring on line to serve the projected needs of the trade.

Even if one considers only the level of investment in new vessels represented by this capacity increase, the industry's commitment to meeting the growing demand for ocean transportation services is impressive. But carrier investment in capacity goes well beyond the introduction of new vessels. It also includes investment in tens of thousands of standard 20-foot and 40-foot containers, as well as specialized equipment routinely provided by many lines, including flat rack, hard-top and open-top containers, 45-foot containers, reefer containers, high-cube containers, hangertainers (for apparel), and bulk containers. Carriers also operate inland container depots, container freight stations, and transloading facilities to allow their customers greater flexibility and efficiencies. Shippers require increasingly efficient terminal facilities and intermodal connections, adequate rail service, and on-line booking, documentation, tracking and payment services. These sorts of "capacity" are also crucial to ensuring an efficient ocean transportation system.

As discussed later in Part III of this testimony, the liner industry faces significant challenges in planning its investments to meet growing market demands, including long lead times in ordering and building new ships, "lumpy" supply additions, mismatches and fluctuations in demand, and the need for accurate trade growth forecasts of international markets.

Pacific adds roughly 52,000 TEUs of new annual carrying capacity in each direction, or 104,000 TEUs of new annual capacity for the roundtrip.

[20] Drewry Container Market Quarterly, March 2002, p. 39 (Table 3.9).

[21] Drewry Container Market Quarterly, March 2002, p.64 (Table 5.2).

One of the reasons that capacity has been added to meet the increasing transportation demands of the various trades is the flexibility carriers have to use their limited, regulated antitrust immunity to discuss a particular market's needs. By sharing the costs and risks of the added assets, and by having the ability to discuss existing and projected demand and what rates the market conditions may support, orders for new capacity and the ability to meet market demands for expanded service are facilitated. Whether as a foundation for cooperative operational agreements, or as a foundation for conferences or other market discussion agreements that give a carrier better information to justify making new service or capacity decisions, limited, regulated antitrust immunity ensures that adequate capacity is made available to meet any market's growing demand.

4. Innovation and Investment

As a service industry, liner shipping has demonstrated an impressive history of continuous technological and organizational innovation. From the initial containerization of international routes in the mid-1960s, through the development of cellular vessels, the implementation of intermodal service via dedicated stack trains, and the provision of increasingly sophisticated special equipment (such as temperature and humidity controlled reefer containers), to the latest efforts to establish on-line services, including the development of multi-carrier internet platforms, the industry continues to invest in technological innovations that increase efficiency, expand markets, and contribute to better management of resources.

Marine terminal automation, on-dock rail facilities at terminals to speed shipments by rail, and increasingly sophisticated tracking and tracing systems are examples of additional assets developed as part of liner companies' on-going efforts to better serve their clients. Carriers are also establishing improved distribution operations, including programs that give total visibility to a customer's cargo flow, that facilitate a shipper's ability to mix international and domestic freight to build full truckload shipments, and that substantially minimize delivery costs. Cooperative supply chain reviews of customers' operations are another service that can enable liner companies to add value, increase inventory visibility, produce measurable results, and reduce costs for shippers. This commitment to innovation pays off for the shipping public in faster, safer, and more transparent inventory flows.

Organizational innovation has also been important. Carriers have established operationally integrated multi-trade alliances that provide shippers with:

- Broader service networks with more port calls
- Additional capacity
- More frequent service
- Shorter transit times, and
- Reduced waiting time and fewer transshipments.

By reducing each carrier's share of the investment and risk involved in developing and expanding their service networks, such alliances reduce costs and improve efficiency. That in turn expands the options available to the lines' customers, and helps reduce their overall transportation, distribution, and administrative costs.

5. High Quality Service

At present the liner industry not only provides the shipping public with a reliable and relatively inexpensive ocean transportation system complete with modern terminal services and intermodal links, it is continually working to improve that system. Such improvements include faster and more efficient vessels that allow reductions in per unit costs; modern, technologically advanced terminal handling systems and equipment; and a growing list of related logistics services.

Working with individual customers to meet special needs and reduce customer costs, carriers conduct supply chain reviews, address cargo consolidation and deconsolidation needs of shippers, provide dedicated customer service representation, develop contracts that combine multiple services, perform quality assurance inspections, and offer an assortment of other customized services.

For example, ocean carriers have developed considerable expertise in moving temperature and humidity sensitive goods. Their sales and marketing personnel can assist agricultural shippers, not only in operational matters such as how best to load cargo in a container, but in helping identify potential markets for their goods. The liner industry's successful efforts to develop atmosphere-controlled refrigerated containers actually helped shippers develop some markets by providing technologically acceptable, and less expensive, ocean transportation for perishable commodities that previously could only be shipped by expensive air freight.

In a commercial environment dominated by individual contracting and characterized more and more by the use of business-to-business e-commerce systems, the services that lines offer are increasingly customized and involve greater participation in customers' supply chain management efforts, involving both the physical movements and the attendant information flows.

Individually, lines are committing substantially more resources to develop and implement value-added logistics services of all kinds. These services allow carriers and their customers to reduce the time involved in packing, haulage, and consolidation of cargo prior to ocean shipping, and follow-on stripping and delivery in ways that sharply reduce lead-time, reduce inventories and associated costs, and increase customers' net profits.

Collectively, members of the industry are developing multi-carrier electronic channels to make it easier for shippers to conduct business with multiple providers using common standards for core business transactions (such as booking, documentation, and tracking shipments).

6. Regulatory Expertise

International liner shipping is subject to oversight and regulation by the Federal Maritime Commission, which is responsible for identifying and, if needed, addressing any anti-competitive conditions or other problems that might arise in the industry. The FMC has well-tested procedures for acting on formal and informal complaints that may arise, and extensive authority to conduct investigations and take appropriate corrective action when warranted.

The Commission reviews all carrier agreements filed in the U.S. trades before they become effective, including detailed information forms that are submitted with proposed agreements. The Commission has an extensive monitoring program in place that covers all U.S. trades. Its monitoring program includes the review of conference and discussion agreement meeting minutes, and detailed quarterly economic reports filed by conferences and discussion agreements. Since the implementation of the Ocean Shipping Reform Act in mid-1999, that monitoring program has been supplemented by access to the Commission's service contract database that includes the rates and terms of all service contracts filed with the Commission. The Commission also has the authority to issue information demands if it has concerns about agreement activities.

In addition to its agreement review and monitoring program, the Commission staff has developed its industry expertise by conducting or participating in several high-profile industry studies (including the five year review of the Shipping Act of 1984, the Advisory Commission on Conferences in Ocean Shipping Study, and the FMC's recent OSRA Impact Study). It has also conducted a number of major fact finding investigations, and regular, informal, industry interview projects covering special topics.

7. Internationally Accepted Regulatory Policies

The United States and its trading partners have consistently recognized the special situation and characteristics of international liner shipping. Consequently, Congress created the successful regulatory regime under the Shipping Act, which includes, as one component, a limited exemption from our national antitrust laws, just as all our trading partners have done. In addition to Congress' passage of OSRA, which became effective in 1999, in the last few years alone, a number of nations have conducted thorough reviews of their national liner shipping policies and have made what they considered appropriate adjustments to their maritime laws. For example:

- The Australian Parliament passed legislation in 2000 to amend Part X of the Trade Practices Act of 1974.
- The Canadian government has undertaken an extensive review of the Shipping Conferences Exemption Act and found that: "Conferences play an important role in Canada's foreign trade, providing stability and reliability in shipping services for Canadian shippers, importers and exporters."[22]
- Japan implemented amendments to its Marine Transportation Law.
- South Korea implemented amendments to its Marine Transport Act.

In every case, limited exemption from the national competition/antitrust laws has remained an essential feature of the revised regulatory regimes. In every case, proposals to repeal the industry's limited antitrust immunity were rejected.

[22] Canadian Transport Ministry Press Release, March 1, 2001.

Indeed, even the most recent report by the OECD's Transport Division staff on Competition Policy in Liner Shipping:

- "does not call into question the principle of limited anti-trust exemptions for operational agreements in liner shipping"[23] as H.R. 1253 does, and
- as to the limited antitrust immunity afforded to rate matters, commends the Ocean Shipping Reform Act in the United States and its principles as a model for other OECD member nations to use if an when they review their shipping regulatory laws, and states OSRA's "principles represent a way out of the carrier/shipper impasse. . . . They can, and are meant to, co-exist side-by-side with a regulatory regime that continues to extend anti-trust exemptions to price-fixing and rate discussions in the liner-shipping sector."[24]

That is what Congress intended three years ago when it implemented OSRA. Congress succeeded, and its success should not be disturbed.

8. Relatively Stable Regulatory Environment

Many of the positive characteristics that have been discussed so far—such as high quality service, ample capacity, and on-going technological innovation—depend on the ability and willingness of carriers to continue to make massive capital investments to expand and modernize their assets. That ability and willingness depends, in turn, on the lines' expectations that they can, over the long term, achieve a reasonable level of profitability that would justify such large investments.

The industry has made huge investments in new terminals, equipment, information technology, and larger vessels to achieve economies of scale, developed alliances to take advantage of economies of scale and scope, and invested in new technologies that made possible significant cost savings. Those efficiency gains and cost reductions have been passed on to shippers in lower rates and improved service.

Forecasts of the growth of demand for liner shipping over the next decade are as impressive as they will be challenging to accommodate. One common estimate is that the amount of cargo being transported in liner shipping is likely to double by 2020, with the highest growth rates in the Far East, South Asia and South America. To keep pace with such an increase in demand, carriers will need to invest an estimated $100 billion in new vessels and containers alone. Expenses for additional maritime terminal capacity, efficiency-enhancing information technologies, and other related investments—such as enhanced security measures in the post-September 11 environment—will have to be added as well.

Given the forecast trade growth, the cyclical nature of liner markets, and the problem of chronic trade flow imbalances, ocean carriers face significant and difficult challenges in their planning and investment decision making. It is in both carriers' and shippers' interests that the stability of the current regulatory environment under the Shipping Act not be undermined. If investments in new vessels, equipment, and marine terminal assets do not keep pace with growing demand, or if regulatory changes and uncertainty produce substantial industry concentration and an oligopoly market structure, the benefits of today's commercial environment would be lost.

Under the current regulatory regime, shippers enjoy a wide choice of carriers continuously trying to improve service, and enjoy rates that trend down over the long-term. For such service and price stability to be maintained, it is important that carriers have sufficient confidence in the marketplace to continue making the high levels of capital investment needed to meet future demand. While carriers' limited and regulated use of antitrust immunity can not overcome the forces of supply and demand, it does improve the lines' market knowledge, increase carrier confidence, and provide increased market stability.

III. THE VALUE AND IMPACT OF THE INDUSTRY'S LIMITED AND REGULATED ANTITRUST IMMUNITY

Today's regulatory environment offers carriers and shippers each of the desired characteristics of a transportation system discussed above. However, the continuation of those beneficial conditions ultimately depends on a reasonable level of market stability and continued carrier investment and innovation to meet the growing and increasingly sophisticated demands being made on the system. The Shipping Act, as amended by OSRA, is internationally accepted and understood, and results in an efficient, highly competitive transportation network that is providing excellent

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[23] "Competition Policy in Liner Shipping", OECD Division of Transport, Final Report, April 2002, p.78.

[24] Id. at p. 80.

service to the world's expanding commerce. This recently validated and successful system should not be disrupted.

The Shipping Act's regulatory regime with limited, regulated antitrust immunity should be analyzed in the context of the unique commercial environment in which the liner shipping industry operates. The inherently international nature of the industry requires a consistent, internationally accepted regulatory framework, which is what the Shipping Act of 1984, as amended by OSRA, provides.

1. International Comity

In this age of globalization, many companies have become transnational entities. That is, they operate plants, or sub-contract work to production facilities in a variety of countries. In such cases, the business unit operating in the firm's home country is subject to the laws and regulations that apply there, and units operating in foreign countries are, in turn, subject to the relevant foreign statutes and regulations. Corporate headquarters needs to be aware of all the relevant regulations, foreign and domestic, but each separate operating unit is subject only to the national laws obtaining in its geographic location.

Liner shipping, on the other hand, is a truly international industry. That is, its operations (the carriage of goods between different nations) are simultaneously subject to the maritime laws and regulations of two or more nations. As a result, it is necessary to the maintenance of an efficient ocean transportation system that conflicts between national regulatory regimes be minimized. Serious problems affecting international commerce could result if, for example, the United States sought to enforce a strict antitrust policy in its trades, while its trading partners adopted a regulatory regime that provided liner shipping with limited antitrust immunity. Because liner shipping operations are global in scope, the potential for conflict is not limited to bilateral differences in maritime policy.[25] This simultaneous application of potentially conflicting national competition policies is precisely why it remains essential to the smooth flow of international commerce to retain the existing, broadly based consensus on liner regulation.

2. International Liner Shipping Market

Liner shipping is characterized by a unique set of economic and political features which, taken together, can produce unstable cycles with respect to both rates and space availability. These characteristics include:

- High fixed costs to operate a regularly scheduled service
- Relatively inelastic demand for services (meaning that rate reductions very rarely can increase the market demand for services)[26]
- Significant mismatches in demand arising from chronic bi-directional trade imbalances (import and export volumes often differ widely) and significant fluctuations in demand
- Inelastic supply (carriers must maintain supply at consistent levels sufficient to meet peak demand, yet are very limited in their ability to rapidly "flex" supply because of their large fixed sunk costs and the nature of liner shipping which requires regular service and strings of vessels that call numerous different ports in a single voyage)
- "Lumpy" supply (capacity must be added or withdrawn in large units—namely entire strings of vessels, unlike a railroad which can add or subtract cars from a train based on variation in demand)
- No regulatory barriers to new entry or capacity expansion
- Distortive government subsidization of shipping and shipbuilding

While other industries may share with liner shipping one or even several of these characteristics, the combination of all of them is unique and produces an industry that is subject to chronic market instability.

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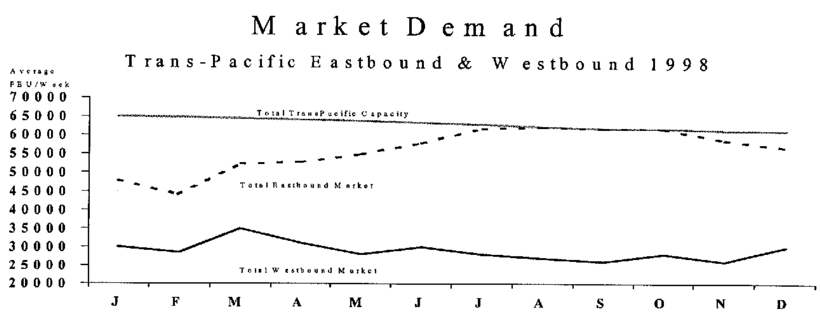
[25] Vessel services generally call at multiple countries, not just two. It is not uncommon for a single service string to call in seven or more countries, serving literally thousands of point-to-point service offerings. As just one example, NYK Line operates a service to and from the U.S. East Coast that provides direct services to Taiwan, the Peoples' Republic of China, Thailand, Singapore, Sri Lanka, Italy, Canada and Saudi Arabia. The regulatory exposure faced by ocean carriers is not merely bi-national, but global.

[26] In the case of most commodities, industry rate reductions do not induce additional volumes and associated revenues. In the case of VCRs shipped from Hong Kong to the United States, for example, if carriers provided free ocean transportation, that would change the cost to the VCR consumer by less than a dollar (assuming the entire reduction were passed on, which is questionable), hardly enough to stimulate VCR sales.

The high fixed costs in providing a regularly scheduled international service,[27] and the fact that ocean carriers offering liner shipping services face inelastic yet variable demand, create special economic constraints. Since carriers' variable costs are relatively small, their ability to adjust rapidly to decreases in demand in a trade by reducing supply is limited.

Furthermore, chronically imbalanced international trade flows make offering a profitable roundtrip service extremely difficult. Balanced trades, where outbound containers and inbound containers approximately match, are relatively rare in U.S. trades. On the "light" leg, empty containers must be shipped, with no revenue to the ocean carrier, back to be available for use by other shippers on the "heavy" leg. Nor is the equipment needed for outbound cargo (such as refrigerated containers for foodstuffs) likely to match the needs of inbound cargo (say auto parts). The existence of peak seasons also creates difficulties since carriers must maintain capacity and equipment adequate to meet peak season demand, even though utilization of that capacity and equipment drops off in non-peak periods.

As an example of the imbalances between capacity offered by the industry and the demand for such capacity, the following graph shows the dynamics of the trans-Pacific trade in 1998:



As one can see, capacity supply is relatively stable,[28] yet (1) the eastbound trade shows substantial seasonal variability—sometimes using all the capacity and sometimes not, and (2) the westbound trade shows chronic overcapacity because U.S. imports greatly exceed U.S. exports.

In such an unbalanced trade, a carrier will collect revenues from shippers moving export cargo and from shippers moving import cargo, and the sum of those rates will be the carrier's total roundtrip revenue. However, carriers incur substantial costs, which are part of their total roundtrip costs, in addition to the cost involved in moving a shipper's cargo—namely, the costs of repositioning empty equipment arising from the trade imbalances discussed above. In July and August of 1998 in the trans-Pacific trades shown above, approximately 40% of the containers in the trade had to be repositioned empty back to Asia in order to handle cargo moving eastbound, and all the expenses associated with the assets and the operations to do this were part of the carriers' roundtrip market economics.

An analysis done in 2000 showed that ocean carriers spent $12.8 billion repositioning empty containers.[29] Roughly 20% of all containers moved globally are empty boxes.[30] Due to its trade imbalances, America's leading "export" is empty containers that ocean carriers must reposition with no export cargo providing offsetting revenue.

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[27] A typical 5,000 TEU container vessel costs approximately $60 to $65 million. A carrier must have a number of containers for each vessel container space, with their costs ranging from approximately $2,000 to $30,000 each depending on the characteristics of the container. According to the Mercer Study, a carrier's operating costs range from approximately $40,000 to over $50,000 per day per ship. The minimum number of ships needed to provide a regular service will vary on the trade (four in the trans-Atlantic, five in the trans-Pacific, nine in the Asia-Europe trade). In addition, carriers must incur substantial marine terminal, shoreside and overhead expenses.

[28] Because of the trade's substantial economic losses in 1998, some carriers withdrew some capacity from the trans-Pacific that year.

[29] Lloyd's List, May 15, 2000, quoting Drewry Shipping Consultants

[30] Id. In an example of another unbalanced trade, in the trans-Atlantic between October 1999 and September 2000, carriers had to reposition 534,000 TEUs of empty boxes from the United States to Northern Europe. See Dynamar Liner Trades Review, p.5 (January 2001).

Liner shipping markets are inherently unstable. The industry operates with heavy capital requirements and high fixed costs—about 75% of the industry's costs exist whether there is cargo on the ship or not-and relatively low marginal costs. Carriers thus do not avoid significant costs when vessel space is empty. Instead, empty space represents a sunk cost that cannot be recovered. The resulting tendency for carriers facing the constant dilemma of empty space—which cannot be stored for later use—is to cut rates to fill space and help cover fixed costs. That leads to marginal pricing that does not recover full costs. Left unchecked, marginal, non-compensatory pricing arising from structural overcapacity would lead to insolvency, withdrawal of capacity, and service degeneration. Rates would subsequently increase, attracting new capacity, and the cycle would begin again. The existing regulatory system is necessary to avoid such destructive competition.

The lines' high fixed costs of providing a scheduled service and limited ability to use rate reductions to increase shipper demand are further complicated by the need to offer levels of service that are sufficient to cover the directional, seasonal, and special equipment imbalances that so commonly exist.

A line's commitment to providing a service that meets its customers' demand for regular and timely service, in both directions, at all times of the year, as well as one that is adequate for the longer-term demands of growing markets explains why simply pulling a vessel or string of vessels out of a trade when supply temporarily exceeds demand is a challenge for a line. Many shippers' businesses depend on their meeting tight "just in time" schedules. They expect, and their business operations are built around "conveyor belt" service. Regularity of sailings and adequate availability of equipment and space is crucial. In order to maintain the regular scheduled services that are the defining characteristics of the liner industry, vessels must sail on time, whether they are full or not. When making their annual business plans, and negotiating their transportation contracts, shippers expect their carriers to maintain reliable sailing schedules, fast transit times, and ample slot availability. Smoothly functioning supply chains depend on high levels of predictability and reliability in transportation and logistics services.

The flexibility to change capacity levels rapidly in response to transient demand changes is possible, but it is both difficult to do and requires great care in order to be responsive to shippers' service needs. Rapid entry and exit from a trade would produce unacceptable instability in rates and service. Such efforts are best organized within the framework of existing carrier agreements.

In making decisions on how much capacity to put into a given trade, lines are also handicapped by the nature of their assets. There is a two to three year gap between the decision to purchase new vessels and their arrival in the trade. That means that new capacity being added cannot be precisely coordinated with increases in demand. This might be less of a problem if capacity could be added in discrete units. But capacity ordinarily can only be added in large, vessel string-sized "lumps." Consequently, lines must purchase new vessels (which have lives of 25 years) in anticipation of uncertain trade growth and, bring in more tonnage to a trade than will initially be needed even if the growth forecasts are accurate. Without the ability to share information on the market and future capacity plans, the problem would be even greater than it often is.

Furthermore, carriers' ability to avoid excess capacity, in spite of the problematic economics of the industry, is further hampered by nonmarket-driven tonnage. Liner shipping is affected by an extensive system of governmental subsidies that generate surplus tonnage worldwide. One element of this system, is the subsidization of domestic shipbuilding industries. As was stated in the Report of the Advisory Commission on Conferences in Ocean Shipping: "Shipbuilding subsidies mean that the problems of industry overcapacity will tend to be more lasting than otherwise, and less responsive to the economic incentives that drive surplus capacity from more conventional markets. This in turn implies that rate wars could be a persistent feature in even a deregulated ocean liner market."[31] Recent press accounts indicate that competitive subsidization of shipbuilding may, in fact, be increasing. Given open trades and the highly competitive nature of the industry, the overcapacity generated by these subsidies further reduces rates and profits in the affected trades.

Taken together, these economic and political factors can and do produce chronic excess capacity in major trades. Through limited antitrust immunity, carriers can at least partially address the excess capacity problem by sharing assets via operational alliances and space sharing agreements, and by the exchange and discussion of key market information. And they can try, pursuant to applicable law, to mitigate the financial effects of the industry's structural overcapacity by promoting rational pricing.

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[31] ACCOS Report , page 69.

It is against this backdrop of structural overcapacity and its effects that governments around the world have affirmed that limited, regulated antitrust immunity is important. If the spiral of non-compensatory rates, business failures, and consolidation that would otherwise result from such overcapacity is to be prevented, there must be a mechanism for addressing the intense pressure on carriers to lower prices below compensatory levels. Limited antitrust immunity allows carriers to discuss and agree on rate levels or guidelines that moderate to some extent the tendency toward rates that do not fully cover costs. These group activities, although they do not overcome or change the forces of supply and demand, do help to buffer the most extreme rate swings that would otherwise harm the industry through destructive competition. In an industry where margins are as thin as in liner shipping, that buffer is crucial.

3. Regulated, Limited Immunity With Safeguards

Carriers' use of antitrust immunity is limited both by the laws providing such immunity and by the nature of the markets in which they operate. The potent combination of free entry into the trades, the lack of "switching costs", the persistence of overcapacity, the dominance of contract carriage conducted on a confidential basis between individual lines and shippers, and the existence of lines that are not parties to agreements, provide intense competition and strong market safeguards.

In addition, liner trades are already subject to active oversight by the Federal Maritime Commission, which has the authority to investigate and, if needed, apply remedial measures.

Stated simply, international liner shipping does not operate with unrestricted antitrust immunity. International liner shipping operates with limited antitrust immunity accompanied by a plethora of pro-competitive regulatory requirements administered by a federal government agency well versed in liner shipping. Under the Shipping Act of 1984, as amended by OSRA, shipping lines:

- May not operate under an agreement with other lines except in accordance with the terms of an agreement which has been filed and reviewed by the FMC
- May not operate under an agreement with other lines if that agreement has been rejected, disapproved or cancelled by the FMC
- May not operate under an agreement that unreasonably increases rates or decreases service
- May not engage in unjust or unfair or predatory practices
- May not retaliate against any shipper
- May not restrict members of an agreement from entering into individual, confidential service contracts with shippers
- May not require a member of an agreement to disclose the terms of its individual service contracts
- May not drive competitors out of a trade
- May not impose any unreasonable prejudice or disadvantage with respect to any port or any person due to the person's status as a shippers' association or ocean transportation intermediary
- May not allocate shippers
- May not offer or pay deferred rebates
- May not unreasonably refuse to deal or negotiate
- May not engage in any predatory practice
- Have no antitrust immunity to negotiate rates or services provided to them by trucking or rail carriers.

There are many other provisions in the Shipping Act regulating shipping activities and transactions. In short, shipping lines are regulated by an expert government agency in a manner that ensures competition, promotes commercial freedom, allows for limited but valuable carrier cooperation in the marketplace, and is understood and accepted internationally.

Before concluding the discussion of the FMC and the Shipping Act's regulatory safeguards, it is appropriate to briefly comment on criticisms that some in the freight forwarding and NVOCC community have made against ocean carriers—namely, that carriers use their limited antitrust immunity to injure small U.S. importers and exporters, and that they have discriminated against NVOCCs as a class.

As an initial matter, it is simply illogical that ocean carriers would try to impair the ability of shippers of any size, large or small, from being competitive and successful in their markets. The more a customer succeeds, the more business the carrier may get, and carriers are looking for business wherever they can find it.

Specifically, some NVOCCs have alleged that ocean carriers in the trans-Pacific trade have agreed to unjustly discriminate against NVOCCs on rates. A petition was very recently filed at the FMC with such allegations. In light of the petition, some comments are in order. First, NVOCC's are a successful growing part of the marketplace. Many NVOs are larger companies than ocean carriers and their financial earnings are generally superior to ocean carriers'. Some of the most intense competition is big NVOCCs against smaller NVOCCs. Second, the carrier agreement in question—the Transpacific Stabilization Agreement—has flatly and unequivocally denied the allegations in this petition. Third, the petition contains not a *single fact* in support of the allegation, nor identifies a single NVOCC or party with an alleged injury. Third, notwithstanding the above, the carrier agreement has offered to provide a neutral mediator, at its expense, for any NVOCC that has a complaint. Fourth, if the petitioners would present the FMC with actual facts that demonstrate that what they say is true, the carriers would be guilty of violating the Shipping Act, and the existing law provides ample penalties and remedies. Finally, to the predictable dodge of "we can't provide facts because we're afraid of carrier retaliation", one should consider that, in addition to the fact that even ocean carriers should receive the due process of law: it would be illegal under the Shipping Act for carriers to retaliate; it is illogical that ocean carriers could or would "retaliate" against NVOCCs who control 30 to 40 percent of the market; NVOCCs don't give their business to one carrier and the second a carrier tried to "retaliate", it would lose that business to a competitor; and, to the extent there is "retaliation" in the market, it is common for NVOCCs to be the ones who retaliate or "punish" carriers by "cutting them off" and denying them cargo if the carrier does not provide acceptable terms. That leverage possessed is powerful and is frequently used, and is one of the reasons the market is so intensely competitive and rates are so low.

4. Uses and Benefits of Immunity

Carriers use their limited and regulated antitrust immunity to establish and maintain two general types of agreements:

- Agreements that primarily involve a cooperative sharing of operating assets such as ships and equipment, and
- Trade-lane agreements with pricing authority (conferences and discussion agreements)

(A) Asset Sharing Agreements

Asset-sharing agreements produce operating efficiencies and reduce costs. They have allowed participating lines to expand their service networks, reduce operating costs, optimize capital investment, and reduce risk. They have also made it easier for carriers to enter new trades by sharing space with other lines rather than having to incur 100 percent of the costs and risks of developing their own string of ships in a service. The benefits to shippers of such expanded and flexible networks are well recognized. Multi-trade alliances also offer an alternative to greater industry concentration via merger and acquisition. Such alliances demonstrate a clear positive benefit of carrier antitrust immunity. That immunity has allowed carriers to undertake the detailed discussions necessary to establish, operate, and periodically revise these efficiency-enhancing agreements.

It is helpful to consider how carriers' use of limited and regulated antitrust immunity, working together with today's system of free entry, has produced such a highly responsive set of service improvements around the world. Decisions to expand service cannot be made in isolation from confidence in what revenues can be generated from that capacity in the marketplace and what costs will be incurred. This confidence is often based on the ability of carriers to work under agreements that have price discussion authority. To illustrate how today's regulatory system has allowed and promoted carriers' ability to easily and efficiently offer new capacity and competition in the marketplace, consider the following examples since 1995 of several World Shipping Council carriers' use of antitrust immunity to join with other carriers in capacity sharing agreements and thereby enter into new trades:

- APL entered the United States-Northern Europe trade, the United States-Mediterranean trade, the United States-Central America trade, the United States-South America trade, a number of intra-Asia trades, the Asia-Middle East trade, and the Asia-Mediterranean trade.
- COSCO, Evergreen, the Malaysia International Shipping Corporation and K Line in February 2001 announced a joint entry into the Northern Europe-Indian Subcontinent trade.

- Hapag-Lloyd entered the United States East Coast-Mediterranean trade, the Mediterranean-Far East trade, the North Europe-East Coast South America trade, the Asia-Caribbean trade, and the United States East Coast-South America East Coast trade.
- Evergreen entered the United States East Coast-East Coast of South America trade and the Asia-Australia trade.
- K Line entered the United States East Coast-North Europe trade, the U.S. Gulf Coast-North Europe trade, the United State-Mediterranean trade, and the all water Asia-United States East Coast trade.
- Maersk-Sealand entered the Europe-South Africa trade and the Europe-Caribbean trade.
- Mitsui O.S.K. Line entered the Europe-United States East Coast and Gulf Coast trades, began direct service between various Chinese and United States ports, and entered a number of United States-Mexico/Central America/Caribbean trades.
- NYK entered the Canada-North Europe trade, the United States-North Europe trade, the United States-West Coast of South America trade, the Korea-Middle East trade and several intra-Asia trades.
- OOCL entered the United States-Mediterranean trade, the Asia-Mediterranean trade, the Europe-Mexico trade, and the United Kingdom/Germany to Russia trade
- P&O Nedlloyd entered the trans-Pacific trade, the Asia-United States East Coast trade, the Europe-Canada trade, the United States East Coast-East Coast of South America trade, the United States Gulf Coast-East Coast of South America trade, the Mexico-Europe trade, the Mexico-Asia trade and the Mercosul trade.
- Yangming entered the Southeast Asia-Australia trade, the trans-Atlantic trade, the Far East-New Zealand trade, the Far East-South Africa-South America trade, the North Europe-Mediterranean trade, and the Asia-United States East Coast trade via the Mediterranean.

This small sampling of examples of carriers using the current system of limited antitrust immunity to the benefit of improved, more efficient service and entry into new trades is far from exhaustive. Furthermore, it does not even attempt to show the numerous ways carriers have operated with limited antitrust immunity to expand and improve services to trades they were already serving, with more direct services, more and faster vessel strings, and better transit times to core port pairs. It is illustrative, however, of the existing regulatory system's clear and demonstrable record of providing excellent, constantly improving service to meet the needs of global commerce. Continuation of that record would be threatened by enactment of H.R. 1253.

(B) Trade Lane Agreements

OSRA's service contracting reforms have produced a shift away from conference contracts to one-to-one business arrangements between shippers and their preferred carriers. The development of more flexible and innovative contracting and a gradual growth of multi-trade contracts have accompanied that shift.

If the new, looser agreements that have evolved out of traditional conferences no longer regulate their members' service contracts, what do they do? And how does what they do contribute to greater market and service stability?

Trade-lane agreements may engage in:

- Collecting, exchanging, and discussing market information (such as supply and demand forecasts, anticipated growth rates, current utilization levels, and relevant government policies affecting service),
- Developing and proposing standardized surcharges (such as bunker charges, currency adjustment charges, and terminal handling charges),
- Discussing and proposing common approaches to pricing to the extent permitted by law (such as common tariffs, recommended prices, proposals for general rate increases and peak season charges), and
- Conducting dialogues with national shippers' councils and government agencies.

Allowing the lines to develop a collective perspective on emerging market opportunities and problems raises the members' level of confidence in the accuracy and completeness of market information and thereby their confidence in making tactical pricing decisions and strategic capital investment decisions.

(C) Carrier Agreements Are Not "Cartels"

As mentioned earlier, the forces of supply and demand and the restrictions of existing regulatory requirements limit the extent to which carrier agreements can affect prices. To operate as an effective pricing cartel, trade-wide liner agreements would need to accomplish four central tasks:

- Predict and prevent the provision of new capacity by non-members
- Restrict the total capacity made available to the market
- Establish each member's capacity quota, and
- Detect and prevent independent pricing and contracting decisions by members.

Carrier agreements are not doing this. Market conditions and existing regulatory limitations on immunity prevent cartelization. First, open trades, free of regulatory restrictions on new or expanded capacity, ensure the unobstructed entry of new capacity in response to increased demand.

Second, the sharing of supply/demand forecasts and utilization information provides agreement members with improved market information. Carrier agreements do not involve capacity restriction programs that artificially limit capacity in a way that would distort the market. And no such program would escape the close regulatory scrutiny to which liner shipping is subject.

Third, there are no agreements that establish trade-wide capacity quotas for member lines, and regulatory officials have stated that, absent clear and convincing justification, they would not allow such capacity restriction programs.

Fourth, and very importantly, OSRA prohibits carrier agreements from restricting members' right to contract as they wish with shippers. This freedom of contracting, and the environment dominated by confidential one-to-one business arrangements to which it gives rise, ensures keen competition.

Fifth, as stated above, the existing shipping laws contain a plethora of protections.

Carrier agreements, even those with relatively high market share, are not, and cannot be, cartels. Any review of actual market conditions, rates and profit levels conclusively will demonstrate that calling carrier agreements "cartels" is empty rhetoric. Such agreements do, however, create important benefits for carriers and shippers alike.

(D) Benefits of Carrier Agreements

First, the exchange and discussion of market information is itself important to the development of better market information and forecasts, and more rational approaches to market pricing as well as strengthening business confidence.

Second, a carrier agreement can, subject to existing market conditions, help improve planning, encourage better capacity utilization, and diminish rate volatility. Although a minority of the cargo moves under the tariff in many conferences today, the tariff acts as a benchmark for collective and individual rate-setting by the agreement members for the remaining cargo and thus helps to provide stability for the trade. In trades that have discussion agreements rather than conferences, voluntary guidelines serve a similar function.

Third, such agreements can and do produce standards for certain surcharges that are needed to address fluctuating cost variables, such as currencies or fuel costs. Such agreements can provide a market standard for contracting season cycles, and allow carriers to communicate to shippers, in advance, expectations about supply and demand and about future rates for planning purposes.

Fourth, by improving the quality of their supply and demand forecasts, producing accurate and timely reports on utilization levels, and sharing other commercial information, agreement members can help avoid exaggerated rate fluctuations in the face of supply/demand imbalances.

Fifth, such information exchange can also assist member lines to identify and respond promptly to impending increases in demand for capacity and equipment.

Liner markets are driven by supply and demand conditions. Any efforts by carriers to avoid panic pricing or better appreciate market facts and opportunities are still subject to market forces and the regulatory prohibitions against unreasonable rate increases and the list of prohibited activities discussed earlier. The benefits to carriers—better market information and marginal improvements in revenue results—are more than matched by benefits to the shipping public. Today's existing practical and well-accepted regulatory system avoids the negative consequences of conflicting maritime regulations and chronic price and service instability, and encourages adequate private investment in the greater capacity and new technologies needed to meet future market demand.

(E) Rebutting the Argument that the System Only Benefits "Foreigners"

Some critics of the Shipping Act have alleged that, since ocean carriers like Sea-Land, APL, Lykes and Farrell are now owned by non-U.S. companies, the law only benefits "foreigners" and is therefore somehow defective. A little thought will show otherwise.

First, the liner industry generates more than one million American jobs and $38 billion in wages to American workers. One can't affect the industry without affecting that.

Second, U.S. owned liner companies were sold because the industry is so competitive that U.S. companies were not rewarded by investors or Wall Street for being in the business. I can tell you from personal experience, for example, that CSX sold Sea-Land—not because it wasn't an excellent, innovative, well-run or efficient company—but because the industry's returns were judged consistently inadequate and CSX stock suffered as a result of its investment in the industry. In short, the sales of these lines only confirm how intensely competitive the industry is, not that American consumers are in any way being adversely affected by the Shipping Act.

Third, the overwhelming majority of the U.S.-flag vessels in the international liner industry are used and financially supported by carriers that are not U.S. owned companies. My personal opinion is that is very important for this country to have a merchant fleet; the government continues to consider how to have more effective maritime promotional policies, which is an issue beyond both the scope of this hearing and the World Shipping Council's activities. But, one thing is certain: Subjecting an already intensely competitive industry to destructive competition by repealing the Shipping Act would certainly do nothing to encourage vessels being placed under the more expensive U.S. flag.

There is a fourth and final point I'd like to make in this regard. We have each Member of the Committee a booklet, entitled "Partners in America's Trade", briefly explaining the substantial contribution liner shipping makes to the American economy and the efficient movement of America's exports and imports. With the industry struggling to make adequate financial returns, and especially with our own U.S. laws failing to attract American capital to this business, the continued presence and investment of foreign capital in the industry which transports America's international commerce is critically important, not something that should be disparaged or discouraged. It is entirely appropriate for the Shipping Act to be designed to ensure robust competition, innovation, efficiency and an appropriate level of regulatory oversight. But it is also important that the regulatory regime be mindful of the need for invested capital to be sufficiently profitable to not only remain invested, but to grow, so that the future needs of America's expanding foreign commerce can be met as well as today's.

IV. CONSEQUENCES OF REPEALING THE SHIPPING ACT'S SUCCESSFUL REGULATORY SYSTEM

A review of international liner shipping shows not only that it is a unique international business, but also that it is currently operating in highly competitive markets with all the desired characteristics set forth in Section II of this testimony. The Shipping Act of 1984, as amended by OSRA, which includes as one element limited, regulated antitrust immunity, is a major reason for this success. If one were to compare, for example, the U.S. domestic aviation industry, or the international aviation industry under bilateral agreements, with international liner shipping, there would be no question that liner shipping is a more competitive, more flexible and less concentrated industry. If one were to compare any nation's rail transportation system with liner shipping, there would be no doubt about which transportation mode provides shippers with greater competition and choice.

Antitrust regulation is one form of government regulation intended to provide competitive, efficient markets. It is not the only form of government regulation, nor necessarily the most effective at achieving this. It will not produce results superior to the existing, well established and internationally accepted form of liner shipping regulation in operation today.

The assumption that repealing antitrust immunity would have no negative effects on the current open, multilateral, non-restrictive regime, but would simply facilitate increased competition and lower rates, is ill-founded. It is worth recalling, at the outset of any discussion about revamping the Shipping Act, that:

- Today's regulatory system is well understood, internationally accepted, and working well. It produces excellent results for shippers and nations concerned about the efficient movement of international trade, and it provides sufficient clarity and certainty for carriers.

- Not all nations share a common approach to competition policy.
- Some nations view liner shipping as a strategic national industry deserving of direct and/or indirect governmental support.
- Many nations play a central role in both international trade and the provision of liner shipping services, and appropriate consideration of their views on shipping policies is important.
- Even nations that apply antitrust/competition measures relatively strictly in their domestic economies, have recently reaffirmed that international liner shipping is a unique industry that is best regulated by providing limited antitrust immunity accompanied by government oversight rather than by applying domestic antitrust laws.

There are several consequences that could be expected to follow from a repeal of the current regulatory regime. It would produce destructive competition in an industry that is already fiercely competitive and suffering from inadequate returns on investment. It would result in poorer service and fewer service choices, at likely higher post-consolidation rates. It would invite other nations to respond by applying their own, different, national shipping laws to the business. And, finally, it is likely to produce a shortfall of private investment in transportation infrastructure, with predictable negative long-term consequences for international trade, including:

- Reduced technological and organizational innovation
- Additional infrastructure bottlenecks
- Slower growth of industry productivity
- Impaired system-wide efficiency, and
- Slower trade growth.

In short, the net effect would be significantly negative.

Repeal of the Shipping Act's limited antitrust immunity would be virtually certain to result in incompatible national maritime policies and conflicts of law. Such conflicts would result in inconsistent and incompatible enforcement of laws, the probable use of national "blocking statutes" to prevent effective enforcement of antitrust laws, severe regulatory and business instability and uncertainty, and the possibility of other nations' enacting counterveiling measures. For the Justice Department to dismiss such concerns is simply naïve.

Many nations have firmly established national policies to support and promote their merchant fleets. These fleets operate in an exceptionally competitive international market today. To believe that such nations would welcome a destabilized market that could put their merchant fleets' economic future at risk would be unrealistic in the extreme. There are several potential responses that those nations could offer, none of which would result in a superior regulatory environment to that which exists today, or as uniform an international approach as exists today. For example:

- Nations could refuse to apply antitrust law, leading to uneven, uncertain, and incompatible regulation of an international business.
- Nations could apply significantly different competition laws to this international business and enforce their laws in inconsistent ways.
- Nations could impose anticompetitive regulatory requirements on the trade to increase stability. Such measures could include reversing the recently won ability in OSRA to have confidential contracts, and replacing the commercial freedom of today with regulated, public, government enforced contracts.
- Nations could embrace bilateral maritime agreements, such as those that exist in international aviation, which restrict and regulate market access.
- Nations could seek to establish trade allocation regimes to stabilize markets and protect their national fleets.
- Nations could increase market distorting subsidies and supports for their merchant fleets, so that marketplace "winners" would not be decided on the merits of superior efficiency and service, but on governments' willingness to expend resources or provide preferential treatment for their fleets.

For those nations that do not have a large national merchant fleet, like the United States, their satisfaction with liner shipping markets depends on having a sufficiently large number of competitors in their trades to ensure that the lack of a substantial national fleet has no significant adverse effect on their commerce. In the destabilizing, destructive competition and industry concentration that would follow a repeal of limited, regulated antitrust immunity, such nations may become uncomfortable as the transportation of their commerce would be subject to fewer and fewer carriers.

As a consequence, H.R. 1253's radical surgery on the Shipping Act would not only disrupt a reliable, efficient smoothly operating international transportation system, but it could transform international shipping from an effective facilitator of international trade to a discordant foreign relations dilemma.

Modern liner shipping has been the engine driving our global economy, a key factor in making today's economic globalization possible. The recently enacted Ocean Shipping Reform Act already addressed the need for any changes. The current system is working well and both shippers and carriers are reasonably happy with the current regulatory regime and results. Accordingly, a regulatory Hippocratic oath should be observed: First, do no harm.

V. CONCLUSION

A sound analysis of liner shipping must recognize that the guiding purpose of whatever regulatory system is applied to the industry must be to produce an efficient, effective and innovative transportation infrastructure for the movement of international trade. There is no question that the liner industry has invested in and built such an infrastructure and has accommodated the enormous growth in international trade very well. It has succeeded to such an extent that the liner industry has been called "the heart of the global economy."[32]

There is also no question that competition in this industry is fierce and that the financial returns in international liner shipping have been poor. Nor is there any question that to maintain and continue building the transportation infrastructure capable of handling this decade's forecasted doubling of cargo movements, carriers will be required to invest huge sums of additional capital. Where will that investment come from if markets are further destabilized and the industry's financial returns are further weakened?

The most important international shipping challenge facing carriers and shippers alike in the coming years is not the existing regulatory structure for liner shipping. That structure is working well. The biggest challenges are addressing the strains, bottlenecks and inefficiencies in the landside transportation infrastructure, and, even more importantly, working with the United States government to design an international transportation system that is more secure against the threat of terrorism. Significant cost savings and improved efficiencies will not be found by changing today's liner shipping regulatory system.

The Ocean Shipping Reform Act was the product of many years of effort involving all stakeholders, including shippers, carriers, ports, and labor. The Act, which has been in place for only three years, provided a comprehensive and thorough examination and reform of the international liner shipping regulatory system. One piece of that system is a limited and regulated antitrust immunity, accompanied by a coherent regulatory regime, overseen by the Federal Maritime Commission, that is internationally accepted, understood and successful. We respectfully submit that the Act is working well and does not require any amendment. We further submit that H.R. 1253 would fail to achieve any meaningful economic benefits for the shipping public, the U.S. public port community, American maritime labor or carriers, but would jeopardize the considerable benefits that America's international trade now enjoys under the present system.

We appreciate the opportunity to provide this testimony and look forward to assisting the Committee with any questions it may have on the international liner shipping regulatory system.

ATTACHMENT A
MEMBER COMPANIES OF THE WORLD SHIPPING COUNCIL

APL
A.P. Moller-Maersk Sealand
  (including Safmarine)
Atlantic Container Line (ACL)
CP Ships
  (including Canada Maritime, CAST, Lykes Lines, Contship Containerlines, TMM Lines, and ANZDL)
China Ocean Shipping Company (COSCO)
China Shipping Group
CMA-CGM Group

[32] New Yorker, December 11, 2000.

Compania Sud-Americana de Vapores (CSAV)
Crowley Maritime Corporation
Evergreen Marine Corporation
(including Lloyd Triestino)
Gearbulk Ltd.
Great White Fleet
Hamburg Sud
(including Columbus Line and Alianca)
Hanjin Shipping Company
Hapag-Lloyd Container Line
HUAL
Hyundai Merchant Marine Company
Italia Line
Kawasaki Kisen Kaisha Ltd. (K Line)
Malaysia International Shipping Corporation (MISC)
Mediterranean Shipping Company
Mitsui O.S.K. Lines
NYK Line
Orient Overseas Container Line, Ltd. (OOCL)
P&O Nedlloyd Limited
(including Farrell Lines)
Torm Lines
United Arab Shipping Company
Wan Hai Lines Ltd.
Wallenius Wilhelmsen Lines
Yangming Marine Transport Corporation
Zim Israel Navigation Company

Chairman SENSENBRENNER. Thank you, Mr. Koch.

Members are advised that the Chair will enforce the 5-minute rule, and I've been writing down who has appeared in which order. So I will recognize people alternatively from one side to the other in the order of appearance, beginning with myself.

Mr. Hoffa, you heard Mr. Koch basically say that the passage of this legislation won't make any difference in how much money the port drivers will be able to charge and the availability of more money to do repairs and maintenance to bring their trucks up to safety standards. I am sure you disagree with his analysis. Would you please tell us why?

Mr. HOFFA. Our study of this area, Mr. Chairman, indicates that these large oceangoing carriers conspire amongst themselves to dictate what they're going to pay. Therefore, they put pressure on these owners of these trucks. And when I say owners of the trucks, a lot of them are fleet owners, where you have a number of people that own their own trucks, the owner-operators, who then work through somebody called a truck owner. The pressure on the truck owner is unbelievable.

They dictate exactly the same rates across the board. And they have to then—and they're artificially low. And this is where these carriers are making money. And then they in turn put pressure on the drivers to basically do this work for nothing, and that's what's happening.

And it's also important to know the type of drivers we have. Many of them are new to our country. Many of them are people that are seeking their American dream. They bought a truck; they think they can succeed here. They're from all over the country, but they are American citizens who have been nationalized. And they are trying to succeed. But they are squeezed by the people they work for, who in turn are squeezed by the carriers, who keep on pushing down the rates.

And this is basically one step—everybody is pushing down the next person to try and make money off their backs.

I've been out to the ports. I see the type of drivers they have, the type of equipment they have. They're barely surviving. And they've created like a subculture and a subclass of workers here who can barely exist in America. And it's not right.

If we change the law, we will start the beginning of getting rid of the exemption for the big carriers, and then that will percolate down to the owners and then helping the owner-operators in the end.

Chairman SENSENBRENNER. In other words, you're saying that if smaller carriers were allowed to compete at free market rates rather than this artificial cartel, they would negotiate better rates for the port truckers.

Mr. HOFFA. That's exactly right. And also they will start breaking up this conspiracy that dictates the lower rates.

Chairman SENSENBRENNER. I have one question for Mr. Coleman. Near and dear to my heart is the export of good Wisconsin butter and cheese all over the world. We make a lot of it. I am disturbed that there is a $1,000 per container tax on refrigerated containers that you alluded to in your testimony. Will you tell me how that works? I assume that having to pay for the tax in the foreign country on the other end is going to make the good products from my State much less competitive overseas, particularly against the cheap junk that comes out of Europe. [Laughter.]

Mr. COLEMAN. Well-stated, Mr. Chairman.

This spring, the WTSA, the Westbound Transpacific Stabilization Agreement, filed a proposal. In fact, they submitted it to the Federal Maritime Commission. And I incidentally would ask that that be included in the record of this hearing.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Mr. COLEMAN. The carriers basically set up a scheme by which they wanted to reduce growth in export capacity. And several of the carriers had invested in new refrigerated equipment, so they could more efficiently carry U.S. exports. And under this WTSA scheme, it was proposed that any carrier be assessed $1,000 per container for every container they carried in 2001 above the capacity that they carried in 2002.

Numerous organizations, when that scheme was filed with the Federal Maritime Commission, had informal conversations with them. The carriers immediately understood that they had been caught red-handed, and they withdrew their proposal. So the $1,000 surcharge was not imposed.

Chairman SENSENBRENNER. I yield back the balance of my time.

The gentlewoman from California, Ms Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. This has been a useful hearing.

And listening, Mr. Hoffa, to your description of the drivers reminded me of my own youth. My father, my late father, was a Teamster, and his father was a Teamster. And your testimony is compelling.

I wanted just to raise two quick issues. One, and I'd ask unanimous consent to make this a part of the record.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Ms. LOFGREN. I have received a letter from the Port of Oakland expressing a variety of concerns about the bill, but one in particular I'd be interested in your comment, Mr. Hoffa. They are concerned, they say, that ports that benefit from the antitrust exemption now have labor-management agreements on benefit assessments. And they want to make sure that that is preserved, that their ability to do the agreements for benefit assessments and labor-management is preserved.

I'm not sure I see the issue. I'm wondering if you have a comment on that point.

Mr. HOFFA. Well, I'm not so sure I understand that either, because these people are really on their own, these owner-operators. And I've been to the Port of Oakland. And Chuck Mack, who is our——

Ms. LOFGREN. Know him well.

Mr. HOFFA [continuing]. Very capable vice president from the bay area, knows what goes on in the Port of Oakland. And the problem we have there is that these people have to wait long hours in long lines, and sometimes they're there all day just to get a load.

Ms. LOFGREN. Yes.

Mr. HOFFA. It's like the old shapeup they used to have in the movies, you know, and on the ports, where people had to wait all day long just to get a load. So you basically waste a day or two just to get some load that barely pays for your truck. And that's what's going on.

I don't know if this—I don't—I'm not aware of what you're talking about, this agreement. But certainly, we could work around that. We don't want to disturb anything that is helpful to the drivers.

But we're trying to elevate the drivers from their low status right now, and the fact that they're being exploited by just about everybody. And it's time that we recognized the problem; we step forward. And the first step, I think, would be passing this bill. Thank you.

Ms. LOFGREN. Do you know, Mr. Hoffa, where organized labor, other than Teamsters, are on the bill? For example, have the Longshoremen taken a position? Are you aware of that? Or have the Sailors' Union?

Mr. HOFFA. They all have. They are supporting us in our efforts. We have established a port division in the Teamsters that is working on both coasts, with both the ILW and the ILU, to organize port drivers. And they're supporting our efforts. And we're working cooperatively, with regard to trying to organize these people.

So this is an effort recognized by the longshoremen unions on both coasts who support our efforts and are aware of the problem. So they're very supportive of this.

Ms. LOFGREN. Thank you very much. And, you know, thinking back, my grandfather actually was a Teamster in Oakland and, actually, years ago was one of those guys that waited and waited and waited for loads. So I'm very appreciative of your comments.

And I would ask if I can, well, we'll make this letter part of the record. Perhaps the Teamsters' experts can take a look at the point that Oakland has made, and we'll work on that, if you agree that it's a problem.

Mr. HOFFA. I'll do that.

Ms. LOFGREN. Thank you very much. I yield back the balance.

Mr. HOFFA. And I'll make sure Vice President Mack sees it also.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Chairman, this has been a good hearing. And just a couple of questions.

First of all, Mr. James, do you feel that ocean carrier rates are too low now?

Mr. JAMES. Thank you, Congressman Forbes.

The fact of the matter is, whatever the level of the rates are at the present time, they're not the market rates. They're not the rates that would be set in a competitive circumstance. Whether the rates have room to go any lower is unclear. We've never really had the benefit of an experiment that would allow us to determine that.

We do know, however, that low rates certainly favor the carrier side of this equation. And I think that it would be important to provide consumers the benefit of that lowered rate, if it can be achieved.

Mr. FORBES. I've heard some suggestions about other countries that may apply their antitrust laws to international liner shipping. Are there any other countries? I just don't know the answer to that. And I've heard—do you know of any other countries that do apply them? If you can, would you let us know that?

Mr. JAMES. As I understand the situation, at present there are none that presently have a situation where the antitrust laws would be effective to address these kinds of issues. And that's part of the issue. It's a chicken and egg kind of concept, where whenever someone starts talking about eliminating this exemption, the notion is that other countries have it.

One of the situations that we face here is that this is perhaps an opportunity for the United States to exercise leadership in a situation where, as the OECD report indicates, countries are actually thinking about bringing more competition to this market space.

Mr. FORBES. Mr. Koch, a question for you, if you could. You talked about some of the results that you thought the exemption had produced. But can you give me any particular types of activities that carriers engage in by virtue of the antitrust immunity and maybe the economic reasons for those activities?

Mr. KOCH. I'd be happy to, Congressman.

They fall into two groups, and the testimony that we provided for the record has many, many different specific examples. They fall into the category of operating agreements where carriers get together with their immunity and agree to share capacity amongst themselves, so that one particular line may also offer on its ships space that can be used by other lines. That's resulted in a more efficient utilization of capacity, increased service, more frequent service, and greater scope of service. And even those agreements, specifically, the OECD report said, they have antitrust immunity, but are very positive and should not be disrupted, even though H.R. 1253 doesn't make that distinction.

The other kind of agreements are what—are the rate discussion agreements, where the carriers try, as I discussed earlier, to deal with the incredible cyclicality and structural overcapacity in this business to come up with rate discussion agreements that provide some modicum of target-level pricing and some level of market stability. What OSRA did in 1999 was fundamentally change the Shipping Act, so that they can agree on that.

But there's no way to enforce a particular rate. All carriers negotiate individual confidential contracts, confidential amongst each other too, which makes sure there's adequate competition. Nevertheless, the rate discussion agreement at least provides some level of market stability and benchmark as to how to approach what is a very, very difficult market.

Mr. FORBES. And we've heard many of the unions are supporting this. Are the ports and maritime unions supportive of this legislation?

Mr. KOCH. Thank you for that question. No, the ports wanted to testify today and weren't able to. I think they've submitted testimony against the bill. And the maritime labor unions, in fact, are opposed to this bill.

I have a letter here, which maybe Mr. Hoffa hasn't seen. The Seafarers Union; the Master, Mates and Pilots; the Marine Engineers; and the American Maritime Officers are all opposed to this legislation.

And if it's not in the record, Mr. Chairman, I'd ask that it be put there.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Mr. FORBES. Mr. Chairman, thank you. I yield back the balance of my time.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I am trying to understand who is benefiting from this antitrust immunity.

And I'd like to ask, Mr. Koch, you represent the World Shipping Council. Are there any United States companies in your council?

Mr. KOCH. Yes, there are a couple.

Ms. WATERS. A couple. Who are they?

Mr. KOCH. Crowley and Great White Fleet.

Ms. WATERS. Are they basically operative now?

Mr. KOCH. Yes.

Ms. WATERS. Are they operating?

Mr. KOCH. Yes.

Ms. WATERS. Because it appears that, from the information that I have, that all of the ocean liners are foreign-based.

Mr. KOCH. I'd be happy to address that.

Ms. WATERS. And as you are addressing that, I really want to understand how immunity will make it easier for U.S. companies to enter and remain in the ocean liner industry. And if immunity helps, why haven't U.S. companies been able to remain in the industry? Could you give me a little discussion on that?

Mr. KOCH. Sure. I'd be happy to. And I'd point out that Crowley is actually headquartered in Oakland.

The liner industry is not just a foreign industry. It generates more than a million American jobs.

Ms. WATERS. Could you——

Mr. KOCH. And $38 billion in wages. Now, the U.S.-owned liner companies that were sold—such as Sealand, where I worked for 7 years, APL, Lykes, and Farrell—they were sold for a very distinct reason, which is, in the United States, if you're a publicly traded company on Wall Street or even with private investment, this industry is so competitive that you get punished for owning—having investment in the shipping industry.

I'll give you a personal example. CSX Corporation owned Sealand. CSX stock was punished on Wall Street. The financial analysts criticized CSX for having investment in this industry, because the rates were so consistently low, profitability was so low, that it suffered for that. And so CSX sold the company to Maersk.

So sales of these lines only confirm how intensely competitive the business is, not that American consumers are being harmed.

Third, the overwhelming majority of U.S. flags that are still in operation in the international liner industry are used and financially supported by carriers that are not U.S.-owned companies. So those vessels that still operate out there, such as Maersk and APL and Lykes and Farrell that have U.S. flags in their service, are companies that are headquartered offshore.

And one thing is certain, which is subjecting an already——

Ms. WATERS. I'm sorry, would you—U.S. companies that operate offshore?

Mr. KOCH. These are U.S.-flagged vessels that are operated by—or that are used by ocean carriers that are not headquartered in the United States, such as Maersk, for example.

So what I'm saying is that what is left under the U.S. flag in this industry is supported ultimately by these foreign investments.

The fourth point I'd like to make is that, with this industry struggling the way it is to make adequate financial returns, and especially with our own U.S. laws unable to attract American capital into this industry, the presence of the companies that are there and the capital they are investing in this business is something which should be encouraged not disparaged, because what this industry does is it provides the transportation infrastructure for the movement of our foreign commerce, over $500 billion worth of goods, $1.3 billion a day through U.S. ports.

This is an industry providing an immense, not only employment base, but an immense value to our economy at exceptionally good rates. It should not be something that is destabilized or made unprofitable.

Ms. WATERS. Thank you.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart.

Ms. HART. Thank you, Mr. Chairman.

I have a question for Mr. Koch. You stated that under the antitrust exemption, ocean carriers are not permitted to establish inland trucking rates. Many of those carriers argued, I assume under oath, to the contrary before a European court and later before the European Commission. In trying to persuade the European Commission that carriers were entitled to set inland rates under the antitrust exemption, those carriers argued that several countries, including the United States, allow liner conferences to fix the prices for inland transport services as part of intermodal transport. Moreover, although the commission rejected the carriers' argument, the commission, relying on their evidence, did recognize that such was the case in the United States in, I believe it's case—*Compagnie Generale Maritime* v. *Commission* of the European Communities. Are you familiar with that? Could you speak to that, please?

Mr. KOCH. I'd be happy to. The Shipping Act clearly does not provide antitrust immunity to ocean carriers to get together and discuss or set the rates they pay truckers. Mr. Hoffa, on that point, has simply been given some bad information. If they do, they are subject to the antitrust laws today.

What ocean carriers do have is the ability to sit down and discuss the rates that would be charged the importer or the exporter. What importers and exporters generally want, at least as an option, is what is the through rate. Let's say, for example, Shanghai to Chicago. Because they want one rate—"I just want to move my stuff from China to Chicago. What's it going to cost me?" So they ask the ocean carrier to provide that through rate for the whole thing, and the ocean carrier will arrange for the inland transportation. That is what the carriers have immunity to discuss, not what they will get together and pay you as truckers.

The European Commission issue you're talking about deals with a variance under European law where ocean carriers don't have that ability in Europe to set the through rate for what they charge the importer or the exporter.

I hope I answered your question clearly.

Ms. HART. So you're basically saying that they can set it if it's for the entire trip but not if it's separate, basically.

Mr. KOCH. No. Let's say GM wants to move some components in from China, so you charge them $2,000. GM can be quoted in a conference or a discussion agreement could recommend a rate of $2,000 bucks, China to Chicago. What cannot happen is for the carriers to get together and say: We're going to pay the trucker or the railroad or whoever $1,000 bucks to move it from LA to Chicago.

That they do not have antitrust immunity to do.

Ms. HART. The next leg, you're saying the next leg is——

Mr. KOCH. Well, it's a piece of it, yes. They have the immunity to set the rate they charge the customer. They do not have immunity to get together and set the rate that they will pay to their own vendors, the trucker or the railroad.

Ms. HART. Thank you.

Mr. Hoffa, do you have any comment on that?

Mr. HOFFA. What I'm saying is that the pressure is on the truck owners, who then give the loads to the independent contractors, who are the drivers that we are trying to organize.

So I'm not saying that the ocean carriers are dealing with the owner-operators. They're dealing with these trucking companies and dictating collectively such low rates that it amounts to exploitation of these drivers.

So it's basically the ocean carriers set low rates for the trucking companies. The trucking companies then have a series of these owner-operators that are standing around with these broken down trucks. So the rates are so low there is nothing left for the driver to operate on. And as I said, he has to stand around.

So that's where the problem is. The rates are low. So low, as dictated to the trucking companies, there's nothing left. And it is this collective power to dictate low rates that's the problem. And that is because of the antitrust exemptions.

And these people are talking all the time, and no one believes that they don't talk about the rates they charge, that they just sit around and talk about shipping something elsewhere over the ocean.

This is part of their cost. So this is where they get involved to dictate rates. And they might deny it, but the indication is that they are artificially low across the board.

Ms. HART. I will allow—Mr. Koch, if you want to say something.

Mr. KOCH. There's a certain amount of sympathy with what Mr. Hoffa is saying, because rates to truckers are low. The port drivers are not well-compensated people. There is some sympathy about the lines being long in the ports, too.

It is the low rates that the ocean carriers are getting that are in fact causing the pressure on trucking rates.

What is not correct is that those low rates are in any way the result of carriers getting together to set low rates. I mean, that wouldn't make any sense.

Carriers, if they have antitrust immunity, are not going to use it to set rates that are unreasonably low. If there is a complaint, it's more like Mr. James' complaint that somehow the rates are somehow higher than they should be.

Ms. HART. My time is up. I yield back.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I guess before I ask a question, I want to make disclosure, so that I try to respond to the gentlelady from California. Sealand, which had a major operation in my congressional district, was acquired by a foreign-based company in a merger acquisition. That foreign-based company has continued to have an equivalent if not larger base of employees and people in my congressional district, even though it moved the ownership. I mean, this is part of this whole globalization thing that's taking place.

So that's neither here nor there on the issue of whether there ought to be an antitrust exemption. But at least we should understand that, in this industry as in a number of industries, all of the headquarters won't necessarily be in the United States, but many of the jobs will continue to be in the United States, because they can't operate in the United States, whether they're U.S.-based or foreign-based, without having U.S. employees.

Having said that, I've tried to understand both sides of this. And there is nothing better, probably, than having a base of employees in your congressional district to make you try to understand that and try to be as evenhanded about this as you can.

Let me ask Mr. Koch a couple of questions. He seems to be outnumbered on this panel, so I'm going to ask him a couple of questions. They're not softball questions, though. They're questions that are truly troubling me.

Mr. Hoffa makes the argument that one of the problems here is that rates are too low. As I understand it, rates are very low in this industry, and you seem to be defending that, which seems to be counterintuitive. What I could see happening, and maybe I don't understand how this would work, is if you didn't have the ability to talk to each other and give through rates and have these sharing arrangements that you have, there would be more competition and ultimately less carriers short term, but less carriers and less competition long term, possibly. I'm not sure that I'm there.

If you didn't have these artificially low prices short term, wouldn't the most aggressive one or two carriers basically, over time, drive out the other carriers? How do you respond to that? That would be a concern that I think we ought to at least put on the table here.

Mr. KOCH. Fine. I'll do my best.

First, if I'm defending low rates, I want to correct that for the record. Rates are very, very low. The point I was trying to make is that they are not low because antitrust immunity exists for carriers to discuss rates. They are low because we're suffering from a major imbalance between supply and demand. There is overcapacity in the business.

Mr. WATT. Why wouldn't they be low because—you can discuss rates as long as they're shipping rates. What you're saying is you can't discuss rates for trucking.

Mr. KOCH. What we pay the truckers, that is correct.

Mr. WATT. Right.

Mr. KOCH. That is correct. But just intuitively, if carriers get together to discuss shipping rates, their purpose is not to get them too low. Their purpose is to try to stabilize the market and rates out there. The fact that they are not very effective at the present time in doing that because the market conditions are so adverse because of supply and demand is just the nature of what the market is right now.

If I've answered that part of your question, I'd like to go to the next, which is what would happen if you did lose the Shipping Act system. And I don't know that anybody is ever clairvoyant enough to predict with certainty what would happen. But I think it's fairly clear that if you destabilize this industry any further, you will clearly cause rates in the short term, as you point—to potentially go down. And you're almost certain to have, as a result of that, a number of carriers go out of business and have severe consolidation in this business.

As you point out, antitrust theory assumes that the most efficient operator will survive. And, therefore, it's good, because the efficient ones survive.

In this industry, there are very many different situated carriers. Some are State-controlled, as you pointed out. Some are structured very differently. And it is by no means certain that the most efficient carrier would be the one to survive.

As you said—I think your term was the most aggressive carriers would survive. I don't know who wins that war in the end. I don't know who's left standing when it's all over. But I'm fairly confident that you will not have the number of carriers or the number of choices that you do today, and I don't know who will end up holding those carriers that do.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair.

I would like to take personal privilege in substituting for the Chairman's inclusion of Wisconsin cheese in his hypothetical. I want to substitute Hershey chocolates in the same hypothetical, so keep that—— [Laughter.]

Chairman SENSENBRENNER. Also a very good product. [Laughter.]

Mr. GEKAS. Yes, thank you.

The Congress is fast approaching finalization of trade authority or fast-track authority for the President of the United States and—it being in conference as we speak.

Without telling us whether you approve of or not the concept of fast-track authority for the President, I would like to know, assuming that it will pass, and I think it will in a final conference report, what does this issue have to do with the President's negotiations with other nations on trade? Does this have an impact, this particular issue?

Let's start with Mr. Coleman.

Mr. COLEMAN. Well, I will go on record as being a very, very staunch supporter of the President having trade promotion authority. I think it's essential in our global economy that our President be able to negotiate trade agreements.

I think that the cost of ocean transportation has a lot to do with any kind of a trade agreement that's negotiated. Trade agreements are just exactly that. It's the ability to move product and sometimes services back and forth between countries in our global economy.

Transportation costs, ocean transportation costs, are a very real part of the cost of any product or service that's provided in the global economy. So I think that antitrust immunity basically allows a carrier to arbitrarily raise transportation costs.

Let me give you an example, if you don't mind. Agriculture is an example. Contracts for the sale of products abroad, for agricultural products, are negotiated months in advance. Prices are set, the product is produced, the product is gotten ready for shipment, and then a carrier can come around and arbitrarily announce a freight rate increase. This totally destabilizes the entire process. It will put a shipper in the position of either perhaps losing his contract or having to move his products to the global marketplace at a loss. Or even if the carrier withdraws the freight rate increase, which they do many times—they will announce a major freight rate increase, and then they will at the last minute withdraw it—it still has completely destabilized the market.

The buyer of our American products in many cases will go to another country that produces a similar product where there is stability in ocean shipping, and they will purchase that product from the foreign country. New Zealand and Australia are two countries that are benefiting from our unstable situations.

So I think that antitrust immunity affects freight cost, and I think freight costs are a part of any trade agreement that's negotiated.

Mr. GEKAS. Mr. Hoffa?

Mr. HOFFA. Well, on behalf of the Teamsters, we're against fast track, and we think that Congress should not abdicate its responsibility to have input. You are the people that are elected by the people, responsive to the people. And you're the ones that reflect the feelings of America. And I believe you ought to have——

Mr. GEKAS. But assuming that it passes——

Mr. HOFFA. You ought to have input into any type of bill that's passed or any type of treaty or trade agreement.

And also, under the fast track, we would suffer by losing a lot of consumer protection bills that we've passed, Congress has passed——

Mr. GEKAS. I understand.

Mr. HOFFA [continuing]. Legislation passed——

Mr. GEKAS. I understand that. I said, assuming that it passes, is what my question is.

Mr. HOFFA. All right, I just wanted to let you know where I stood. [Laughter.]

Mr. GEKAS. Yes. I knew that.

Chairman SENSENBRENNER. Will the gentleman yield?

I just want to put on the record at this point in time that I have expressed my concern to U.S. Trade Representative Zoellick that the Europeans will end up putting competition clauses into the latest round of trade agreements that would legitimately fall under the jurisdiction of the Judiciary Committee, since competition is our bailiwick and not that of Ways and Means. And I advised him that I am strongly opposed to that and would strongly oppose any type of international trade agreement that was negotiated that would end up modifying U.S. competition law, whether it be the antitrust laws or the Federal Trade Act, in any way, shape or form.

I want to put that marker in there right now, so that 4 years from now, we all of a sudden don't find out that our ability to amend the antitrust laws ends up being delegated to the World Trade Organization.

Mr. GEKAS. I ask unanimous consent that I be granted an additional period of time to hear the full answer of Mr. Hoffa, and the same——

Chairman SENSENBRENNER. The gentleman will get an additional minute.

Mr. HOFFA. Okay. My point is I think that we should get rid of this antitrust exemption, because there would be more competition and more of an ability for us to raise the level of the truck drivers. That's our position.

And I don't think—and to be consistent with that, you wonder how that works out with any type of a fast-track agreement, which would possibly make a treaty nullify our antitrust laws. So it's conceivable there could be a conflict here.

But as we said at the beginning, we're against this antitrust exemption. We want that out. I don't see the conflict. But conceivably, they could get into negotiations with somebody that say, on top of that, all of your antitrust laws have to go. So I think there could be a conflict there.

They're talking about repealing—many trade agreements go to some of our consumer protection laws that our Legislatures in different States have passed. They have to get removed, because they're found to be in conflict with the World Trade Agreement, or NAFTA, or something like that.

So there really is a problem here with fast track and how it conflicts with our laws, both State and Federal.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. GEKAS. Mr. Chairman, I need an extra 30 seconds to allow Mr. Koch to answer the same question, if he can in 30 seconds.

Chairman SENSENBRENNER. If he can do it in 30 seconds, because Mr. Conyers is really getting antsy to have his licks.

Mr. GEKAS. Well, Mr. Conyers owes me a couple of seconds over the years. [Laughter.]

Mr. KOCH. I'll try to be brief, Congressman. Our industry supports anything that promotes free trade, international trade, because that's what we do. That's what we carry. So we would support fast track.

I would also say—I just have to say that the statements by Mr. Coleman are just simply not true, particularly as to agricultural exports. Rates are so low—I refer you to the Department of Agriculture's own report that—to say ocean carriers would price a commodity's transportation in such a way as to keep it from getting to a market and, therefore, lose the cargo, is just plain silly. It is nonsense to make that kind of argument. The facts don't support it. There are no facts to support it.

If you took the total cost of importing—now, on the import side, all commodities by liner shipping, whether they're for consumers or industrial, and averaged it out, it would be $130 per American household. This is not a huge part of the cost of either imported goods——

Mr. GEKAS. But back to the question, fast track would have to take into consideration what this legislation would do.

Mr. KOCH. No, I don't think it would. I think it is a separate issue.

Mr. GEKAS. Thank you. I yield back the balance of my nontime.

Chairman SENSENBRENNER. And it is nontime. [Laughter.]

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

First of all, I want to greet my former Detroiter, James Hoffa, and let him know he really knows how to put a pro-labor Congressman in a tough spot. I want to congratulate you for that, sir. [Laughter.]

Mr. CONYERS. I could really take care of most of the other witnesses with you, but this complicates things, and especially since you relate it to other larger issues and where this will all spin out.

Now, the shippers would love this, so there you are. General Motors, Ford, and Chrysler happen to be laying around Detroit since the beginning of the automobile industry; they would like it. The cargo consolidators, Mr. Coleman's group, they would love it. But the rest of the labor movement, I get an uneasy silence, or an out-right opposition, which leaves your friends in a difficult position. The carriers oppose it.

And so I just want to ask our new Assistant Attorney General in charge of antitrust, whom we welcome to the Committee, his first appearance before us, which I hope will be—he will receive the kind of kind cooperation that will lead him to be anxious to respond to our invitations in the future. [Laughter.]

Mr. CONYERS. Can you explain—where is that report that came out? Let's take a look here at a report that kind of tries to tell us what's happened with the 1998 Ocean Shippers Reform Act. I need the name of the report. Remember that report that came out? "The Impact of the Ocean Shipping Reform Act of 1998," prepared by the Federal Maritime Commission, and they released it in September of last year.

Mr. JAMES. I'm familiar with the report, sir.

Mr. CONYERS. You said what?

Mr. JAMES. I'm familiar with the report.

Mr. CONYERS. You're familiar with it.

So they didn't come up with this notion that's before us in the form of a bill, did they?

Mr. JAMES. No, they didn't.

Mr. CONYERS. And——

Mr. WATT. Is your mike on?

Mr. JAMES. Yes, it is.

Mr. CONYERS. Well, pull the mike closer.

Well, what—did you disagree with the report?

Mr. JAMES. I don't know that I necessarily need to disagree. I think——

Mr. CONYERS. Did you like the report? [Laughter.]

Mr. JAMES. Did I like the report? I read it. I thought it had some interesting insights in terms of what it suggested.

But the issue is not, I think, one that has to be taken in very binary terms. Did the reform act work, or is the reform act not working? The real issue that we're attempting to address here is sort of the nature and quality of competition.

As we've talked about the discussion today, the ocean carriers under the current situation are allowed to act as a cartel. Mr. Hoffa and Mr. Coleman represent organizations that are forced to deal with this cartel on a daily basis, and it has consequences for their operations.

Mr. CONYERS. Okay, Mr. James, forgive my intrusion, but I only have a couple of minutes left.

This act, as counsel advises me, was about the impact of antitrust on ocean shipping. So you and I can have some longer discussions about that, but the gist of the report, I thought, was that everything was okay as it is.

Now, let me ask you another question. I'll put a pin in that one. Is there any rationale for people attempting to remove the antitrust immunity provision, projecting that costs will go up, and others projecting cost will go down, which you've heard here today? Can you help me sort that one out?

Mr. JAMES. I'm not exactly sure the basis for projection that cost would go up. I think the issue that's discussed here is the extent to which the existence of the immunity permits competition. The substance of the report was that OSRA had, the effect to the extent that it permitted more independent action by shippers, permitted a degree of additional competition. By the same token, it permitted the use of these discussion agreements, which a different report by the FMC, in reference to the 1998 situation in the Pacific trades, suggested that the discussion agreement, the so-called TSA, Transpacific Stabilization Agreement, has had potentially anti-competitive effects and was something that was of concern to the FMC commissioner who investigated that matter.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I very much appreciate your holding this hearing. I do not have any questions for the witnesses. In fact, I'm just learning about the issue.

But I have been requested by the Virginia Port Authority to put a letter, from them to me, into the record, and I ask permission to do so.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The other gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Hoffa, I think I understand the idea that if the cartel has got a price that doesn't leave enough money left over for truckers, that you can't get a reasonable fee and that they're going to be using broken down trucks. People are going to actually operate on that.

My question though is how this bill will affect that situation, because it seems to be that if they've agreed on that low fee, if they can't agree anymore, at least somebody would be willing to go for that low-ball fee. If others charge a higher fee, the one with the low-ball fee is going to get the contract on a competitive bid, and you're right back where you started from.

How would—so I guess my question is, how would the passage of the bill relieve the situation you're in?

Mr. HOFFA. Our belief is that this cartel is making tremendous amounts of money. There's no doubt about that. They're doing very well. And they're squeezing the people below them to make this money.

If we broke up the cartel, at least they wouldn't be working like they're working now, and we could start making separate arrangements with them. But they're comfortable with the fact that they have the cartel, and they just deal with each other, and they collectively exploit everybody below them.

So the first step is let's break up the cartel and let's see what happens. I mean it's like OPEC. We broke up OPEC. Let's see what happened with OPEC, and maybe we can talk to Venezuela, maybe we can talk to other companies—I think that's the—other countries. I think that's the idea.

If we could break up the cartel, then they could—we would see what happens economically with their dealing with trucking companies and setting overall rates that are the ultimate rate that is set for the entire transportation of a container.

So I think the answer is, you're not going to know. It's like breaking up OPEC. If you broke up OPEC, what would happen? Well, we could have more competition. We might be able to get better deals with them, get lower rates.

But let's go the other way. Let's take this cartel. This cartel has collectively got together; they're making a lot of money exploiting everybody down. Let's break up the cartel, let's get rid of the antitrust exemption, and let's see what happens, because I think we can then start dealing with them on an individual basis, and they won't be able to rely on each other to exploit people. And perhaps we could do better in setting rates.

Mr. SCOTT. Mr. Koch, several people have mentioned the stability of the industry. If the bill is passed, what effect would it have on investments in U.S. ports, employment level at ports, and salary levels at ports?

Mr. KOCH. To the extent the bill was enacted, Congressman, and produced the results anticipated, it would cause further destabilization and rate droppage. It would obviously—Mr. Hoffa's got a point, which is, because rates are so low, carriers are forced to try to find cost savings everywhere. Truckers, he's got a point, are not making what he would like to see them make.

If you drive rates even further, that pressure on the truckers will increase, the pressure on longshoremen would increase, the pressure on oceangoing crews would increase, on sales forces, everywhere. So what that would do is certainly have a major impact on the more than 1 million Americans who get their employment from this industry.

What follows after that, what kind of consolidation emerges, and what kind of price competition reduction might occur, is somewhat speculative. Nobody would really know the answer to that. But it certainly would be a more concentrated industry with fewer carriers. And it would certainly be a situation where, because they'd have to go through that shakeout period, there would be a lot of people who work who are affected by these companies who would get squeezed even more than they are today.

Mr. SCOTT. How much of the rate-setting would be affected by the antitrust repeal, as opposed to the idea that the rates are set pretty well worldwide and it doesn't matter what we do here?

Mr. KOCH. Well, shipping rates aren't set worldwide. They're really set by trade lanes. We have transatlantic rate—trade lanes, transpacific. I mean, every trade lane that serves American commerce will have different rates. So they really aren't set on a worldwide basis.

What is true is that——

Mr. SCOTT. A shipper doesn't have a choice between a lot of different shippers? And if we change our antitrust exemption, it would get—I mean, would the price change?

Mr. KOCH. The assets that are used in this business certainly can be moved from one trade to another, to the extent profitability got to the point where you couldn't make money in a U.S. trade. Theoretically, you could move it to another trade; let's say Asia-Europe trades. That would be, frankly, difficult to do, because there is already adequate capacity in those trades.

That's one of the traps the carriers find themselves in. They build capacity for a trade. If that trade collapses, that investment is sunk. It's there to serve what was projected. And you theoretically can move it somewhere else, but if you've already invested to serve those other trades, then you just exacerbate the problem in that trade by moving capacity around.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me thank the gentlemen for their testimony and indicate my presence on the floor for debate, having missed their statements. So forgive me if some of the inquiries have been mentioned in your statement. But I would like to make a number of inquiries.

And before I do that, let me simply say that this is a dilemma, but I think a point that is not a dilemma but, frankly, sad is to acknowledge that all of the major carriers operating in and out of the United States are now under a foreign flag. I think that's disappointing.

If you begin to look at our history, even if you happen to be a history buff that looks at the various early wars, and not that you would necessarily be a hawk, but you looked at the various sea wars and know the prowess and the expertise that we had in the United States on shipbuilding, and the controversy that we've had over the years, regarding that industry, and to think now that our carriers are under a foreign flag.

With that said, let me try to understand this issue with Mr. James and, just in a brief scenario, have you taken a position? When I say you, has the DOJ taken a position on this legislation?

Mr. JAMES. Yes, we have, Congresswoman. We have consistently supported elimination of this antitrust exemption, and this has been the position of the Department of Justice for at least 12 to 13 years.

Ms. JACKSON LEE. And you see no problem with this sort of benefit being given to foreign carriers? I know there are a lot of subsets. There are the shippers and—but you don't see the difficulty in giving this benefit, this exemption, to foreign-flagged carriers, who will then have an added advance, if you will, to some of the needs that we have here in the United States?

Mr. JAMES. We are actually opposed to the exemption, and so——

Ms. JACKSON LEE. Okay. I wasn't hear——

Mr. JAMES. I apologize. We are actually opposed to the exemption and believe that this benefit, the idea that a cartel should be permitted to stabilize this industry, is actually a bad public policy idea.

Ms. JACKSON LEE. And why do you think—why would you then take the position that they don't need it? What can they do in the alternative besides seek an exemption?

Mr. JAMES. They could compete like companies do in other industries and deliver to consumers the benefit of competition. We are opposed to the cartel.

Ms. JACKSON LEE. And your research suggests they could compete?

Mr. JAMES. Absolutely.

Ms. JACKSON LEE. Mr. Hoffa, would you kindly just—because there is this dilemma that the Ranking Member has exposed and is clear between some of the Federal trades and, of course, the Teamsters. I'm interested in creating jobs. How do we balance that by opposing the exemption?

Mr. HOFFA. Well, we want the antitrust exemption lifted because we believe then we would be able to work with—it would have some effect that they cannot rely on each other to set rates that are artificially low. And perhaps then it would start moving and getting us an ability to deal with these carriers and the trucking companies, so we can organize our people to raise the level of these workers.

Everybody at this table has admitted that what the truckers get is artificially low and they are being exploited. But it doesn't square with the fact that the companies are making record profits.

So somewhere, somebody is grabbing that money, and it is not trickling down to where it is. And we have—we've tried it with the antitrust exemption right now, and it hasn't worked. The money hasn't trickled down.

Therefore, we agree with the Chairman that they should be lifted. And then, with competition, it could open the fact that we could have better rates for the drivers and that more of these profits would trickle down to the people who need the jobs and have to be able to live a life in America that is one that they can enjoy, as opposed to basically living in your truck, as many of these people do.

Ms. JACKSON LEE. Let me just have you broaden your perspective just for a moment, and I understand that you support the lifting of the exemptions so that there can be the kind of regulation that needs to be. But how do you balance that with your needs and the individuals that you represent, truckers, and trickling down to the other workers, such as port workers, which have a concern that it hurts them if we don't have the ability for the cartel to save itself—because that's what they're saying. Do you believe that this lifting will trickle down to all of the workforce?

Mr. HOFFA. I think it would, and I don't know of anybody that's doing well at these ports. They're being under tremendous pressure right now with so-called globalization and everything else that are pushing down the wages that they make right now. The truckers are one of them. The other people are also suffering the same way. These ports are under tremendous pressure right now, because of these cartels that are setting these rates, taking all the money and not sharing it and making sure that other people share in this great amount of money that's being made.

So we believe, if you break up the antitrust, we're going to be able to deal with these companies and maybe then work out the fact that we can get more money for our truckers, more money for the people at Sealand and other companies that are working in the ports across the United States.

Ms. JACKSON LEE. That is a concern.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE. Thank you.

Chairman SENSENBRENNER. Let me thank each of the witnesses for their very good testimony today. This hearing was much better than the one we had 2 years ago on this subject.

There being no further business, the Committee is adjourned.

[Whereupon, at 12:07 p.m., the Committee was adjourned.]

APPENDIX

Statements Submitted for the Hearing Record

Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress From the State of Wisconsin

The Committee on the Judiciary has exclusive jurisdiction over laws pertaining to antitrust and effective competition in the marketplace. As Chairman of this Committee, I have made it a priority to carefully examine the implementation and enforcement of our antitrust laws to ensure effective competition in our free market economy. This Committee also periodically considers competitive aspects of various industries including those exempt from antitrust laws. Today, we will consider H.R. 1293, the Free Market Antitrust Immunity, or "FAIR Act of 2001," a measure I introduced to remove the antitrust exemption presently accorded to ocean carriers.

The United States has the world's largest economy, and is its largest market. International trade represents close to 30 percent of U.S. Gross Domestic Product and accounted for nearly a quarter of U.S. economic growth over the last decade. Most of this trade is conducted over ocean shipping lanes, and this industry forms the basis of an international commercial system upon which the strength of the American economy depends. The Shipping Act of 1916 exempted ocean carriers from United States antitrust scrutiny. As a result, carriers have been free to jointly set ocean shipping rates in what are known as carrier conferences or discussion agreements.

These shipping rates directly affect the international commercial opportunities of potential U.S. exporters and the consumer choices of all Americans.

Subsequent amendments to the 1916 legislation have helped remedy persistent competitive concerns within this industry, and the Ocean Shipping Reform Act of 1998 helped address some of these concerns by permitting independent shippers to enter into service contracts with ocean carriers on a confidential basis.

However, over the last 75 years, the market conditions upon which ocean carrier antitrust immunity was predicated bears little resemblance to modern realities. Today, there are no major American-owned ocean carriers. As a result, this protection almost exclusively benefits foreign-owned carriers at the expense of Americans.

American shippers and companies which consolidate smaller shipments for import are given little choice but to pay rates that are collusively set by the carriers themselves.

American corporations can not avail themselves of export opportunities that would exist in a competitive marketplace. American workers who transport goods to and from ocean ports are required to accept trucking fees on what amounts to a "take it or leave it" basis. And ultimately, American consumers are forced to pay higher prices for a variety of imported goods. If Congress were to consider granting antitrust immunity to ocean carriers in today's shipping environment, it would be hard-pressed to justify this policy to the American people.

International comity has traditionally been a factor Congress considers when passing laws pertaining to international trade. However, Congress has a continuing, affirmative obligation to periodically examine or repeal laws which become detrimental to the well-being of American citizens.

Moreover, while maritime countries currently permit ocean carriers to evade competition laws, there has been considerable movement away from this policy. Canada is currently examining fundamental reform proposals and a European Union Court recently prohibited carrier conferences from collectively establishing inland transportation rates.

In addition, last April, the Organization for Economic Cooperation and Development, an international organization comprised of the world's leading economies, issued a comprehensive report examining the international ocean carrier industry. The report, which will be included in today's hearing record, concluded that "antitrust exemptions for conference price-fixing no longer serve their stated purpose—if they ever did—and are no longer relevant."

The report further recommended that member countries "seriously consider removing antitrust exemptions for price-fixing and rate discussions." H.R. 1253 would accomplish precisely this goal, and the American people deserve no less.

Before I yield to Ranking Member Conyers, I would like to acknowledge the leadership of former Chairman Henry Hyde, who introduced similar legislation last Congress and has long been a leading advocate for American shippers and consumers.

PREPARED STATEMENT OF THE HONORABLE SPENCER BACHUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman, ranking Member Conyers, and distinguished Members of the Judiciary Committee, as a member of this Committee and the Transportation and Infrastructure Committee, I have spent considerable time on the issue of ocean carrier antitrust immunity. At the outset, let me say that I believe the reforms made in the Ocean Shipping Reform Act of 1998 (OSRA) are working, and that we should carefully consider the entire regulatory scheme under which this industry is regulated before we rush to enact changes to it.

In September 2001, the Federal Maritime Commission released a two-year study of OSRA's impact on the liner shipping industry. The report concluded that OSRA is working as intended. There is price competition in the industry; rates are actually lower than they were 15 years ago. There is ample capacity, high quality service and regulatory oversight. In this industry, Mr. Chairman, we are in a much better place today than we were prior to the enactment and implementation of OSRA.

In contrast, repeal of the carriers' limited antitrust immunity would disturb the hard-won consensus reached in OSRA. Instead of providing a benefit to the market, such a change would result in a destabilization of the market, destructive price wars, severe financial loss, industry consolidation and poorer service for U.S. customers.

Finally, as we all recognize, the ocean carrier industry is undergoing major changes in the way it secures its ships and containers to thwart terrorist attacks. I caution the Committee from proceeding down a legislative path that will require the industry to redirect resources from port security to economic matters at this critical time for our nation.

Mr. Chairman, liner shipping is the heart of our economy. Whether we realize it or not, products from around the world fill our offices, homes and backyards. Many of these products arrived in the U.S. on container ships. We should work together to ensure that this industry remains secure and strong in the years to come.

Thank you.

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, thank you for conducting this hearing on H.R. 1253, the Free Market Antitrust Immunity Act of 2001. I am glad to have the opportunity to participate here today because, as you know, I was Chairman of the Subcommittee on Coast Guard and Maritime Transportation when we first began to discuss ocean shipping deregulation almost eight years ago.

As Chairman of the Subcommittee, I held extensive hearings on this issue and believe that the compromise reached in 1998 represented a delicate balance that had the support of a majority of the major stockholders in the ocean shipping industry. That is certainly not to say that this law is perfect. In fact, I would venture to say that the Congress rarely passes a perfect piece of legislation.

As you know, the Ocean Shipping Reform Act of 1998 (OSRA) dramatically changed the regulatory and competitive environment of the ocean shipping industry. It is also important to recognize that the changes brought about by this legislation took effect only three years ago—May 1, 1999. In September of 2001, the Federal Maritime Commission released a report stating that OSRA is working to the benefit of all parties, including customers, and rates continue to be competitive.

In respect to this hearing and its focus on the antitrust aspects of the Ocean Shipping Reform Act, there are several key points that I think merit attention. While I would not generally consider myself a supporter of antitrust immunity, it is important to recognize that the exemption from antitrust laws for ocean carriers has existed since 1916 and is the policy of our international trading partners. Additionally, both the railroad industry and the motor carrier industry, both of which currently operate in a deregulated environment, enjoy similar immunity. I do believe that unilateral action by the United States to revoke antitrust immunity would disrupt international trading conditions and unfairly disadvantage U.S.-flagged carriers and shippers.

If given time, I also believe that these reforms will provide a unique opportunity for non-vessel-operating common carriers (NVOCCs), shippers' associations and freight forwarders to thrive. Shippers now have numerous choices in deciding how their goods are transported and these intermediaries may become significant players with which carriers and conferences will have to negotiate.

Finally, while some opponents of the antitrust exemption argue that today's carriers are foreign-owned and therefore should not receive U.S. antitrust immunity, it is important to recognize that this industry employs approximately 528,000 American workers, including carrier management, tug crews, longshoreman, and harbor pilots. Further, it is estimated that the liner shipping industry generates approximately $38 billion annually in U.S. wages. That said, in my opinion, although these carriers may be foreign-owned, the American worker, customer and economy greatly benefit from the success of this industry as a whole.

Mr. Chairman, in an ideal world we would have a completely deregulated global shipping market with full competition. I believe that this notion is probably not realistic, and therefore, I maintain that antitrust immunity is desirable in order to protect U.S. carriers and is in the national security interest of our country. Simply stated, we

should allow the Ocean Shipping Reform Act to work as we intended and as it is doing.

PREPARED STATEMENT OF THE HONORABLE LINDSEY GRAHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, ranking Member Conyers, and distinguished Members of the Judiciary Committee, I am submitting this statement for the record of the Committee's June 5, 2002, hearing on ocean carrier antitrust immunity. This issue and the overall regulatory scheme governing the liner shipping industry is a matter of great importance to the State of South Carolina, which is home to the Port of Charleston, the busiest container port along the Southeast and Gulf coasts and the fourth busiest nationwide.

The enormous role in which international trade plays in South Carolina is not well known outside the State, but it is well recognized within our borders. International trade through the Port of Charleston provides over 83,000 jobs throughout the State and pumps $2.6 billion in wages into our economy each year. Charleston has played a major role in international commerce throughout our nation's history, and with three major port-related projects underway today, it will continue its leading role in the future.

In 1998, Congress approved the Ocean Shipping Reform Act (OSRA). It was a hard-won consensus among shippers, carriers, ports and the maritime unions. Enactment of OSRA was a four-year project for Congress, and we are now seeing the benefits of its implementation. There is ample capacity in the ocean carrier industry, high quality service, regulatory oversight and price competition. Rates are lower than they were 15 years ago. Last September, the Federal Maritime Commission released a two-year study of OSRA. It concluded that OSRA is working as intended to the common benefit of shippers, ports, ocean carriers and transportation intermediaries.

Mr. Chairman, in order to keep our ports strong and vibrant into the future, we should allow OSRA to continue in effect and not make major changes to it. If it's not broken, then let's not try to fix it. In my opinion, repeal of the limited antitrust immunity that ocean carriers use to address the structural defects and chronic instability of this unique market would disturb the hard-won consensus reached in OSRA. The result will be destabilization of the market, destructive price wars, severe financial loss, industry consolidation and poorer service for U.S. customers.

We also must be mindful of the fact that this is an international business which must operate under a regulatory regime that is acceptable to all trading nations. No country in the world applies its domestic antitrust laws to liner shipping. Instead, the current regulatory regime, overseen in the U.S. by the Federal Maritime Commission, is well-understood, functioning well and is internationally accepted.

Finally, the Chairman knows full well, having served as the House's point person on much of the post-9-11 anti-terrorism legislation, the heavy burdens being placed on our nation's transportation infrastructure to prevent future attacks. The port community and the ocean carriers are front and center in this debate, and they are devoting considerable manpower and resources to confronting the challenge. At this time of intense activity on this front, we should not be enacting legislation to fundamentally alter the economics of the industry that keeps our ports bustling, productive and efficient links to the world.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Chairman Sensenbrenner and Ranking Member Conyers, for holding this hearing on H.R. 1253, the “Free Market Antitrust Immunity Reform (FAIR) Act of 2001.”

I am very familiar with the shipping industry, and I am satisfied that competition exists within the current model. As a small business owner for over twenty years, I distributed my products all over the world. I depended on the shipping industry to deliver my products on time and unblemished. I had choices as to which carrier to use, and the marketplace was not dominated by a single carrier or pricing scheme. I am confident that there is price competition within the industry.

The antitrust immunity the shipping industry currently has is limited in scope. Carrier agreements have no authority to limit service contracting activities or enforce rates. However, these agreements serve the function of allowing shipping lines to exchange market information, improve planning for capacity utilization, and diminish rate volatility. The need for limited antitrust immunity is best illustrated in the market with which I am most familiar—America’s trans-Pacific trade.

Like most trade lanes, a severe cargo imbalance exists between the directions of the lines’ roundtrip voyages. Precisely two containers of U.S. imports move east for every container of U.S. exports traveling west. As a result, carriers incur heavy expenses repositioning empty equipment. In this situation, limited antitrust immunity is vital. It allows the carriers to exchange and discuss market forecasts, capacity plans, and determine a rational economic response.

Mr. Chairman, thank you for holding this hearing today, and I look forward to hearing the testimony from the panel of witnesses.

PREPARED STATEMENT OF STEWART D. HAUSER, PRESIDENT, NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC. & CARLOS RODRIGUEZ, ESQ., TRANSPORTATION COUNSEL TO THE ASSOCIATION, RODRIGUEZ O’DONNELL, FUERST GONZALEZ & WILLIAMS

Mr. Chairman, Congressman Conyers, and Members of the Committee, on behalf of the members of the New York/New Jersey Foreign Freight Forwarders & Brokers Association (the “Association”), I would first like to thank you for the opportunity to provide written testimony before the Judiciary Committee as you consider H.R. 1253, the “Free Market Antitrust Immunity Reform Act,” or the “FAIR Act.” We are pleased to submit comments before the Judiciary Committee as you consider various antitrust aspects currently facing the international ocean shipping industry and public. H.R. 1253 represents a bold and needed step forward for my industry. We are pleased to see that the Committee remains committed to overseeing implementation of recent changes to our nation’s shipping laws, and more importantly, that this body is serving as a forum for open debate of the issues confronting our industry and, indeed, the American public.

My comments reflect the views of our membership, which have been actively involved in ocean shipping regulatory reform for decades. I trust that you will find our comments constructive and insightful as you examine antitrust aspects of U.S. shipping laws and regulations. We hope that the Committee will ultimately agree that now is the time for additional legislative modifications to our nation’s shipping laws.

INTRODUCTION

The Association would also like to thank you, Chairman Sensenbrenner, for introducing H.R. 1253 and for holding this important hearing. You promised last session that this congress would revisit shipping reform and, in particular, the outstanding issues of concern to our membership. We would also like to thank Representative Hyde for his long-standing and continued support of our Association and the Ocean Transportation Intermediary (“OTI”) industry. We are all well aware of the “delicate compromise” that resulted in passage of the Ocean Shipping Reform Act of 1998

("OSRA"), and we are all well aware that forwarders and non-vessel-operating common carriers ("NVOCCs")[1] were not part of the final OSRA compromise. This piece of legislation and this hearing are very important to helping ensure that our nation's shipping laws serve the interests of the American public.

By way of background, the New York/New Jersey Foreign Freight Forwarders and Brokers Association is an association of approximately one-hundred-sixty (160) ocean freight forwarders, NVOCCs and customs brokers. We have served the New York-New Jersey port area, the largest sea port operation in the U.S., for over ninety years. The Association is also an affiliated member of the National Customs Brokers and Forwarders Association of America, Inc., the nationwide organization of forwarders and brokers. The New York/New Jersey Association has been actively involved in representing the views of forwarders and brokers at the regional, national and international levels throughout the years. I was named as a private-sector advisor to the U.S. delegation to the Organization for Economic Cooperation and Development's ("OECD") Maritime Transport Committee, and continue to take part in the OECD's work on regulatory reform in liner shipping.

Although our industry is linked in so many vital ways to international trade, the average person knows little or nothing about the essential services that our membership provides. Our members include "ocean freight forwarders," who traditionally have provided much-needed services to small and medium-sized exporters and importers, such as preparing and processing export declarations; booking, arranging and confirming cargo space on vessels; preparing and processing ocean bills of lading; coordinating the movement of shipments from origin to vessels; and providing expert advice to exporters concerning letters of credit, other documents, and licenses or inspections, applicable to various shipments. It is well documented that forwarders sometimes are the very catalysts that bring small and medium sized domestic manufacturers to export for the very first time, providing the expertise that brings goods to the international marketplace. Freight forwarders, in many cases, become the "traffic department" of many small and medium-sized exporters and importers.

Another type of ocean transportation intermediary is the NVOCC. These are intermediaries that provide transportation services but do not own the actual vessels by which the ocean transportation is provided. In effect, NVOCCs enter into shipping arrangements, usually through service contracts with the vessel operators, and agree to provide a certain amount of volume to the carrier in exchange for reduced rates, which are then offered to the general shipping public. It is in this way that small and medium-sized shippers are able to obtain shipping rates that they would not be able to otherwise obtain directly from steamship companies. Freight forwarders and NVOCCs represent a vital segment of the shipping industry.

The Association's members are directly involved in the international flow of goods, and, thus, are positioned to comment on proposed changes to the U.S. regulatory scheme that affects oceanborne transportation. In the past, for example, the Association has provided commentary on proposed trade and transportation legislation at the state and national levels, Federal Maritime Commission ("FMC"), U.S. Department of Transportation, and U.S. Customs Service rulemakings, as well as with federal agencies that implement export and import control regulations. In each instance, the Association's objective has been to provide insight from the forwarding/NVOCC and customs broker community on the proposed legislation or regulation. Hence, the members of the Association are well situated to provide constructive commentary on how OSRA impacts their daily lives, as well as to provide recommendations on how Congress might modify OSRA to correct some of the flaws that prejudice OTIs under the new Act.

The Association stands ready to assist the Committee with regard to each regulatory reform issue of concern raised by us and other OTI organizations on this panel.

ENACTMENT OF H.R. 1253 IS NEEDED BECAUSE OSRA IS NOT WORKING

First, Mr. Chairman, OSRA is not working. We have heard from many, including FMC Commissioner Delmond J.H. Won, today and during past Judiciary Committee hearings, that although OSRA represents an improvement in the shipping regime of this nation, it is inherently flawed and will never provide the needed protection to smaller shippers and ocean transportation intermediaries. This is predominately true because of the potential for discriminatory conduct by the carriers under their

[1] "Non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. *See* 46 U.S.C. app. §1702(17)(B) (2001).

antitrust immunity. OSRA, and the “confidential world” that it created, has indeed created a shift in the way that carriers and shippers do business. OSRA was, in theory, a good thing. However, the fact that carrier antitrust immunity was not touched by OSRA, and was actually expanded in certain respects, now provides the carriers with the best of all worlds. Carriers may still formally group in legalized cartels - or “conferences” - and discuss, review, formulate, implement and enforce collective rates for all shippers; they can form “discussion agreements,” which include both conference and non-conference carriers to review and establish pricing structures to be used by the carriers in a given trade; they can exchange information on shippers that enables them to monitor what each carrier is doing, even in a “confidential environment;” they can collude and discriminate against shippers based simply on the type of company that may be seeking to use their transportation services; and they continue to avoid application of U.S. antitrust and competition laws and regulations. This begs the question how does Congress rationalize that U.S. exporters and importers involved in the international commerce are subject to federal antitrust laws, while foreign steamship lines continue to operate immune from the very same laws? Mr. Chairman, it is important to note that there have been major developments since the Committee’s last hearing on ocean shipping, specifically the sale of all remaining U.S.—owned and operated international shipping companies to foreign parent corporations. Presently, there are no American companies that provide international liner service to and from the United States. This complete dismantling of U.S. shipping has occurred at the same time that many are questioning whether it is in the interest of our nation to permit foreign ownership of our rail lines or to increase foreign ownership in our airlines. Yet, until now, there has been no real examination of what has happened to U.S. shipping interests. The end result is clear: no matter how they may attempt to rationalize it, the sad and unfortunate fact is that there is no true U.S.—owned and operated international steamship company providing service to U.S. ports today. When Congress first granted the immunity to the lines, one of the reasons was to assist with the development of U.S. shipping lines. I proffer that the drafters of the Shipping Act, 1916, which granted the immunity, would not be very pleased at the state of U.S. shipping today. Yet, we still have antitrust immunity on the books that benefits foreign interests over American interests. I ask all members of the Committee, how many would vote today for an antitrust immunity that benefits solely foreign interests over those of clearly identifiable American interests?

Even today, as we discuss the merits of antitrust immunity for the shipping industry, carriers are taking advantage of their extraordinary rights to target OTIs and smaller shippers in the Trans-Pacific trades. This year’s contract discussions were overshadowed by carriers collectively agreeing to deal with OTIs as “second class citizens” and the refusal to deal until large beneficial cargo owners were satisfied with their shipping rates. As a result, members of the Trans-Pacific Stabilization Agreement (“TSA”), which is the agreement in the inbound Pacific Trades, told OTIs in the United States and abroad that they needed to “wait” until the proprietary shipper contracts were negotiated. Further, once some carriers began to talk to OTIs, the OTIs were told that they would have to pay surcharges, repositioning fees, and other ancillary costs that proprietary shippers of the same or sometimes smaller size were not charged. In the end, OTIs, as shippers, were the victims of the carriers’ antitrust immunity. The events surrounding the Trans-Pacific shipping season are now before the Federal Maritime Commission as a result of a petition by the National Customs Brokers and Freight Forwarders Association.

It is not a defense for ocean carriers to say that “discussion agreements” only provide for guidelines which carriers are “free to circumvent.” The reality is that even if the market place does eventually give way to true market forces, the marketplace was artificially distorted - if only for a few months - by the “voluntary” guidelines. There is no valid reason for that type of collective and anticompetitive behavior by ocean carriers.

In addition, the European Commission has decided to reconsider its approach to the block exemption granted to liner shipping companies. The OECD has finally released its recommendations on the topic - and the verdict is clear: antitrust immunity must be revised. The OECD report was concluded after years of study and research. It includes the views of all sectors of the shipping community - including carriers and shippers. There is a clear trend on the international level: carrier antitrust immunity must be reconsidered and revised. The Judiciary Committee is helping to ensure that United States shipping policies are not stuck in the 19th Century.

CONGRESS MUST CONTINUE TO REVIEW OCEAN SHIPPING POLICY

Opponents of the FAIR Act will argue that OSRA has killed the steamship cartels and that there is no need to remove the immunity that the carriers have enjoyed since 1916. Steamship cartels like those that existed before OSRA are dead. However, in their places the carriers have re-invented a device called the “discussion agreement.” Since OSRA became law in May 1999, discussion agreements have been the focus of many, including the Committee. In general, shippers, intermediaries, and shippers’ associations, call for the application of antitrust and competition laws to carrier discussion agreements because, in effect, they act like super-cartels by including over 90% of all carriers in a given trade - except one: the North Atlantic. As a result of a carefully examined and implemented prohibition, the European Commission (“EC”) does not permit carriers to operate in a discussion agreement. This has already proven beneficial to us in the United States. During the last several shipping seasons, major and many minor carriers providing fixed container service between the United States and Europe, met to establish a mega-discussion agreement called the “North Atlantic Agreement.” The proposal was filed with the Federal Maritime Commission, as well as with the appropriate European Commission. The EC’s Competition Directorate (DGIV) announced that it had problems with the proposed agreement and articulated its opposition, on the grounds that the agreement would amount to a carrier discussion agreement, which is prohibited under EU law. In contrast, the FMC did not oppose the carrier agreement, and, in fact, would have approved the agreement albeit for the fact that the carriers withdrew the proposal when it became clear that the EC would strike it down. On a related note, and an argument that opponents of H.R. 1253 will advance, is the question of whether OSRA is truly working and is it too early to begin again congressional action? First, it is clear by today hearing and the introduction of legislation, that Congress appears ready to listen to our concerns and move forward with new ocean shipping reform legislation. For that, we thank the Committee for its work to-date on this topic.

On the question of whether OSRA is working, our membership clearly believes that it is not and that there must be congressional action. For example, the EC’s DGIV, in conjunction with its Transportation Directorate (DGVI), have focused on apparent carrier collusion on the Atlantic with regards to the application of a surcharge that was announced and applied by both conference and non-conference lines in recent shipping seasons. The joint review by DGIV and DGVI indicates that things are not as peaceful as some would want the Committee to believe under OSRA. A sharp contrast to the proactive stance taken by the EC is an examination of antitrust/competition activities taken by the FMC since OSRA became law. Both the FMC and the EC’s DGIV and DGIV have jurisdiction over shipping matters on the Atlantic, but to-date the FMC has done nothing that comes close to the enforcement action taken by the EC in recent years.

Carriers do in fact review pricing information, shipper information - including confidential information that OSRA was intended to protect - and establish price “guidelines” for certain type of shippers, such as smaller shippers and NVOCCs. The issue of carrier antitrust immunity is important to my membership and the well-being of our nation’s import and export economies. Carriers continue to argue their immunity is required, even under OSRA, and have cautioned Congress not reopen debate on the new law. We must continue the debate on shipping reform. OTIs are affected by ocean carrier antitrust immunity, just as every shipper, including NVOCCs, are at the mercy of the inherently anticompetitive practices of carrier “discussion agreements.” In fact, OTIs have been specifically targeted, both prior to and under OSRA, by groups of carriers operating under their immunity. We have been subjected to discriminatory and predatory behavior of some lines. OSRA may have weakened traditional rate-setting cartels, and provided for confidential contracting between shipper and carrier, but it did not remove or modify carrier antitrust immunity. Our industry has changed dramatically since 1916. Today, industry analysts tell us that the future is in “mega carriers,” such as Maersk-Sealand, NOL-APL, CP Ships-Lykes, and P&ONedlloyd. These very same super steamship lines are also providing “point-to-point” logistics and are directly competing with OTIs. These lines are all foreign-owned, yet they enjoy an extraordinary privilege-immunity from U.S. antitrust laws. At the same time, these companies enjoy all the benefits under OSRA that OTIs are unable to claim. This makes no sense to the thousands and thousands of American owned companies that are OTIs - or for that matter, to U.S. importers or exporters.

As remarked, under OSRA, steamship cartels have been eliminated in every trade but the Atlantic, and according to the carriers, the conferences’ replacements, the “discussion agreements,” have no enforcement authority on their members for price setting. Many have asked what U.S. interests remain in retaining ocean carrier antitrust immunity, now that all major international liners are foreign-owned. Further, we must ask why retain the immunity under the changes made by OSRA? Especially when, if you believe that carriers are actually relying on marketplace demands, negotiating in confidence with shippers, "discussion agreements" don't set rates and the cartels no longer dominate the trades.

For further comment on this issue, I will defer to others on this panel and the prior testimony of others in support of H.R. 1253 before the House Judiciary Committee here today. But I did want you to know that ocean carrier antitrust immunity is an important issue and Congress should revisit it because it does adversely impact the lives of your constituents. It is time to at least modify the 1916 immunity to better reflect the times in which we find ourselves in the ocean transportation community.

CONCLUSION

OSRA does represent positive change, but it did not provide the same amount of shipping freedom for certain segments of the shipping industry and public, such as OTIs, smaller shippers, and shippers' associations. Ocean carrier antitrust immunity has long been the subject of criticism by shippers. However, it is hard to disagree with the fact that the ocean shipping world has changed-indeed evolved-substantially since the days of the London-Calcutta Conference, circa 1875, first collectively established rates and services. In the United States, the shipping industry and community is not the same as it was when the historic Alexander Committee [2] issued its report to Congress with a recommendation to exempt carriers from application of antitrust laws. OSRA helped introduce sweeping changes to the shipping community in the U.S., but the new Act's promise of a more market-driven approach to ocean shipping will continue to be undermined unless carrier antitrust immunity is substantially modified.

When Congress passed OSRA, members of this committee pledged to revisit the outstanding issues and commented on the House floor that Congress would work to correct some of the flaws in the new law because OTIs add such a great deal to the free and open marketplace. Congress acknowledged that it would have to deal with the concerns of OTIs and smaller shippers under OSRA. Today, carrier antitrust immunity hinders our ability to remain competitive in the marketplace because it does not permit the same freedoms as it does foreign-owned steamship companies and others. We call upon you and all members of the Committee to correct the flaws of our nation's shipping policy and help make the law a true deregulatory piece of legislation. Congressional action to enable us to sign contracts with our clients, eliminating tariffs and addressing carrier discussion agreements under OSRA, are all required to help keep us competitive in today's marketplace. OTIs are unable to wait silently for the next round of ocean shipping reform talks. We call upon you to eliminate carrier antitrust immunity as soon as possible. Such action will ensure that OTIs remain in business well into the 21st Century. Rep. Sensenbrenner, members of the Committee, I thank you for considering our comments, and we hope that you have found them insightful, constructive and helpful.

The Association is happy to provide further assistance to the Committee as it continues to review antitrust policy vis-&-vis international liner shipping regulation.

Respectfully submitted,
NEW YORK/NEW JERSEY FOREIGN FREIGHT
FORWARDERS AND BROKERS ASSOCIATION, INC.
Stewart D. Hauser
President
New York/New Jersey Foreign Freight
Forwarders and Brokers Association, Inc.

Carlos Rodriguez, Esq.
Ashley W. Craig, Esq.
Transportation Counsel to the Association
RODRIGUEZ O'DONNELL
FUERST GONZALEZ & WILLIAMS

[2] *See generally* House Comm. on the Merchant Marine and Fisheries, Investigation of Shipping Combinations under H.R. 587, 62d Cong., 2d Sess., 63d Cong., 2d Sess. (1913-1914).

MATERIAL SUBMITTED FOR THE HEARING RECORD

PORT OF OAKLAND

TAY YOSHITANI
Executive Director

June 3, 2002

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Sensenbrenner:

On behalf of the Port of Oakland, I would like to share with you our perspective regarding H.R. 1253, the "Free Market Antitrust Immunity Reform Act of 2001." I understand you are scheduled to hold a hearing in the Judiciary Committee on June 5 pertaining to this proposed legislation. The bill would repeal the antitrust immunity that has been granted to ocean liner cargo carriers since 1916. It is our hope that when H.R. 1253 is discussed in the hearing, you will carefully evaluate the issues I am sharing with you.

As you know, Congress preserved the maritime industry's antitrust immunity when it enacted the Ocean Shipping Reform Act (OSRA), which became effective May 1, 1999. The antitrust component of OSRA reflects a significant compromise between ocean liner cargo carriers and major cargo shippers. This compromise entailed four years of debate and a year of post-enactment work. The antitrust immunity that was retained in the OSRA legislation appears to be working well for the Port and its maritime tenants.

Repealing the antitrust immunity for ocean liner cargo carriers would jeopardize carrier operational alliances such as vessel-sharing arrangements, equipment sharing and other joint use of assets. Disrupting current carrier alliances could potentially lead to a decline in service and intense pressure on carriers to lower already depressed rates to non-compensatory levels. This would in turn generate destructive competition. It is important to realize that the economies of scale the ocean liner carriers receive from their alliances financially fuel the massive infrastructure improvements needed to sustain modern marine terminal operations at public ports. The ocean carrier alliances which fuel port expansion projects also bring jobs to local port cities. Repealing the antitrust immunity may adversely impact these benefits.

It is our understanding that you advocate retaining antitrust immunity for marine terminals, labor-management agreements on benefit assessments, and for port authorities. While this is commendable, our concern is that repealing antitrust immunity for ocean carriers will ultimately expand to eliminate the immunity needed by public port authorities. While the Port does not monitor service arrangements between ocean carriers and exporters or importers, the competitive factors in today's market demand that we monitor other West Coast marine terminal contracts. These arrangements are obtained because of the port industry's antitrust immunity through

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Chairman F. James Sensenbrenner, Jr.
Page 2

filings which have been made with the Federal Maritime Commission (FMC) or directly from other port authorities. Port antitrust immunity is therefore important towards maintaining Oakland's, and the Bay Area's, ability to remain competitive with the larger ports in Southern California and the expanding maritime facilities in the Pacific Northwest. Although the Port of Oakland views the labor-management agreements as issues to be administered between the ocean carriers and their union workforce, we can ill afford any potential labor unrest that could potentially divert cargo away from Northern California.

We respectfully ask that you carefully conduct your upcoming hearing with an eye towards our concerns in order to keep the Port and the Northern California maritime industry competitive.

Sincerely,

Tay Yoshitani
Executive Director

COMMONWEALTH *of* VIRGINIA

Virginia Port Authority
600 World Trade Center
Norfolk, Virginia 23510-1679
Telephone (757) 683-8000
Fax (757) 683-8500

J. Robert Bray
Executive Director

May 29, 2002

The Honorable Bob Goodlatte
United States House of Representatives
2240 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Goodlatte:

The Virginia Port Authority is the gateway for our State and our region's economy to connect to world markets. Last year, $25 billion of goods moved through our ports in an exceptionally efficient and cost effective manner. We are proud of our contributions and role in the creation and operation of an industry that efficiently and reliably serves the needs of American commerce, and we are vitally interested in government policies that affect the industry's health.

In 1999, landmark legislation – The Ocean Shipping Reform Act – reformed the way international liner shipping was regulated. This legislation, which labor, shippers, carriers, and ports painstakingly helped fashion, took five years to negotiate. It was a difficult and delicate compromise. That Act, administered by the Federal Maritime Commission, resolved the regulatory issues involved in international liner shipping in a fair, balanced and effective manner. It is working well, is internationally accepted, and, as the Federal Maritime Commission's recent two-year study of the Act shows, has produced a highly competitive environment that is working as Congress intended.

We understand that the House Judiciary Committee is holding a hearing June 5 on H.R. 1253, which would repeal the liner industry's limited and regulated antitrust immunity and, in effect, repeal the Ocean Shipping Reform Act and eliminate the Federal Maritime Commission.

We strongly oppose this bill. No nation applies its domestic antitrust laws to international liner shipping. Instead, the internationally accepted regulatory regime, ably overseen by the Federal Maritime Commission, is working as Congress intended and should not be changed. H.R. 1253 would cause substantial destabilization and chaos in the industry. Importers and exporters are benefiting from record low shipping rates and the industry is financially struggling under intense competition. As a member of the House Judiciary Committee, we hope you will agree that this bill should not receive the Committee's favorable consideration.

Thank you for your consideration of our views.

Sincerely,

Bob Bray

J. Robert Bray
Executive Director

Unclassified **DSTI/DOT(2002)2**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

16-Apr-2002

English - Or. English

DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY
DIVISION OF TRANSPORT

DSTI/DOT(2002)2
Unclassified

COMPETITION POLICY IN LINER SHIPPING

FINAL REPORT

Contact: Transport Division, Mr. Hübner, tel: +33 1 45 24 91 32; e-mail: wolfgang.hubner@oecd.org or Mr. Scorpecci. tel: +33 1 45 24 94 33; e- mail: danny.scorpecci@oecd.org or Mr. Crist, tel: +33 1 45 24 94 47; e-mail: philippe.crist@oecd.org

JT00124488

English - Or. English

Abstract

If there is one topic that elicits strong reactions in the maritime sector, it is the practice of carriers to commonly fix prices and regulate capacity in international liner shipping. Proponents of these practices vigorously defend these as necessary in order to guarantee the regularity of maritime freight transport services. Opponents, on the other hand, vehemently attack these as one of the last bastions of cartel control of an entire sector. This report examines *a)* the positive and negative impacts of common pricing under anti-trust exemptions, *b)* the impacts of conference, discussion and stabilisation agreements on the sector and *c)* the potential effects that could stem from the removal of anti-trust exemptions for liner shipping in an attempt to determine whether these anti-trust exemptions are beneficial or harmful to society at large.

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SUMMARY

As part of ongoing OECD work on regulatory reform, the OECD Secretariat convened a workshop in May of 2000 in order to discuss regulatory reform in the maritime sector. Given the wide divergence of views at the workshop regarding anti-trust exemptions given to liner operators, the chair called on the OECD to investigate three issues relating to regulatory reform and competition policy in the sector:

1. The positive and negative impacts to both carriers and shippers of common pricing under anti-trust exemptions.

2. The impacts of conference, discussion and stabilisation agreements on both carriers and shippers.

3. The possible effects stemming from the removal of anti-trust exemptions for liner shipping.

A draft of the present document was discussed at an OECD workshop of carriers, shippers and government regulators in December 2001, and this final report reflects many of the comments made at that time.

This report's focus is not on the operational arrangements used by carriers to generate greater efficiencies and promote higher productivity, but rather, on those arrangements amongst market actors that seek to fix and/or discuss prices or artificially control supply. In particular, this report looks into the rationale and impacts of traditional conference price-fixing and Discussion agreements, and, insofar as they could potentially skew market-wide freight rates, Capacity Limitation agreements.

The analysis in this report is based on information collected through a survey completed in the spring of 2001, supplemented by other publicly available sources of information. This report has investigated market share, freight rate, financial performance and regulatory trends in addition to different models of liner shipping markets. Based on the results of this analysis, this report has sought to determine whether the continuing existence of anti-trust exemptions for price fixing and rate discussions in liner shipping are preferable to a move towards more competitive liner markets. This review has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers, and recommends that limited anti-trust exemptions *not* be allowed to cover price-fixing and rate discussions. It also finds that capacity agreements should be carefully scrutinised to ensure that they do not distort the markets in which they are present.

However, recognising the high degree of polarisation in the longstanding debate relating to these topics, this paper also sets out a possible way forward based on points of convergence between shippers and carriers. These points serve to frame three principles that countries could use to guide future re-assessments of the validity of anti-trust exemptions for price fixing, rate discussions and capacity agreements between competitors in the liner shipping sector.

1 Why re-visit Competition Policy vis-à-vis Liner Shipping?

1. If there is one topic that elicits strong reactions in the maritime sector, it is the practice of carriers to commonly fix prices and regulate capacity in international liner shipping. Proponents of these practices vigorously defend these as necessary in order to deliver regular maritime freight transport services. Opponents, on the other hand, vehemently attack these as one of the last bastions of cartel control of an entire sector. More words have been said, more ink has been spilled and more acrimonious jibes exchanged on the subject than on possibly any other in the maritime sector. And yet, there is no clear resolution in this matter. Are these practices — and the anti-trust exemptions granted to them by most countries — beneficial or harmful to society at large?

2. It is against this backdrop that in May 2000 the OECD Secretariat convened a workshop to discuss opportunities for regulatory reform in the maritime sector. This workshop was part of an ongoing initiative within the OECD to investigate the state of, and potential need for, reform activities within various economic sectors – including maritime transport. The OECD Secretariat had prepared a background paper to provide a framework for the workshop discussion. While much of the paper elicited little reaction from delegates, industry representatives and maritime experts, those sections dealing with competition policy in the liner shipping sector gave rise to heated debate.

3. In particular, the paper called for a gradual roll-back of anti-trust exemptions for common rate-fixing and capacity limitation agreements among liner shipping companies – especially those involved in conferences, discussion agreements and/or consortia. While many shippers and representatives of competition authorities present at the workshop expressed strong support for these recommendations, many maritime ministry delegates and carrier representatives were adamantly opposed to any change in the status quo. One criticism levelled at the background paper was that its conclusions seemed to be more grounded in ideology than in a complete and detailed analysis of the issue. Proponents of keeping block anti-trust exemptions in place expressed frustration at the leap they perceived between the quantitative and anecdotal data provided in the paper and the strong findings against granting anti-trust immunity for liner operators.

4. It is true that more can and should be done to more thoroughly investigate the impacts of anti-trust exemptions in liner shipping on shippers, carriers and the community at large. Faced with calls for the immediate removal of anti-trust exemptions on one side, and calls for no action on the other, the Secretariat chose to ask both proponents and opponents of these measures to provide the data necessary to fully and objectively analyse the issue. In particular, the chair of the workshop called on the OECD to investigate three central issues:

1. The positive and negative impacts to both carriers and shippers of common pricing under anti-trust exemptions.
2. The impacts of conference, discussion and stabilisation agreements on both carriers and shippers.
3. The possible effects stemming from the removal of anti-trust exemptions for liner shipping.

5. This report seeks to investigate these three issues from a neutral perspective, acknowledging that, while anti-trust exemptions typically impose costs on society, they may in special circumstances give rise to benefits that outweigh these costs. What follows is a critical evaluation of whether scheduled maritime freight transport services constitute such a case. However, before describing how the Secretariat has sought to balance the arguments for and against anti-trust exemptions for liner shipping, it is perhaps useful to understand why OECD Member countries have given regulatory reform (including reform of competition policy) such a high priority.

1.1 The OECD and Regulatory Reform

6. Democratic governments give voice to the collective will of citizens and serve to frame and guide their actions in order to maximise economic and social well being. This broad task can be carried out in a number of ways, *e.g.* by developing policies to promote economic vitality, high levels of employment, better education, and high standards of environmental quality health and safety. Government regulation -- the elaboration of enforceable rules of conduct – is one necessary and effective tool governments use to carry out their mandate. However, with the ability to impose rules concerning the activities of citizens and enterprises comes an equal responsibility to ensure that these rules are still relevant, effective and able to improve the welfare of citizens. Regulatory review and, when necessary, regulatory reform are therefore two central government activities.

7. In 1995, OECD Ministers requested that the OECD embark on a two-year study of the significance, direction and means of reform in regulatory regimes in OECD countries. In 1997, the resulting OECD report on regulatory reform concluded that citizens had much to gain from government efforts to analyse and reform their regulatory framework. This is especially true in nations and economic sectors undergoing rapid changes where existing regulatory frameworks can quickly become obsolete and serve to block rather than contribute to intended improvements in economic and social welfare. This outcome led Ministers to request the OECD to undertake a series of reviews covering a range of economic sectors, including transport.

8. The failure to re-evaluate the effectiveness of regulatory regimes can have two significant results. The first is that governments, through their regulations, serve to promote less-than-optimal outcomes by creating unnecessary and unwanted barriers to trade, investment and economic efficiency while, at the same time, reducing innovation, wasting government resources and favouring uncompetitive economic actors. The second outcome is a result of the first – failure to enact necessary regulatory reform imposes significant costs on citizens. These costs are difficult to precisely quantify but the OECD report's analysis of sectoral reforms indicates that they can be substantial (Box 1.1).

1.2 Competition Policy

9. One common theme of regulatory reform in OECD countries in the past 20 years has been the greater reliance on competitive markets. Through competition policy, governments seek to develop an equitable framework for competition among market actors. A well-functioning competitive market environment allows buyers to decide and communicate what products and services they desire, and allows sellers to respond to this demand as creatively and inexpensively as the market will permit. These goals can be thwarted by inefficient government regulation or by collusion among sellers to artificially restrict output, set prices above what they might otherwise be and/or unfairly eliminate competitors.

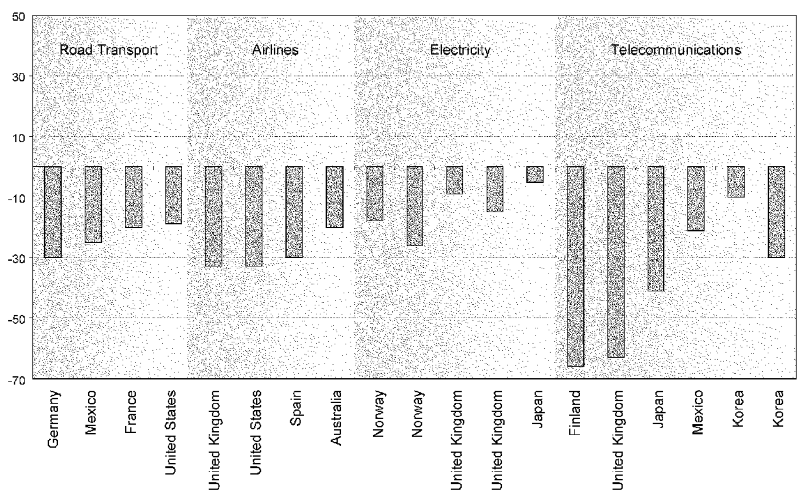
Box 1.1 Regulatory reforms increase productivity, lower prices, and eliminate shortages...

By sharpening competitive pressures, the elimination of economic regulations has encouraged firms to become more efficient and helped to boost the productivity of entire industries:

- In Europe, labour productivity growth in the *manufacturing sectors* most affected by competition-enhancing reforms in the Single Market Programme were double those of other sectors (14% versus 7.5% for the period 1986-91).
- In *air transport* in the United States, real fares dropped by one-third between 1976 and 1993; more than half of this decline is attributed to deregulation. Following airline liberalisation in 1993 under the European Single Market, 800 new licences were granted in Europe, and more people are using lower-cost economy fares.
- *Road haulage industries* in the United States and the United Kingdom enjoyed increases in capital productivity of around 50% after relaxation or elimination of out-dated operational controls. Capital productivity was also boosted in these industries in France and Germany following liberalisation.
- Market liberalisation in *telecommunications* and technological advances led to new services and striking improvements in efficiency. Elimination of monopolies helped stimulate new technologies and increase the number of subscribers of cellular phones in OECD countries from 700 000 in 1985 to 71 million in 1995. After reform, average prices for telephone services fell by 63% in the United Kingdom. and 41% in Japan; long distance prices fell by 66% in Finland.

Increased efficiency means lower prices for consumers and businesses. Prices have fallen significantly and often swiftly where regulatory reforms strengthened competition or imposed efficiency-enhancing price regulations (Figure 1). Not all of the price reductions reported in Figure 1 can be attributed to regulatory reform only. Part of the decline in prices of telecommunications services, for example, is likely to reflect technological progress rather than regulatory reform. However, on balance, much of the price reductions represented below were enabled by the removal of regulatory barriers and a more pro-competitive legislative framework.

Price reductions after elimination of economic regulation (percent)

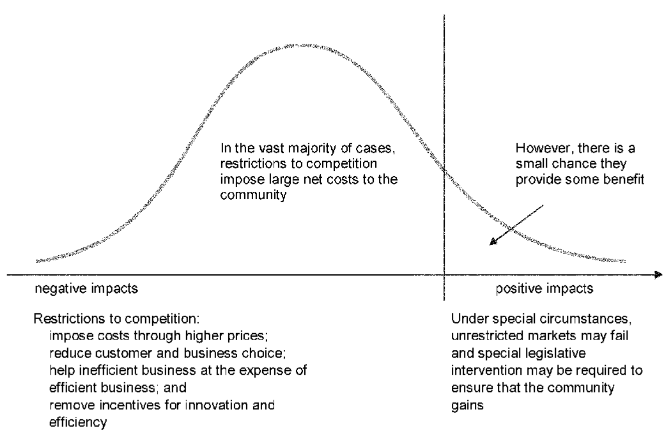


Excerpted from: The OECD Report on Regulatory Reform – Synthesis, pages 11-12

10. Achieving an equitable balance between the benefits of free markets and the need to promote social objectives that cannot be met through markets is one of the foremost tasks for regulatory agencies. While OECD Member governments have found that in the overwhelming majority of cases anti-competitive behaviour imposes large net costs on society, under special circumstances, restrictions to competition may deliver some benefits (Figure 1.1). Governments, therefore, find it necessary at times to intervene directly in markets to overcome market failures and/or to pursue other social goals. In some cases this might even require sacrificing some of the benefits of competition.

11. Given the effectiveness of competitive markets in most sectors, and the net negative impact of most anti-competitive practices, these are the exception rather than the rule. The common practice is to put the onus of proof for implementing or continuing such practices on the proponents of such measures. Furthermore, governments engaging in regulatory reviews of competition policy have a responsibility to ensure that the special circumstances that gave rise to restrictions on competition still exist and/or warrant exemptions to the general pro-competition policies. Indeed, OECD Ministers agreed in 1997 to "reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests"[1].

Figure 1.1 Impact of restrictions to competition on the community



Source : Centre for International Economics, 1999, page 6.

1.3 Reform in the transport sector

12. Transport plays a crucial role as an input into almost all economic sectors. It is also a means of globally moving all trade in goods, as well as passengers, and is a sector characterised by particularly intricate domestic and international regulations and institutions that have accumulated over time. It is also

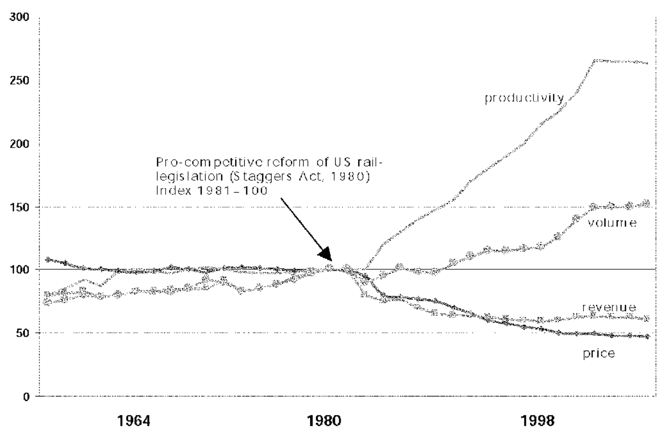
1. OECD Policy Recommendations on Regulatory Reform, June 1997 OECD Ministerial Meeting.

a sector where regulatory review and reform has the potential to unleash efficiency gains, cost savings, service innovation and user and consumer welfare. Recent analyses of past and/or partial reform in road, rail and air transport indicate that these benefits can be significant (Figure 1.2). Technical and organisational progress in transport services also necessitates regulatory adjustment at domestic and international levels.

13. Transport is also a very important economic activity in its own right. It can be assumed that the production, maintenance and use of transport infrastructure and mobile equipment represents some 4-8% of GDP and 2-4% of the labour force. Maritime transport, by far the main mode of international transport of goods, is particularly significant as a service industry facilitating international trade. Total seaborne trade volume reached 5 885 million tons loaded in 2000.

14. This maritime trade involved two major maritime transport sectors. *Liner shipping* provides shippers with transport services (mostly by ships designed to carry modular containers) involving regularly scheduled arrivals and departures from advertised ports. On the other hand, *bulk shipping* operations are undertaken by vessels designed to carry homogeneous unpacked dry cargoes (for example grain, iron ore and coal), or liquid cargoes (such as oil, liquefied gas or chemicals). Bulk shipping operations are ordinarily carried out for individual shippers on non-scheduled routes.

Figure 1.2 Performance of major railroads in the United States, 1964-1998



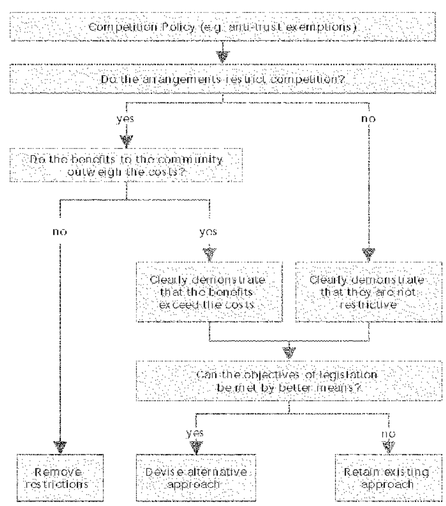
Source : ECMT, 2001 (Association of American Railroads).

15. Many have argued that liner shipping is indeed a special case where practices that are otherwise considered anti-competitive in fact deliver advantages beyond the costs imposed. Indeed, the history of the conference system (where carriers openly and collectively set rates or otherwise organise aspects of their business) is a long one that has been marked by continued and repeated government support. However, as pointed out earlier, the "specialness" of liner shipping and its exemptions from anti-trust legislation have equally been strongly called into question by the users of shipping services and certain regulatory agencies.

1.4 Getting to the heart of the matter...data and analysis

16. The difficulty in assessing the validity of the pro- or anti-exemption position has always been the availability (or lack thereof) of the detailed information necessary regarding actual negotiated freight rates, terms and provisions of service contracts, relationships between operating costs and freight rates and the nature of arrangements among carriers. In an ideal world, a regulatory agency would be able to proceed in a logical fashion to investigate the benefits/disadvantages of anti-trust arrangements. This would entail making an assessment as to these practices' impacts on competition, the net balance of benefits and dis-benefits flowing from these measures and an investigation of alternative approaches to achieving the benefits resulting from these actions (Figure 1.3).

Figure 1.3 Competition policy review flowchart



Source : Centre for International Economics, 1999, page 7.

Box 1.2. Parties asked to provide data for the OECD review of liner shipping competition policy

__Carrier Trade Associations__
World Shipping Council
CENSA
European Community Shipowners' Association ECSA
Japanese Shipowners' Association
Korean Shipowners' Association
International Chamber of Shipping

__Conference Secretariats__
Liner Shipping Services
SCAGA
Canada Westbound Rate Agreement
Transpacific Stabilisation Agreement
Associated Conferences Secretariat Inc.
Canada-United Kingdom Freight Conference
Canadian Continental Eastbound Freight Conference
Canadian North Atlantic Westbound Freight Conference
Continental Canadian Westbound Freight Conference
Europe to Australia and New Zealand Conference
Europe Japan Freight Conference
Europe Mediterranean Trade Agreement
Europe Middle East Rate Agreement
India Pakistan Bangladesh Ceylon European Conferences
Philippines Europe Conference
Far Eastern Freight Conference
Far East/South Asia-Middle East Conference
Hong Kong Europe Freight Conference
Hong Kong/Japan Freight Agreement
Intra-Asia Discussion Agreement
Europe Indonesian Freight Conference
Japan/Indochina Freight Conference
Japan/Philippines Freight Conference
Mediterranean Canada Conference
Mediterranean Far East Conference (MEDFEC)
South Asia Rate Agreement
Trans Atlantic Conference Agreement
Turkey/United States Atlantic and Gulf Rate Agreement
United States South Europe Conference

__Shipper Associations__
Dutch Maritime Shippers' Council
British Shippers' Council (Freight Transport Association)
Federation of Swedish Industries
American Import Shippers Association (AISA)
Canadian Shippers' Council
European Shippers' Council (ESC)
International Federation of Freight Forwarders Associations (FIATA)
Japan Shippers' Council
National Industrial Transportation League (NITL)
New York/New Jersey Foreign Freight Forwarders and Brokers Assoc. Inc.
New Zealand Shipping Federation and New Zealand Shippers Council
Australian Peak Shippers Association

17. This framework served to underpin the analysis in the present paper. A number of conference/discussion agreement secretariats, and carrier and shipper trade organisations were thus approached by the OECD in December of 2000 (Box 1.2) with a request for data. These parties were given the assurance that whatever information provided would remain confidential and be presented only in the aggregate (unless the provider agreed to make it public). In particular, the OECD asked for information regarding:

- Market definition and market share.
- Freight rates charged by carriers and rates paid by shippers (including details on the application of sur-charges).
- Carrier participation in conferences, discussion agreements, capacity stabilisation agreements and consortia.
- Capacity deployed and volume carried on major trades.
- Profits on turnover, return on capital and other financial performance assessment by trade or trade segment.

- Investment in new capacity and updated technology or enhanced equipment.
- Data on share of freight volume by trade covered by service contracts.
- Data on share of freight volume covered by door-to-door multi-modal contracts vs. port-to-port contracts.
- Patterns of non-observance or breach of terms of shipping contracts.

18. After the deadline for submittals had passed, two things became very clear. The first was that relatively few parties had taken the initiative to answer in their own capacity — if at all. Many respondents chose to go through their trade organisations and thus an opportunity was lost to collect some of the specific dis-aggregated data necessary for the Secretariat analysis. Secondly, the quality of the data provided by both carrier *and* shipper representatives, while variable, tended to be rather poorly suited to the detailed analysis necessary for the study[2]. This was a surprising finding in itself as one might have expected either side to provide a large amount of detailed information supporting their position. This was not the case and the analysis that follows is therefore based on the best of the information provided by shippers and carriers supplemented by research and commercially available data.

19. Following a brief overview of the liner shipping industry, this paper addresses each of the three points in the Secretariat mandate for this work (*i.e.* the positive and negative impacts of common pricing, the impacts of conference, discussion and stabilisation agreements on both carriers and shippers and the possible effects stemming from the removal of anti-trust exemptions for liner shipping). In each case, the paper examines assertions made by both proponents and opponents of anti-trust exemptions and seeks to apply appropriate "tests" to these when possible and supported by data. The balance of the outcomes of these tests helps to form the conclusions on the need to retain or modify existing competition policy in the sector.

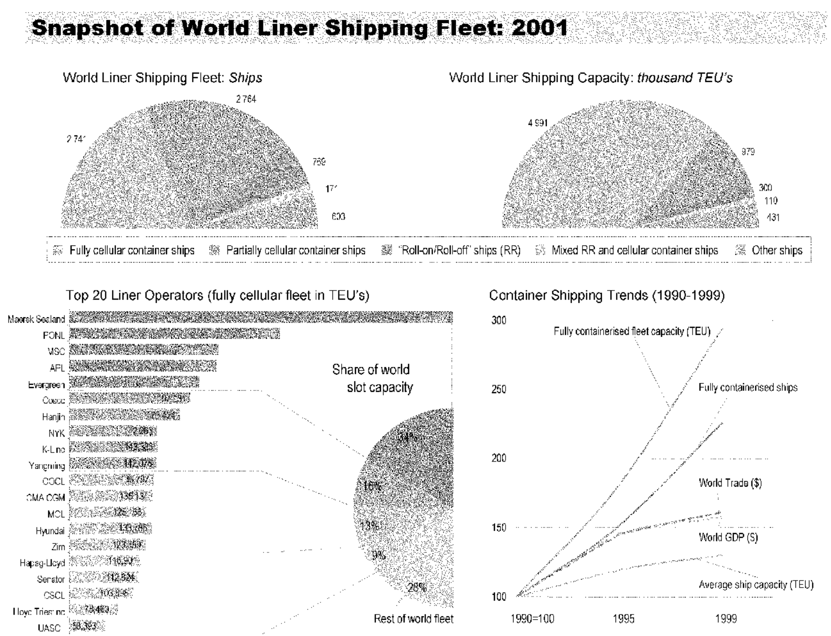
2. Ironically, some shipper organisations have pointed out that providing the detailed rate data required would make their members liable to the same anti-trust actions from which carriers have immunity.

2 The liner shipping sector

2.1 General

20. Liner shipping refers to maritime transport services that are provided on a regularly scheduled basis to pre-determined ports. Ships involved in these trades can be general cargo carriers, specialised cargo carriers (*e.g.* car carriers or refrigerated goods carriers) and/or partially or fully dedicated container carriers. A number of important characteristics and trends relating to the liner shipping sector are outlined in Figure 2.1.

Figure 2.1



21. This snapshot reveals four important points that characterise the sector:

- Fully containerised vessels represent an important part of the general cargo fleet and carry a large majority of containerised trade.
- The top 20 liner operators account for 72% of world container capacity (measured in the industry standard 20 foot container unit or TEU) and the five largest operators account for 34% of the fully containerised fleet capacity.
- The growth in the fully containerised fleet, both in number of ships and especially in capacity, has far outstripped growth in global economic activity and trade.
- Ships have been getting larger as operators seek to benefit from economies of scale.

22. These and other characteristics of the liner shipping sector are described in this section.

2.2 Fleet development

23. There are important factors related to the development of the international liner fleet and the composition of the ownership of that fleet.

24. Not only has there been a sharp increase in the world fleet of fully cellular container vessels (in 2001 this stood at 2 741 vessels with a total carrying capacity of 4.99 million TEU, up from 1.25 million TEU ten years earlier), but more importantly the size of the vessels themselves had also increased substantially. For example in 2001 container vessels in the 2-4 000 TEU range accounted for 41% of total capacity, while 22% of vessels were over 4 000 TEU (up from 15% in 1999)[3]. Container vessels have now reached 7 000 TEUs, and there is talk of plans for vessels up to 10 000 TEU.[4]

25. It is possible that maintaining the capacity utilisation of such large vessels will require greater organisation of shipping networks around a hub-and-spoke structure. If there is pressure to move towards a hub-and-spoke structure, this will lead to pressure for further mergers, consortia or alliances. Also, relatively few ports can handle such ships, leading to a concentration of major services to a limited number of major ports, implying an increase in feeder and transhipment services to other terminals.

26. More importantly, the capital intensive nature of the container shipping industry means that in 2001 the top 20 container service operators accounted for about 72% of the world fully containerised shipping fleet and for 33% of all vessels carrying containers. The importance of this factor is that again there is pressure on liner operators to exploit economies of scale, and that through various consolidations it is likely that ownership (and therefore control) of the world's liner shipping fleet will drift to an increasingly smaller number of hands.

27. Finally, the majority of the fully containerised fleets' capacity is deployed along three main trades (see Figure 2.2). However, all three of these trades display imbalances between their separate legs (see Table 1) which leads to an oversupply of capacity in the weak trade direction in order to provide

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3. These figures refer to the overall container fleet including roll-on/roll-off vessels and partial container ships, the growth in capacity for fully containerised ships is even greater.

4. While large vessels are being deployed on all of the main trades, it is the Europe-Asia trade that has seen the arrival of the largest of these, in part due to a need to provide efficient services along the long trunk routes. The latter are fed through a dense network of shorter feeder routes.

adequate service on the strong leg. In particular, the imbalance on the Trans-Pacific route is approaching 70%, while on other routes the imbalance is around 30%. Directional variations in demand such as these are a common feature of many passenger and freight transport markets. In most cases, transport service providers ensure that both their pricing policies and the levels of capacity that they devote to those markets reflect those imbalances.

Figure 2.2. Containerised fleet deployment: TEU share on main trades in 2001

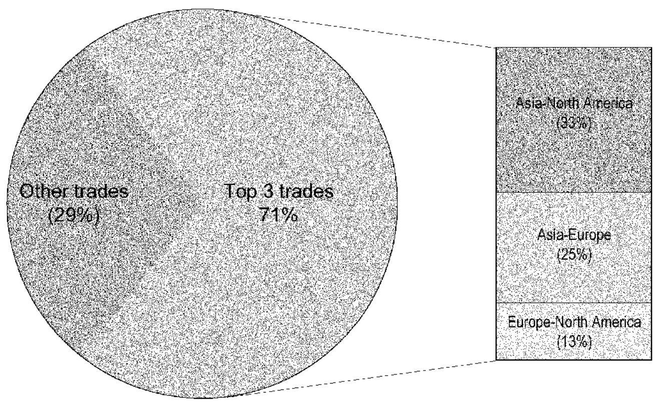


Table 2.1. Cargo Movements: Major Trade Routes 1995-2000*

(000's of TEUs)

	Trans-Pacific			Asia-Europe			Transatlantic		
	Asia to USA	USA to Asia	Difference	Asia to Europe	Europe to Asia	Difference	Europe to USA	USA to Europe	Difference
1995	4 009	3 471	*15.5%*	2 834	2 306	*22.8%*	1 448	1 208	*19.9%*
1996	4 104	3 520	*16.6%*	3 142	2 584	*21.6%*	1 421	1 219	*16.6%*
1997	4 662	3 615	*29.0%*	3 290	2 734	*20.3%*	1 556	1 276	*21.9%*
1998	5 221	3 326	*57.0%*	3 487	2 710	*28.7%*	1 696	1 327	*27.8%*
1999	5 840	3 370		3 950	2 850		1 340	1 710	
2000	6 130	3 540		4 150	3 050		1 410	1 800	

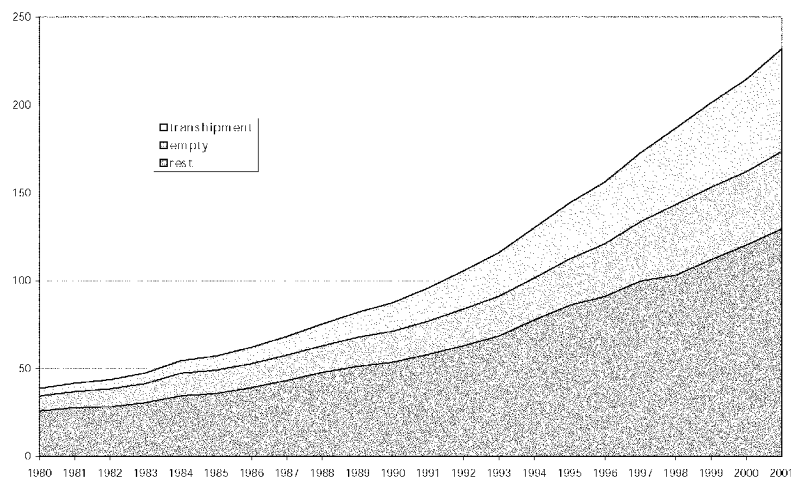
Figures for 2000 are estimates.

Source: *Review of Maritime Transport 1999, 2000 UNCTAD.*

2.3 Growth in container trade

28. Global traffic in containerised cargoes has expanded rapidly during the 1990s, rising from an estimated 83 million TEU in 1990 to 198 million TEU in 2000[5]. This equates to an average growth of about 9% p.a. Such a gain has been closely associated with the industrialisation of the Asia-Pacific economies, with traffic in that region growing annually by 10.8% to over 97 million TEUs in 2000. This destination thus accounted for 50% of total container traffic in 2000, against 21% for Europe, 15% for North America and 14% for other regions. Containerised cargo accounts for approximately 54% of world-wide trade in general cargo in 2000, up from 48% in 1995 and 37% in 1990. Given that the likely saturation point for containerised cargo has been estimated at 65% of world cargo trade, there remains considerable room for growth by substitution for other forms of cargo and by growth in traded goods.

Figure 2.3. Growth in World Containerised Trade (million TEUs)*



* Data for 2000 and 2001 are estimates.
Source: Drewry Shipping Consultants, 2000.

29. The figures given for global and regional container traffic refer to the movement of containers at ports – these therefore include the movements of containers from one ship to another (transhipment), the movement of partially filled containers and the re-positioning of empty containers (Figure 2.3). The latter accounted for 41 million TEU in 1999, up from 30 million in 1996 and stems from significant imbalances in trade flows between the different legs of the main trading routes.

30. Current estimates for transhipment movements show these to be approximately a quarter of all container port throughput, although in some specialised ports such as Singapore and Colombo, transhipment accounts for up to 70% of port throughput. These movements have grown in importance as liner operators have invested heavily in larger capacity ships on the main trunk routes. These ships are

5. "Containerisation International," Yearbooks and UNCTAD Review of Maritime Transport, 2000.

serviced by a number of smaller vessels operating regional feeder routes connecting the main hub ports to their surrounding region. While this "hub and spoke" system remains a dominant feature in many regions, certain global carrier alliances have recently started to offer a blend of main trunk services calling on major ports along with second-level services calling on a string of secondary ports.

2.4 The organisation of the liner industry: a bit of history

31. The principal, and crucial, organisational feature of the liner sector is the ability of operators to enter into a variety of co-operative arrangements and agreements which in most industry sectors would contravene laws intended to ensure competitive behaviour. While these organisational arrangements in liner shipping have traditionally taken the form of liner conferences, with the advent of containerisation, new forms of co-operation, such as consortia, strategic alliances, capacity accords and discussion agreements have also emerged.

32. This co-operative behaviour has historic origins going back to the 1870s, and is based on the early history of liner service operations in the late 19^{th} century. At that time the appearance of fast steamships on liner trades brought a considerable amount of instability into the relatively young liner shipping sector. In addition to an imbalance between legs of certain key trades, the industry was characterised by cut-throat competition between obsolescent sailing ship operators (who represented the majority of capacity offered) and the emerging steamship companies. Rates dropped sharply from 1874 to 1878 as sailing vessels offered rates that were far below what would have been a reasonably compensatory rate for the capital intensive steamship companies. Technical advances in steam engine design allowing steamships to carry yet more cargo in the 1880s further exacerbated the intense competition between steamship and sailing vessels. Finally, steamship operators also engaged in competition amongst themselves and shippers took advantage of the over-supply of capacity to set one carrier against the other and obtain lower freight rates. Rather than limit their services to those instances when carriers could expect compensatory returns (*e.g.* by providing irregular services based on full ship-loads), the liner operators of the day opted for formal arrangements amongst themselves to limit capacity and fix rates. In this way, they felt they could still provide the value of a fixed port rotation while reducing their exposure to destructive competition. Despite 130 years of economic, political and social changes, these formal arrangements – the conference system (and other forms of industry co-operation to limit capacity and set common rates) – have characterised and still serve as an organising principle for many in the industry today.

2.5 Rationale for capacity limitation and rate-fixing agreements

33. The experiences of liner carriers in the late 19th century led them to develop the institution of the Liner Conference. They argued that there was a real need for capacity control and rate-fixing in the international liner shipping sector in order to ensure stable international shipping services. This line of argument still serves today as one of the principal rationales provided in support of price-fixing and rate discussions in liner shipping. Carriers point out that the basis for this rationale can be found in some of the basic characteristics of the liner sector. In particular, liner operators operate an almost common-carriage service where ships must sail at set times irrespective of the amount of cargo they have on board. Failure to provide such a regular service would undermine the value provided to shippers and these would turn to other operators who could ensure steady sailing schedules. In order to provide these scheduled services at a relatively frequent interval (~ weekly), carriers must be able to field several similar ships on any given trade route. Purchasing and operating these ships requires a substantial capital outlay and subsequent financing charges. Furthermore, carriers face unbalanced trade flows and therefore capacity deployed in sufficient quantity for the dominant flow will often be far in excess of the amount needed for the return leg. Finally, carriers operate in a relatively uniform product market where there has traditionally existed little differentiation between operators. These market conditions, in aggregate, are not unique to the liner

shipping sector but are faced by any capital intensive industry providing a guaranteed and/or scheduled service (*e.g.* air cargo, power generation, etc.).

34. Without capacity limitation and price-fixing arrangements, carriers fear that the industry would re-live the type of destructive competition that characterised the late 1800s — resulting in a profoundly destabilised industry. In particular, they argue that conferences and other similar arrangements have several important beneficial effects.

- Carriers can avoid exaggerated rate fluctuations in the face of supply/demand imbalances and encourage private investment in new capacity and technologies thus allowing carriers to earn a compensatory rate of return on their investments and continue to provide scheduled shipping services.
- These arrangements avoid destructive competition leading to an ever-dwindling number of super-carriers with much greater potential for monopolistic behaviour.
- Shippers are thus ensured that regular predictable services will always be able to transport their goods.
- Shippers can also expect that sufficient capacity will be deployed to transport all of their goods, and finally
- Shippers can expect rates to exhibit greater stability than would otherwise prevail.

35. Shippers however, generally remain unconvinced of the benefits of price-fixing and have repeatedly complained that carriers' rate-fixing and manipulation of capacity leads to abuses of power and freight rates above what they would otherwise be in a fully competitive market. Shippers have therefore asked governments and courts to intervene and protect their interests. However, despite documented (and sometimes prosecuted) cases where carriers did indeed take advantage of their position, governments of all major trading nations have continued to provide carriers with exemptions from national anti-trust statutes governing price and capacity fixing.

36. These arrangements are continuously under review in OECD Member countries. In the past ten years, at least four out of 30 OECD Members (Australia, Canada, Japan and the United States) have re-evaluated their competition policy vis-à-vis liner shipping and although there has been a tightening of these provisions in several of these jurisdictions, no Member country has yet removed these exemptions. The last review of competition policy for liner shipping within the European Union dates back 15 years. Rather than doing away with price- and capacity-fixing arrangements altogether, governments have typically sought to bolster shippers' defences and recourses against abuses of carrier power.

2.6 Liner conferences today

37. There is great diversity in the nature and practical effects of conference agreements. Some have written agreements and secretariats responsible for their day-to-day operation. A few may have no written agreement at all, although they are still called conferences. Others may be called "associations" or something similar, although they are universally regarded as being conferences in the accepted sense of the word, at least for the purposes of anti-trust legislation. Conferences consisting of different members may be present on both directions of a given route.

38. Today, there are around 150 liner conferences operating throughout the world, with membership ranging from two to as many as 40 separate lines. They operate only in the general cargo field (liner trades), as conferences do not transport bulk cargoes.

39. Statistics of world cargo liner trade are not complete, nor is it known precisely what share of such trade is carried by conferences. Analysis of available data indicates that in the late 1990s, conferences accounted for approximately 60% of the TEU capacity in the major trades (see Box 2.1 and Table 2.2) — although conference shares have been steadily declining in recent years. However, conferences account for dominant shares of specific trades and/or certain port-pairs (*e.g.* United States to Asia or Japan-Europe).

40. The growing participation of non-conference operators can be attributed to a number of large, independent carriers that have sufficient resources to duplicate the capacity, frequency and level of equipment that has generally been the province of the conference carriers. Also, there are "niche" markets available to smaller or lower cost operators, who can offer lower standards of service for cargoes that are low value and/or not time sensitive.

Box 2.1 Do conferences have market power? Market definition and market share

One standard test of anti-competitive behaviour is the degree to which one, or several market actors, can dominate a market and thus independently or unilaterally impose prices that would not otherwise be possible within a dynamic competitive environment. Thus the issue of market definition is important and attribution of market share becomes a useful indicator of potential for market abuses.

Market definition

In order to understand the market in which carriers operate, one must have a good feel for its outer boundaries – *e.g.* are there substitutes for container ships that can effectively help to provide shippers with cost-effective alternative transport? Liner operators carry containers that contain a wide variety of goods ranging from relatively low-value agricultural products to high value electronics and machinery. The European Commission has determined that on certain routes (*e.g.* the transatlantic trades), air, tramp and breakbulk shipping do not present an alternative to liner shipping and cannot be substituted for the latter. This is not the case on all trades and there is evidence that for some (*e.g.* Africa-Europe) these may sometimes present alternatives. Despite some substitution possibilities for either high and/or low value goods, the bulk of cargo transported by containerised ship cannot be cost-effectively shipped by alternative means (Brooks, 2000, p. 201). For certain goods, such as refrigerated products and/or products requiring sensitive handling and specialised treatment, it may be worthwhile to look at conference vs. non conference shares to determine the power of the former to control some niche markets.

While shippers often do not have the possibility of shipping by other means, they do have the option of choosing among carriers who may propose different routes and port combinations. Therefore, route and port substitutability can give an indication of the geographic boundaries of the market. For example, the trans-pacific trade is composed of several dozen routes and port pairs, the degree to which these overlap can be seen to define the market (*e.g.* to what extent are Seattle-Southern China routes substitutes for Vancouver- or Long-Beach-southern China routes?) One element to consider when looking at port/route substitutability is the extent to which shippers in the hinterland have access to the former. Two nearby ports may not be part of the same market if multi-modal access is good to one and not to the other or, conversely, two distant ports may indeed be in the same market if both are easily reached from the same hinterland.

The complexity of defining geographic markets can be seen in the case of United States vs. Canadian routing for shipments originating and/or terminating in the central portions of the United States and Canada (Brooks, 2000, 204-205). Shippers theoretically have several options available to them including shipping from United States eastern seaboard ports (*e.g.* Baltimore and New York) with either conference or non-conference carriers or shipping via Canadian ports (*e.g.* Montreal or Halifax) again, through either conference or non-conference carriers.[6] In reality, however, a number of issues must be examined before concluding that these alternative routes constitute one market. Indeed, many Midwestern American shippers feel that Montreal is not in the same market as the US ports because of the extreme winter weather that has the potential to interrupt services. Canadian shippers, on the other hand, will argue that US routing does not present a realistic alternative for them as they feel that US customs will unreasonably hold up their shipments. What is clear is that the trade lane is one of the most important elements of market definition and shippers perceptions serve to define these markets.

Market concentration

Once a market is defined it is important to determine the market share of various participants – including the combined share of conference and/or discussion agreement members. Generally, the preferred method to calculate this share is to examine the total annual TEU throughput between country pairs in the trade lane (*e.g.* China-Canada).[7] In the EU, regulators have chosen to investigate TEU volumes between port pairs. However, when data is hard to come by, it may be necessary to fall back on total offered capacity between relevant countries/hinterlands. This however can only serve as an *indication* of potential market share and can potentially be misleading since draught limitations and/or service requirements may cause ships to sail at less than their total capacity. Given that respondents to the OECD questionnaire provided little specific data on market share, much of the information on market concentration below is based on capacity rather than actual volumes and should be interpreted primarily as describing the *potential* for market control by conferences.

Data on Market Share

Conferences, at least in aggregate, account for the majority of liner shipping capacity on the most important global trade routes although this share has fallen considerably since the 1970's. A review in 1997 indicated that conferences accounted for 60% of the available capacity in the major trades in the mid- to late- 1990s. This aggregate figure masks important differences between trades and even within trades (see Table 2.2). For example, while the Far East Freight Conference accounted for approximately 60% of available capacity for the Europe to Asia trade in aggregate, the breakdown for specific trades can be much higher (*e.g.* the FEFC accounts for approximately 70% of the capacity between Europe and Japan).

41. It should also be recognised that while closed conferences (*e.g.* conferences that can restrict membership) exist on trade routes outside the United States (where they are not allowed), in practice entry has not been difficult, and since the early 1980s there have been few cases where membership to closed conferences has been refused to applying parties. In part this reflects the falling influence of conferences, as independent operators have captured increasing shares of the market. Also, the growing range of looser, co-operative arrangements available to liner operators has tended to reduce the incentive to enter into the tightly controlled conference agreements.

6. In this example, some lines that operate as conferences for US ports, operate as non-conference carriers for the Canadian routes.

7. A better option is to fully define a relevant route/port market for the hinterlands involved as described earlier thus China-Canada might become Southern China-Northwest US/Western Canada.

42. Although there is a great diversity in the details of individual conference agreements, they are typically constructed around rate-fixing agreements. In closed conferences, these agreements may also go so far as to allocate market shares among conference carriers. Other conference arrangements may include one or more of the following major provisions; rebates to shippers; joint services, and door-to-door services.

Table 2.2. Conference/Discussion Agreement Share on Selected Trades

Trade	Conference/discussion agreement share
Far-East to Europe	In the 1970s, the FEFC accounted for 85% of the capacity in the Europe Far-East trade. By 1990, this share had dropped to 57%. It has since risen to approximately 60%.[8]
Trans-Atlantic	The dominant conference (TACA) had dropped to 48.7% of available capacity in 1990 before subsequently rising to 63% in 1998. An unfavourable judgement from EU competition authorities has led to departures from the conference and the conference now estimates its share to be approximately 46% of the North-Atlantic to United States trade in 2000 (TACA, 2001 and Meyrick, 1999).
Trans-Pacific	In 1990, the dominant conference accounted for 56.7% of the capacity in the east leg and 68.9% of the capacity in the west-bound leg. By 2001, the TransPacific Stabilization Agreement accounted for slightly over 80% of the market.[9]
Australian Trades (average across 6 major Australian trades)	Data for these trades shows that the aggregate conference share of available capacity has declined from 74% in 1984 to 55% in 1999. However, if the available capacity of discussion agreement members is added, the share rises to approximately 70%.

43. Up until the early 1980s, another important feature of conferences was the way in which members adhered to (and enforced) relatively strong rate discipline. For example, before the passage of the United States Shipping Act in 1984, conference carriers faced great difficulty in offering shippers below-conference rates. The 1984 act allowed carriers to legally offer discounted rates so long as these were made public and communicated to other conference carriers. The great proliferation of such "independent action" rates lead to a generalised decrease in rates with little impact on service (US FMC, 1989). The public filing and advance notice requirements associated with these rates, however, still presented cumbersome barriers to carriers' ability to offer quick and flexible responses to demand. The passage of the United States Ocean Shipping and Reform Act (OSRA) in 1998 did away with these cumbersome procedures and allowed shippers and carriers active in the US trades to enter into confidential contracts without prior notice. The result of this has been a rapid and massive switch (200% increase) to such confidential agreements, which have the potential to undermine the dominance of conference tariffs (at least for shippers with the power to negotiate lower rates). Very little traffic (*e.g.* less than 10% of the USA-Europe traffic) now takes place directly under conference terms.

44. This movement towards service contracting between individual shippers and carriers underscores a generalised erosion of conference power. This decline is supported by data from individual trades and is the result not only of the regulatory changes governing conferences in many OECD countries, but also from the arrival of large and efficient independent operators. This new breed of independent operators is qualitatively different from the small independent operators of the past:

8. Meyrick 1999, p. 15 and Productivity Commission, 1999, p.10.

9. Meyrick, 1999, p.15 and Transpacific Stabilisation Agreement, 2001, p.4.

> "[Traditionally] the typical model was one of a dominant conference service ... with a long-term commitment to the trade, with a small contingent of opportunistic outside lines attracting a comparatively small market share by offering an inferior service at discounted prices. This model is no longer applicable." (Meyrick, 1999)

45. It is important to note, however, that conferences still remain an important factor in many trades and the growth in alternative forms of organisation (consortia, alliances, discussion agreements) have raised the potential for sensitive trade data to "bleed" across conference boundaries and to other market actors. Also important is the observation that a decline in conference share (and a corresponding rise in non-conference market share) does not necessarily translate into appreciably greater competition since many independent operators have every incentive to price off conference rates rather than competing vigorously and independently with conferences on price (see section 4). Furthermore, many smaller independent operator services may be inferior to those offered by Conference lines in terms of geographic scope and frequency of service.

Box 2.2 Confidential Contracting Under the United States Ocean Shipping Act of 1998 (OSRA)

The passage of OSRA in 1998 signalled a new approach to Conference/carrier regulation in the United States trades. Before the passage of the law, very strong impediments to individual Conference carriers' ability to negotiate rates one-on-one with shippers existed. Under the previous shipping act ("The Shipping Act of 1984"), Conferences were required to publicly post tariffs and negotiated individual service contracts with the Federal Maritime Commission (FMC). In this regulatory environment not only did all carriers know exactly the terms of their partners' *and/or* rivals' freight rates but these were also visible to all shippers. Under the "me-too" clause of the law, any shipper could request the same rate as that negotiated for any other "similarly situated" shipper.

After the passage of OSRA, however, the requirement that service contract terms be made public was abolished (although these must still be filed with the FMC) as was the "me-too" clause. Conference tariffs are still required to be published but shippers and carriers have almost overwhelmingly decided to bypass the published Conference tariff and have taken advantage of their newfound ability to negotiate "confidential" service agreements.

In effect, the law allows shippers and individual carriers to engage in negotiated "confidential" service agreements to determine their terms of carriage for a set period (typically a year). The use of service contracts has jumped 200% in the period 1999-2001 and 98% of these concern contracts passed with individual, rather than Conference carriers. At the heart of the success of this form of contracting is the fact that, in principle, the terms of the contract can be kept safe from other carriers and/or shippers.

However, two important issues remain.

The first is that "confidential" contracts are only confidential if the contracting language expressly stipulates that some or all of the terms of the contract are not to be shared with outside parties. While shippers have requested specifically crafted confidentiality language in 5% of all post-OSRA service contracts, some carriers have stated that, by default, confidentiality terms are only added at a shipper's request. In all, about 50% of carriers report including all standard confidentiality clauses in their contracts. Shippers on their side have pointed out that these standard clauses typically allow for carriers to share sensitive contract information with other members at carrier agreement meetings.

The second issue relates to the sanctions typically retained by contracting parties for breach of confidentiality. Only 2% of post-OSRA service contracts stipulate penalty provisions for breaching contract confidentiality. This seems an unusually low figure given that opportunities for breach of confidentiality abound, especially for carriers in Conferences and discussion agreements given that sensitive rate information is accessible on bills of lading.

Source: United States Federal Maritime Commission, 2001b.

2.7 Other forms of Liner Shipping organisation: Capacity Stabilisation and Discussion Agreements

46. These include Capacity Stabilisation and Discussion/Talking Agreements, and this is the area where the greatest divergence exists in their treatment under competition policy laws.

47. In Australia, Japan, New Zealand, Norway and the United States, conferences or individual members of conferences are allowed to enter into agreements with non-conference shipping lines; and no

special provisions for such agreements are laid down. In Australia, however, if these agreements have anti-competitive provisions, they must be registered to obtain the exemptions available under Part X of the Trade Practices Act 1974. In the United States, such agreements are subject to the regular oversight procedure by the FMC which is applied to every form of agreement between carriers. In Canada, agreements between conference members and non-conference operators are not exempted by the Shipping Conference Exemption Act, 1987, although inter-conference agreements are.

48. In the case of European Commission, agreements between conference and non-conference members do not benefit from a block exemption and the Commission scrutinises these agreements with great attention since these can serve to undermine competition between independent and conference carriers – competition which the commission views as a necessary balance for granting conferences anti-trust exemptions.

49. Such agreements between conference and non-conference operators may occur when efforts by conferences to regulate capacity are ineffective due to the presence of a large number of non-conference operators or where conferences are open. Such situations have sometimes resulted in "stabilisation agreements" across a trade or a region, or in looser agreements such as "discussion/talking agreements." "Stabilisation" agreements attempt to control freight rates and regulate capacity through a binding agreement covering all or most operators of the trade or a region. These have appeared in two forms: either as a separate "stabilisation" agreement between conference and non-conference ocean carriers or as a formal agreement among conference members. Discussion/talking agreements attempt to reach an understanding among operators (conference and non-conference) about these topics, but are not binding.

2.7.1 Consortia

50. Consortia are agreements/arrangements between liner shipping companies aimed primarily at supplying jointly organised services by means of various technical, operational or commercial arrangements (*e.g.* joint use of vessels, port installations, marketing organisations, etc.). In many cases, members of a consortium are also members of a conference.

51. The development of consortia was a response to the technical requirements needed to launch container services. For example, member lines of the same conference (whether all or only some of them) usually formed a consortium at the beginning of containerisation to smooth the way for the introduction of rationalised conference services. Consortia arrangements also offer advantages to participating shipping companies through cost reductions derived from economies of scale.

52. These agreements take a considerable variety of forms, given that the degrees of co-operation and the extent of the common activity that they envisage are different, depending on the needs and the circumstances of the trades in question. For example a consortium can be composed entirely of otherwise independent lines, or, they may be members of the same conference. In some instances conferences have members that participate in several consortia, and there are consortia composed of both conference and non-conference lines. The principal difference between consortia and conferences is that the former addresses the rationalisation of container shipping service operations, whereas conferences extend their co-operation to uniform or common freight rates.

53. The treatment of such consortia under competition policy is variable. For example, in Australia, Canada, Japan, New Zealand and the United States, consortia agreements seem to be entitled to immunity from anti-trust law, without reference to whether the agreement provides that ship operators should operate under uniform or common freight rates.

54. In the European Union only certain categories of consortia, based on the share of the market which they cover, profit from a block exemption from the prohibition of restrictive arrangements contained in Article 81(1) of the EC Treaty. Therefore, a consortium which has a market share higher than 50% will not automatically benefit from the group exemption and would require an individual exemption. Where the consortium has a market share of between 30% or 35% and 50% (the second level) the consortium will come within a simplified procedure in accordance with which it will benefit from the group exemption unless the Commission opposes it within six months of its notification. On the other hand, a consortium having a market share below the second level (30% or 35% depending on whether or not it operates within a conference) can automatically benefit from the group exemption.

2.7.2 Strategic/global alliances

55. The purpose and intent of the participants in strategic/global alliances, which became operational at the beginning of 1996, has been to establish co-operative agreements *on a global basis* among a group of companies. These agreements (see Figure 2.4 for their recent evolution) apply not to one trade route, and not with different carriers on different trade routes, but with the same carriers over certain major routes which can be described as global.

56. In these terms, a strategic/global alliance embraces at least two of the major east/west trade routes (Europe/Asia, Asia/US, or US/Europe) served either by combined services on each route or in a round-the-world service. In some jurisdictions global alliances are treated as just another consortium or carrier agreement, and would be covered by the general definition of "conference" (and therefore be covered by general exemptions from competition policy laws). However, in terms of operation and commercial implications, strategic/global alliances are an entirely new form of operation.

57. Because of differences in the regulatory regimes or transportation conditions on each route, parties have thus far implemented these new alliances by a series of route agreements. These agreements cover the employment and utilisation of vessels, including joint vessel route assignments, itineraries, sailing schedules, the type and size of vessels to be employed, additions and withdrawal of capacity, ports and port rotations, and operations over the whole global system. They agree on charters, space/slot charters, the use of joint terminals, co-ordination of containers, pooling of containers and establishment of container stations, vessel feeder routes and co-ordination (where permitted) of inland services. The parties may agree on information exchanges and procedures. In other words, they look to full operational integration of each participant's services into one whole.

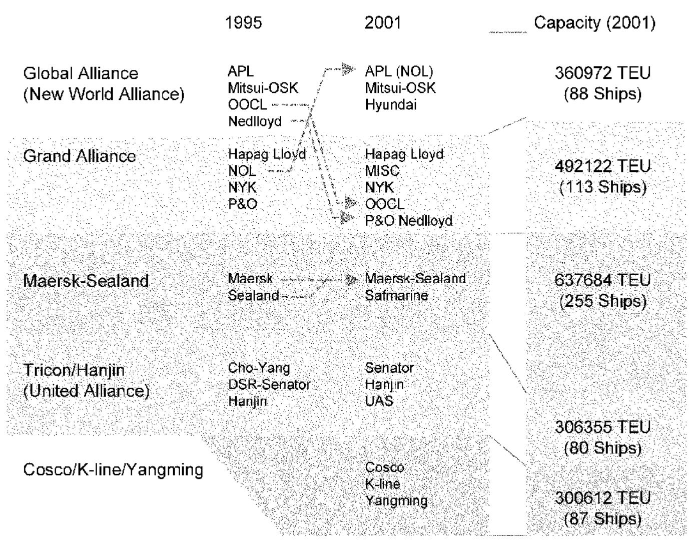
58. An agreement may place restrictions on a participant's use of third party carriers on specific routes without prior consent of the members, it may impose provisions for withdrawal, including notice and penalties, and may contain provisions with respect to ownership changes during the agreement. The initial duration of the agreement is normally up to five years.

59. However, strategic/global alliances do *not* cover:

- Joint sales, marketing, or joint maritime/multimodal pricing.
- Joint ownership of vessels or maintenance or insurance.
- Joint or common bill(s) of lading.
- Common tariffs or the sharing of profits/losses.
- Joint management and executive functions.
- Revenue pools or cargo pools.

60. Each member retains their own identity and the agreements do not create mergers. However, the absence of a common tariff is unlikely to lead to substantial differences in the tariff prices of the parties. First, by the more efficient use of capacity the parties will better control the "supply side." The carriers argue that this has a stabilising effect on prices, which can assist shippers by providing certainty for their own contractual obligations. Second, the agreements generally permit the members to discuss and agree on common positions in alliance matters, and where there is no conference or an open rate, they are permitted to discuss and voluntarily agree on rate and service matters. Third, if any of the parties attempt to capitalise on circumstances by "dumping" freight rates, this would be considered as an inherently destabilising factor in the alliance, and would likely be acted upon. Finally, it should also be observed that the more the services become integrated, the more difficult the task of marketing and sales would be to establish qualitative differences.

Figure 2.4. Alliances in Liner Shipping: 1995-2001



2.8 Industry Structure: major issues for competition policy

61. This section has highlighted a number of issues: container trade is growing and becoming more consolidated, ships are becoming larger and therefore capital inputs are growing, trades remain unbalanced and carriers are seeking to restructure themselves and seek alliances to minimise the impacts of these imbalances and cyclical variations in trade. In short the liner-shipping sector is undergoing a considerable amount of change to cope with a changing world. As described in a recent government overview of the liner industry:

> "No longer can the structure of liner shipping be viewed as fifty or so major carriers operating autonomously. It is more appropriate to view the industry as blocs of operational partnerships with criss-cross ties via space charters between and among different members of different partnership blocs." [10]

62. Two issues in relation to competition policy for the sector emerge from an overview of these trends:

- Absolute (based on the size of the top operators) and relative (based on the size of the top alliances) concentration is increasing in the industry. While mergers, acquisitions and partnership-building has been a normal response to increased competition in the major trades and some niche markets, it also has the potential to ultimately lead to a reduction in competition – especially as those market actors retain anti-trust exemptions. Increasingly, the cost of fielding the fleet of ships required to be a global player or partner will be such that only those operators with the deepest pockets will be able to survive in the industry. In this respect, a regulatory framework that affords carriers significant anti-trust exemptions may be ill-suited to an environment where independents are integrated into global partnerships with conference/discussion agreement carriers or are confined to niche markets, feeder services and or secondary roles.
- A second and related concern is that the potential for sensitive market information to be shared between conference and non-conference carriers is high as long as certain market actors are afforded anti-trust exemption for fixing rates. Confidential contracting, in theory, allows for shipper/carrier agreements to remain confidential in the United States trades. In practice, however, relatively few confidential contracts expressly prohibit the sharing of information and even fewer provide for strong sanctions for breaching confidentiality.

10. United States Federal Maritime Commission, 2001.

3 Investigation of the positive and negative impacts of common pricing under the anti-trust exemptions

Shippers and carriers disagree on the positive and negative aspects of price fixing

63. Table 3.1 sets out our assessment of the sometimes disparate views that carriers and shippers have regarding the features of the Liner shipping sector, of the relative benefits for price-fixing and their assessment of the reasons serving to justify the continued recourse to price-fixing in the sector. The major points of disagreement will serve to focus the discussion in the following two sections.

Table 3.1 Carrier and Shipper views on Liner Shipping and Price-fixing

	Carriers	Shippers
Features of Liner Shipping		
No regulatory barriers to entry	agree	agree
No economic barriers to entry	agree	mostly agree
Wide array of service options	agree	reserved
Market-driven competition	agree	disagree
Ample capacity	agree	agree
Efficient capacity	agree	disagree
Investment in innovation	agree	reserved
Efficient operation	agree	disagree
Unique challenges (*e.g.* lumpy costs, below average cost pricing, etc.)	agree	disagree
Benefits of price-fixing in Liner Shipping		
Allows for competition and market rates to emerge	agree	disagree
High quality service	agree	reserved
Stable commercial environment	agree	disagree
Stable service delivery	agree	agree
Allows to mitigate effects of excess capacity	agree	disagree
Justifications for price-fixing		
Counteracts destructive marginal cost pricing that would otherwise be below real costs	justified	not justified
Prevents consolidation of industry into a few monopolistic actors	justified	not justified
Exchange and discussion of market information is necessary to better develop future strategies	justified	not justified
Commonly-set prices act as a benchmark for negotiated rates	justified	not justified

Note: Data are lacking to make an objective arbitration between shipper and carrier views.

64. Analysis of the impacts of these arrangements requires data. Ideally one would dispose of detailed and historical real freight rate information for a broad cross-section of carriers in a number of sub-markets (*e.g.* North America-Asia eastbound, Mediterranean-North America westbound, etc.). This information could then be compared to historical data on carrier participation in rate and capacity agreements and adjusted for external market and political factors. The ensuing analysis would then enable an arbitration between the two contrasting views on the impact of anti-trust exemptions. However, such dis-aggregated information concerning real ocean liner freight rates (*e.g.* those actually negotiated between carriers and shippers, including specific surcharges) is extremely difficult to obtain. Indeed, neither carriers nor shippers contacted by the OECD for this review provided such information. Therefore, this section principally relies on publicly available information in order to address these issues.

3.1 What have been the positive/negative impacts of anti-trust exemption on the evolution of freight rates?

65. As seen in section 2, proponents of anti-trust exemptions for price- and capacity-fixing agreements argue that these do not lead to abuses of market power (and, in their rationale, to higher freight rates). Indeed, they cite evidence of falling freight rates as proof of adequate and balanced competition in liner trades. They further argue that these arrangements are necessary to provide a stable price environment for shippers and therefore to protect the latter from excessive rate variability.

66. In a sector as complex as the Liner shipping industry, it would have been difficult to define a causal relationship between anti-trust exemptions and positive and/or negative movements in freight rates. This task is rendered impossible by the lack of detailed data regarding actual costs faced by carriers. This section cannot therefore definitively assess to what extent anti-trust exemptions have *resulted* in positive/negative movements in freight rates, but only observe what these movements have been. It is important, however to keep in mind that whatever the observed trends, they have played in an environment characterised over the past 20 years by a *weakening* of the power of conference carriers.

67. Freight rate information is available from a number of sources – notably from Containerisation International's on-line database of freight rates charged in the three major trades. Other sources for rate information include the 1989 United States Federal Maritime Commission's Report on the Shipping Act of 1984, the German Ministry of Transport/German Federal Office of Statistics' time-series on freight rates to and from German (and Dutch) ports, the United State's Department of Labor Statistics price index for inbound maritime freight and the Bank of Japan's Corporate Service Price Index. These time series provide a broad overview of trends in rates and are presented below. However, with the exception of the 1989 FMC report and the German Transport Statistics these series cover a relatively short period from the early to mid-1990s onwards, during which liner operators experienced a great deal of change.

68. This section will first examine short-term rate trends in a number of trades and compare these to price trends for other commercial service sectors. However, the impact of conferences on ocean freight rates extends considerably beyond the past few years. In order to place recent rate trends into perspective this section will also examine longer-term trends in liner service prices. Finally, this section will consider to what extent conferences and other price and capacity-fixing arrangements have contributed to price stability by drawing on surveys from US and European shippers.

3.1.1 Short-term evolution of liner freight rates and prices

69. Average liner freight rates have decreased in all of the main trade leg segments over the past decade in constant dollar terms. Data covering published rates in the three major trades (outlined in

Figures 3.1 to 3.3) illustrates these aggregate trends. However, liner price indices (Figures 3.4-3.6) show that these general trends do not uniformly apply to all countries involved in international maritime trade.

3.1.1.1 Freight rate movements

70. Asia-US eastbound rates in 2001 were almost 12% lower than 1993 levels and rates in the opposite direction (US-Asia westbound) were nearly 46% lower. Corresponding figures for the Europe-Asia-Europe and Europe-US-Europe trades were –35% (eastbound)/-23%(westbound) and -42%(eastbound)/-12%(westbound) respectively.[11] These rate movements are for average freight rates in these trades. Rates for specific commodities may be significantly different from these and may have experienced different trends.

71. The rate imbalance between the different legs of the Asia-US trade can be observed in the Europe-Asia trade as well.[12] These imbalances are the natural result of changing trading patterns between the regions involved and are a consequence of changing demand for maritime transport to and from these areas (as can be confirmed by Table 2.1 illustrating vessel utilisation rates in these trades). The Asian economic crisis of 1997 caused demand for US and European goods to dry up within that region freeing up capacity on Asian in-bound routes (US-Asia westbound and Europe-Asia eastbound). At the same time Asian exports towards the United States and, to a lesser extent Europe, were buoyed by growth in the latter two regions. Carriers, in order to supply the capacity necessary to carry Asian exports, were faced with excess capacity on the return leg (and a corresponding need to reposition empty containers). Overall capacity was also growing over this period as Liner operators were receiving delivery of larger ships ordered under the premise of continued steady economic growth in Asia. The result was that carriers slashed prices in an effort to attract and/or retain steadily dwindling cargo. The drop in rates was exacerbated by competition from many independents who faced the same need to fill their ships in these unbalanced trades.

72. The Europe/US/Europe trade has experienced relatively less rate imbalance between the east- and west-bound legs reflecting a generally healthier trade balance.

11. Figures calculated from *Containerization International*'s on-line freight rate database. Notes: rates cover six of the trades' major liner companies. All rates are all-in, including the inland intermodal portion, if relevant. All rates are average rates of all commodities carried by major carriers. Rates to and from the United States refer to the average for all three coasts. Rates to and from Europe refer to the average for North and Mediterranean Europe. Rates to and from Asia refer to the whole of South East Asia, East Asia and Japan/Korea.

12. A similar imbalance can be observed to be growing in the Europe-US trades from 1999 onwards.

Figure 3.1 (1993=100, 1993 constant dollars)

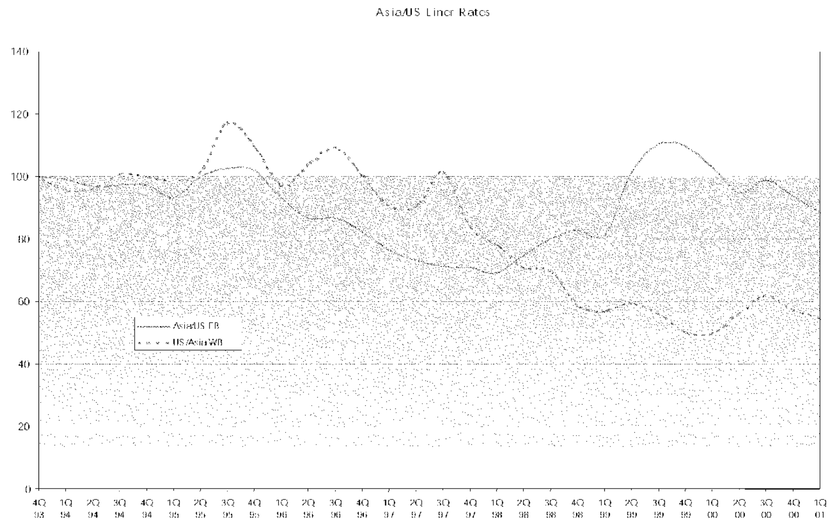


Figure 3.2 (1993=100, 1993 constant dollars)

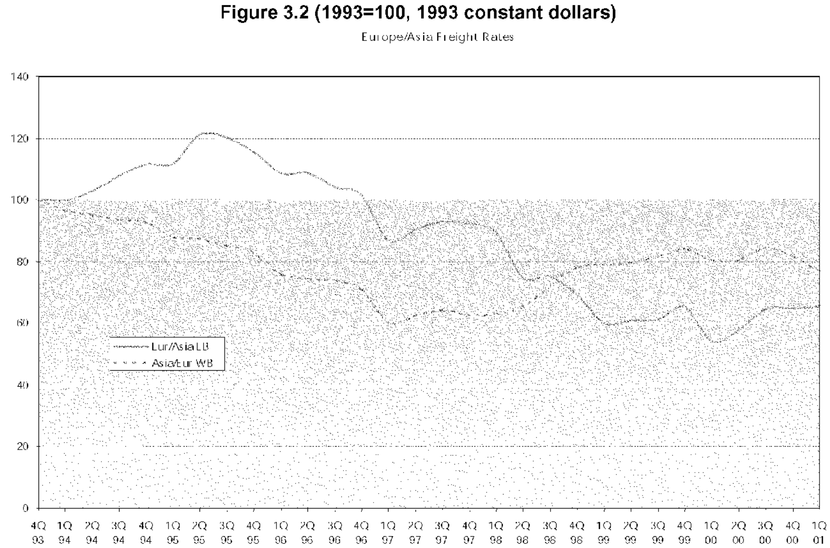
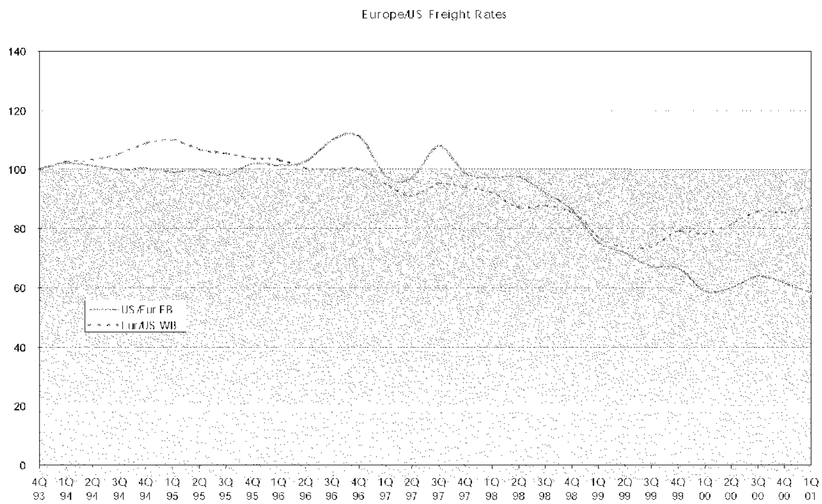


Figure 3.3 (1993=100, 1993 constant dollars)



3.1.1.2 Freight rate index trends for ocean liner services

73. Price trends illustrated by three national commercial service price indices[13] show a slightly different picture. Data from Japan (Figure 3.4) shows that the cost of Liner shipping to Japanese companies in 2001 had decreased approximately 24% from 1995 values in terms of the contracting currency (typically US dollar) although on a yen basis, the cost was essentially unchanged. Data for the price of liner services to and from German and Dutch ports shows an overall increase in price of 21% from the 1995 index year (Figure 3.5). While it is difficult to compare these indices to CI's freight rate database (since both the Japanese and German data reflect prices in multiple trades), the German data is noticeable in that one might have expected a decrease in prices since the CI freight rate data shows price decreases in the four European trade legs over the same period (the fourth trade leg was essentially unchanged).

74. Data for US inbound liner services from both the Atlantic and Pacific indicate that the aggregate price of these liner services had increased in real terms from 1991 to 2001 for both segments (figure 3.6). This index is relatively easier to compare to the CI freight rate data since each inbound segment in the price index more or less corresponds to the trade legs covered by the freight rate data[14]. Compared to the

13. The United States Bureau of Labor Statistics (BLS) International Price Index, the Bank of Japan's Commercial Service Price Index and the German Ministry of Transport's Liner Price Index.

14. The BLS's Atlantic inbound segment is roughly equivalent to CI's Europe-US westbound leg since most trade coming into the Atlantic façade of the US comes from Europe. Likewise, the BLS's Pacific inbound segment is roughly equivalent to the CI Asia-US eastbound leg since most trade coming into the US Pacific coast originates in Asia.

1995 index value, first quarter 2001 prices had slightly decreased in the Atlantic (-2%) and considerably increased (+29%) in the Pacific segment. While the Atlantic inbound figure is similar to the Europe-US westbound figure compiled from *Containerization International*'s data (-5%), the Pacific inbound figure is several orders of magnitude greater (CI data show only a 2% increase).

Figure 3.4 (1995=100)

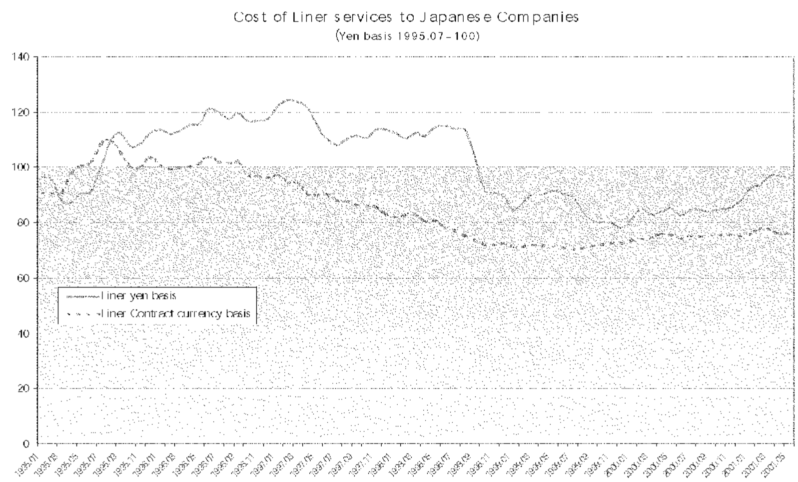


Figure 3.5 (1995=100)

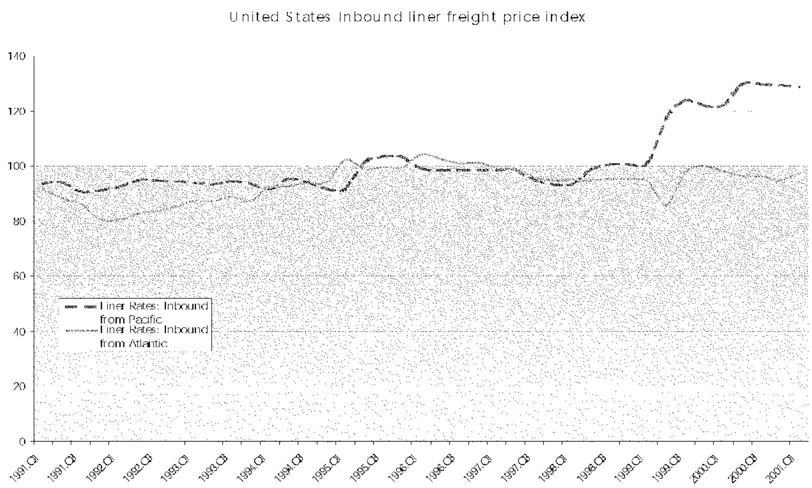
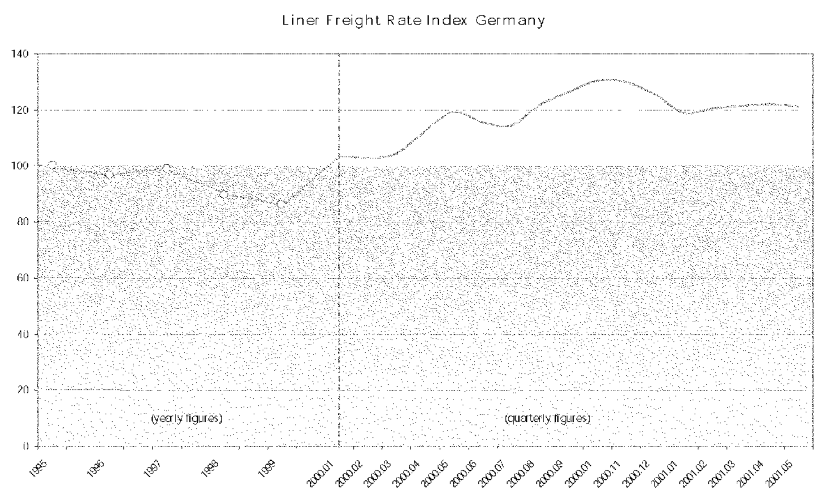


Figure 3.6 (1995=100)



3.1.2 Long-term evolution of liner freight rates and prices: United States Federal Maritime Commission report on the Shipping Act of 1984

75. The United States Federal Maritime Commission published in 1989 a major overview of the impact of the United States Shipping Act of 1984 on a number of factors related to liner shipping. The Commission compiled information regarding longer-term movements in rates for a number of US trades and sought to explain how these came about. This section summarises the report's findings for rate movements on major US trades.

3.1.2.1 The Atlantic Trades [15]

76. It appears that, as could be expected, the general macro-economic environment played an important role on the demand for liner services and that this element set the stage for rate movements in this trade. This was especially the case during the economic downturn experienced by the United States from 1980 to 1983. This, combined with a surge in capacity spurred by both conference and independent lines, led to a drop in rates during this period. While rates in the westbound direction rose after the recession, they continued to fall in the eastbound direction through 1984 as growing trade imbalances between the United States and Germany made themselves felt.

77. Against this background of declining rates, several independents sought either to leave the trade or merge with one of the dominant conferences. After the passage of the 1984 act, the two dominant conferences merged into a single entity accounting for over 80% of the market share. At that time only two significant independent operators remained and freight rates rose once again in the eastbound leg. Drawn by increasing rates in the eastbound leg, the strong independent carrier Evergreen lines entered the trade and replaced those independents that had left or merged with the conference in the early 1980's. This was a significant event given that Evergreen was one of the first strong independent carriers to offer conference-like services at independent operator prices.

3.1.2.2 The Pacific Trades

78. The FMC report examines rate movements from 1976-1987 in the United States-Japan and United States-Chinese Taipei trades. Perhaps more so than in the case of the Atlantic, this trade has been victim to bouts of overcapacity that perhaps mirror its importance and potential for growth. The oversupply of capacity in 1980 in the eastbound leg and in 1985 in both directions contributed to a fall in rates during those years. However, while in 1980 carriers had sought to respond by either leaving the trade or laying up vessels, in 1985 carriers responded by joining the dominant conference (in the case of independent operators) or by otherwise strengthening conference market share (which, for example, accounted for 80% of the market share in the westbound trade in 1985). Carriers were able to transform this increase in market share into an increase in freight rates in these instances.

79. The arrival of service contracting after 1984 was also a factor that had an impact on freight rates in the Pacific. The FMC report states that the rise in service contracts caused rates to fall even further than they might otherwise have in 1985 and 1986. The ensuing rise in rates came about as the principal carriers serving the South Pacific trade formed a new conference with over 80% of the market share and sought to

15. The 1989 FMC report investigates rate movements in three Atlantic trades: The North Atlantic-Germany trade, the South Atlantic-Germany trade and the North Atlantic-Italy trade. Since all three follow similar movements, this section will focus on the dominant North Atlantic-Germany trade.

limit the amount of individual carrier service contracting by requiring that such contracts be negotiated through the conference.

80. Higher levels of westbound exports from the United States, brought about by a weakening of the US dollar against the currencies of Japan and Chinese Taipei, also allowed the new conference to increase rates once again on this trade leg. However, by 1987 an increasing portion of the westbound cargo was moving also under "independent action" and/or service contract rates.

3.1.2.3 Conclusions from the US FMC data

81. The US FMC report also examined rate movements in the Italy-US, Australia-US and Brazil-US trades but data from these trades does not significantly alter the FMC report's overall conclusions on the long-term movement of freight rates in the United States liner trades. These conclusions are that a number of factors have influenced the movement of conference rates in the United States trades between 1976 and 1987-88 – the most important of these being changes in trade conditions brought about by macro-economic factors (such as GDP growth and exchange rate fluctuations) and the increased presence and effective competition from new and strong independent operators. However, the FMC study did not seek to correlate these movements to conference market share.

82. In a staff report issued in 1995 using much of the same data, two United States Federal Trade Commission economists (formerly with the United States Advisory Commission on Conferences in Ocean Shipping) did attempt to correlate rate movements in the United States trades to conference market share. They concluded that:

> "although we find no significant relationship between conference market share and freight rates, our evidence indicates that freight rates were significantly lower on those routes where individual conference carriers were allowed to enter into service contracts with individual shippers. These results suggest that some conference rules, perhaps when combined with relatively high conference market share, may allow carriers to maintain rates at levels higher than they would otherwise" (Clyde and Reitzes, 1995)

83. Rob Quartel, Commissioner of the United States Federal Maritime Commission in 1992 went further and pointed out that an econometric study using the same FMC data carried out in 1992 by the Advisory Commission on Conferences in Ocean Shipping found that "rates charged for transporting cargo are positively related to the market share of the conference and the value of the cargo". (Quartel, 1992)

84. So what can be concluded from the US FMC data? Generally, when competition from independents is low, conference market share high *and* trade conditions are favourable to carriers (*e.g.* little overcapacity), conferences can charge higher rates. Conversely, more competition from independents and more freedom for shippers to negotiate individually with carriers leads to a decrease in rates — suggesting that in the absence of the latter two conditions, conference rates would be higher. This describes nothing less than the normal working of the market with the notable exception that in liner shipping, market actors can discuss among themselves and fix prices which prevail as long as favourable market conditions prevail.

3.1.3 Longer-term freight rate movements: data from the German inbound trades

85. In a comprehensive University of Chicago working paper (Hummels, 1999), D. Hummels (now at Purdue University) examined to what extent technological and institutional changes have reduced the real price of ocean shipping services. This paper was unpublished as of early 2002 and as such, while it provides a useful guide to understanding long-range freight rate movements in the German trades, this cannot be necessarily extrapolated to other trades. The author of that paper, and the authors of this report, caution that the data it contains is indicative of rate movements in that trade since 1954, but should not be seen as an authoritative analysis of overall general rate movements over that period. The study uses long-term time series data (from 1954) provided by the German Ministry of Transport and the German Federal Office of Statistics for liner cargoes loaded and unloaded in Germany and the Netherlands.[16] In order to evaluate the real evolution of shipping prices over time, the study adopts two deflators to establish the outer bounds of the real price range: a US GDP deflator (most rates are quoted in dollars) and a German GDP deflator (Consumer price index) to account for Liners' practice of applying a currency adjustment factor (CAF).[17] The resulting indices are presented in Figure 3.7.

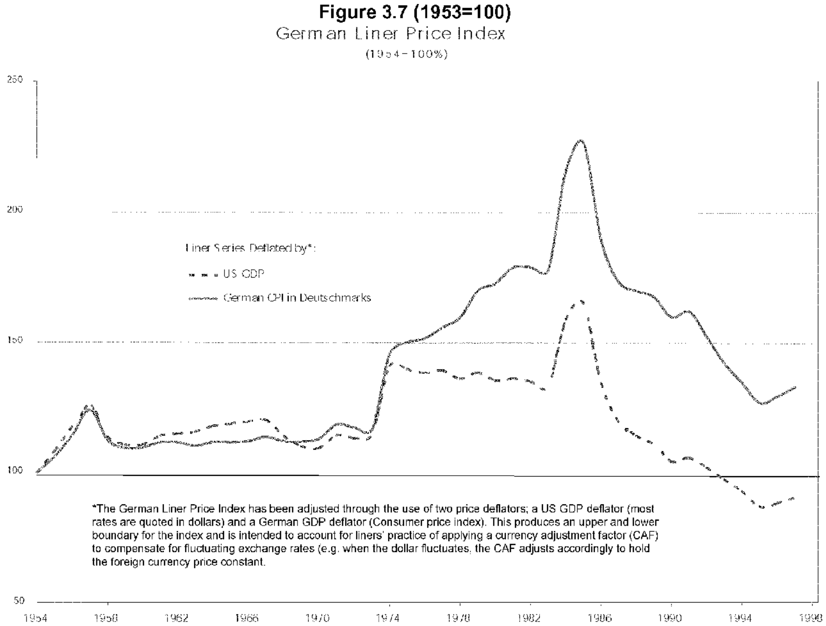
86. In relation to the baseline year (1954) the study shows prices rising steadily through 1970, after which they increase strongly through 1985. It is only since 1985 that prices decrease. In looking at the long-term evolution of liner prices, it is interesting to note that, by 1998, the German-deflated prices were still above the index year value and the US-deflated price was only slightly below the index year value.

87. This would appear to be a counter-intuitive finding since the study period covers the adoption and spread of containerisation within the industry. Indeed, the widespread adoption of containers allowed for decreased handling costs, more efficient loading and off-loading and greater economies of scale. Normally, one might have expected these changes to contribute to increased productivity and lower shipping prices. However, this is not reflected in this liner price index.

16. The German Liner Freight Index is a rough measure of freight rate development to German (and, until recently, Dutch) North Sea ports. It is a weighted average of rate information provided by a sample of carriers and agencies and seeks to track rates for fully and partially loaded containers, other conventional cargo and bulk goods carried in the German liner trades. However, as it heavily emphasise general containerised cargo over bulk commodities, it can be seen as representative of the evolution in containerised trade.

17. Liner operators apply a currency adjustment factor (CAF) to compensate for fluctuating exchange rates (*e.g.* when the dollar fluctuates, the CAF adjusts accordingly to hold the foreign currency price constant.

Figure 3.7 (1953=100)



88. There are several possible explanations for this. The first is that this trend may only be specific to the German trades. This study has investigated this possibility by analysing non-German liner rates, vessel operation and port costs. Data from the UNCTAD's Review of Maritime Transport does not support the hypothesis that the German trades represent an anomaly. Indeed, this data indicates that annual nominal increases of 10-15% were commonplace across all routes in the 1970s. At the time, these increases prompted several national and international investigations in order to determine the source of these changes. Analysis of the North Atlantic Trades carried out in the context of these investigations concluded that prices had increased by a range of 21% to 26% (adjusted with a dollar deflator) – supporting the data found in the German Statistics. Other data from the Royal Netherlands Shipowners' Association show important real increases (average 67%) from 1970 to 1980. Based on these analyses, this study concludes that the trend observed in the German data appears to be a generalised trend within the industry.

89. Another explanation may be that liner vessel and service operating costs (including port costs) have increased. Evidence from the 1970s (Sletmo and Williams, 1981) indicates that the liner industry was faced with significant increases in operating costs — particularly due to increases in fuel prices and new ship construction costs. Increases in fuel prices, however, were not unique to the liner shipping sector. When comparing liner to tramp prices, the study finds that despite a common increase due to the energy crisis of the early 1970s, real liner prices continue to trend upwards while Tramp prices decline during the 70s. This difference can be partly explained by looking at newbuilding costs for containerships which rose at twice the rate of general cargo newbuilding costs during that period. Increases in port costs resulting

from new investment in container-specific port infrastructure seem also to have played a role — especially as these costs are typically accounted for in liner freight rates, unlike tramp time charter rates.

90. The study concludes that these factors, alone, are possibly insufficient to account for the general increase in Liner shipping prices. It hypothesises that prices may have risen either despite, or alternatively, *because* of containerisation. In the latter case, the advent of containerisation in the sector meant that relatively fewer ships could carry the same amount of trade leading to a greater potential market power for conferences on containerised routes. Testing this hypothesis is problematic and is beyond the ability and purview of the present report. However, the Hummel report's principal conclusion that the costs of liner shipping services have in fact tended to be stable or even increase over time, supported as it is by other data, provides a counterpoint to assertions that recent downward trends in freight rates are indicative of a generalised long-term decrease in liner freight rates.

3.2 Impact of conferences/discussion agreements on the price of liner services

91. Little can be conclusively drawn from the recent data on liner freight rates and prices with respect to the specific impact of conferences on the former. In some trades, rates and prices have trended downwards in recent years as overcapacity and competition from independents and new entrants have eroded conference/discussion agreement market power. In others aggregate prices have increased. Shipper responses to the OECD questionnaire regarding recent trends in freight rates confirm this ambiguity. For example, while more shippers in the North American trades experienced a decrease, as opposed to an increase, in rates from 1995 to 2000, this finding varied considerably according to the specific trade with some trades seeing more increases than decreases.

92. However, freight rates have generally declined from high levels achieved in the late 1970s and early 1980's where conferences were better able to dictate rates.[18] It is perhaps significant that some of the steepest declines in rates have occurred in the past few years following on the heels of regulatory changes allowing more flexible pricing mechanisms and the arrival of strong independent operators.

93. Little can be concluded from comparing trends in the liner sector to price trends in other industries (Figures 3.7 and 3.8). In the United States liner prices have increased inbound from the Pacific and decreased in the Atlantic — but not by as much as airfreight prices. In Japan, the prices of liner services have generally followed movements in the prices of other maritime transport services although liner prices have decreased relative to many of these. However, despite greater volatility, the general trend in liner prices is on par with the general decrease in all commercial services (-4% from 1995) in Japan. Based on this, it is difficult to conclude that liner prices decreased at a faster rate, or displayed significantly different characteristics, than prices in other like industries.[19]

18. So much so that many countries opened investigations into conference abuses of market power leading to a changed regulatory structure in many instances.

19. Hummel finds that, unlike liner shipping, air freight prices have experienced significant real decreases in the long term.

Figure 3.8 (1995=100)

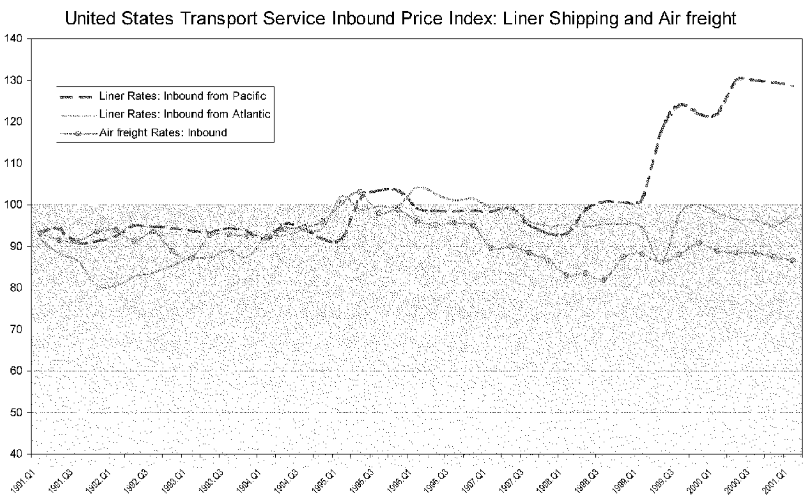
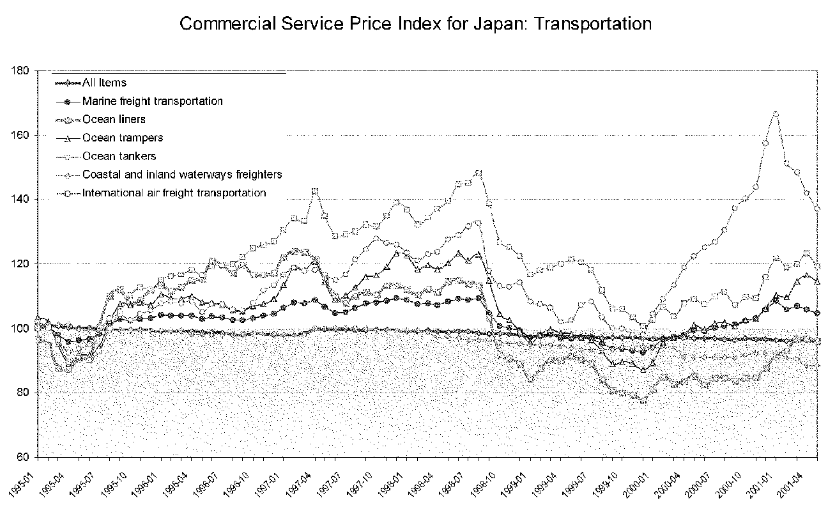
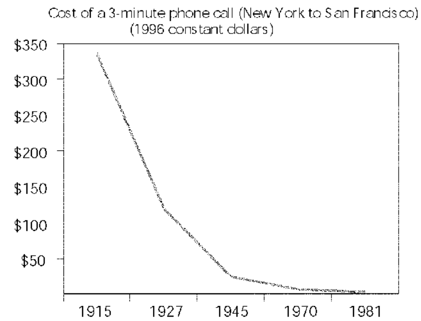


Figure 3.9 (1995=100)



Box 3.1. Price movements and competition

Proponents of anti-trust exemptions have argued that recent trends indicating falling prices support their claim that competition is healthy and that price- and capacity-fixing agreements among carriers are not resulting in abuses of market power. However, falling prices are neither a necessary or sufficient indication of a competitive industry. Indeed many industries, including the notoriously monopolistic United States telecommunications industry up to its break-up in the 1980s, have simultaneously experienced falling prices and market power abuses (see figure below). How prices change is of less importance than the manner in, and the purpose for, which they are set. This is precisely the difficulty in assessing the impact of collusion among liner operators.



94. One can generally conclude that liner freight rates currently respond to supply and demand conditions in the market – they decrease when demand drops and increase when supply is limited. In most cases, conferences and discussion agreements have not been able to push through the full extent of co-ordinated price increases (carriers refer to these as "rate restoration") in trades experiencing falling demand. However, the simple fact that prices decrease (or show reactivity to supply and demand) does not necessarily mean that a market is operating efficiently (see box 3.1 and discussion in section 4). While the *dynamics* of the liner service market appear to be functioning, the same cannot be said for the *level* at which it operates or its *efficiency* given the ability of carriers to set prices and capacity. Conferences and discussion agreements note that these arrangements serve to dampen downward rate movements – *e.g.* they keep rates from falling so low as to force carriers into bankruptcy and potentially destabilise the trade. On the other hand, shippers argue that these arrangements allow carriers to charge higher prices than otherwise would be possible when supply is tight.[20] Furthermore it is not at all clear that price and capacity fixing arrangements have served to buffer rate change movements in the liner trades.

3.2.1 Liner rate-setting practices

95. Responses to the OECD questionnaire relating to rate-setting in the liner-shipping industry issues reveal a varied picture.

20. This impression is supported by the conclusions of the 1995 Clyde and Reitzes report on collusion in the liner industry – while recent (pre-1998) regulatory and economic conditions rendered effective long-term collusion among carriers difficult, markets were still skewed by the ability of conferences to wield market power and prevent individual contracting by conference members. (Clyde and Reitzes, 1995 pp. 37-38).

96. European shippers report very little divergence in rates quoted amongst carriers of the same conference. This contrasts with the recent experience of US shippers where not only do shippers find that conference carriers offer a wider range of rates amongst themselves but that these rates also tend to compare more favourably with those offered by independent operators. This difference is due to the introduction of confidential contracting in the US trades following the passage of OSRA. Since confidential contract terms can no longer be automatically shared among carriers under this legislation, liner operators now find themselves having to set rates closer to their real costs in order to ensure that they remain competitive. According to one conference, published tariffs now largely serve as "benchmarks" for rate negotiations in the US trades (TACA, 2001). Indeed, a recent review of the impacts of OSRA indicated that 90% of contracted rates are linked to a tariff:

> "Some shippers commented that GRI [General Rate Increase] clauses and other such tariff links in contracts which allow for the pass-through of rate increases and surcharges that are difficult to anticipate or ascertain are antithetical to the purpose of contracting for a specific rate. Carriers maintain that such tariff references and links make drafting and managing contracts easier. The Commission's survey revealed that [...] approximately 90% [of contract rates] were linked or referenced to a tariff. [...] Many contracts contained rates inclusive of specific surcharges for fixed durations, with the proviso that any other charges in the governing tariff would apply [...] In addition, the survey found that 36% of the contracts contained GRI clauses or other such provisions for the general increase of freight rates connected to tariff rate increases [...] While tariff references in contracts are not new, their use under OSRA has created some controversy regarding the carriers' ability to influence contract rate levels and terms collectively".[21]

97. Insofar as rates are largely negotiated on a one-on-one basis, the fact that the final, negotiated, rate still references a fixed conference rate indicates that the latter can still be used by conference members to transmit price signals among competing firms. Carriers, of course, currently retain anti-trust immunity for such arrangements but if one of the aims of the OSRA confidentiality clauses was to reduce the ability of carriers to use this kind of market information then it could be argued that common referencing of rates and rate terms in shipper contracts may in fact thwart that objective. The reliance of the industry on "benchmark" or "governing" tariffs begs the question as to why such "benchmarks" or other references are needed among erstwhile competitors in an era where commercial survival is often predicated by a firm's ability to track, control and price on the basis of its own real cost.

3.2.1.1 Ancillary surcharges

98. Shipping Associations responding to the OECD questionnaire reported that all of the members they polled indicated that carriers rarely deviate from one another when asked if conference and discussion agreement members differ from each other in the type and level of surcharges charged. While some surcharges (*e.g.* bunker or currency adjustment factors) can reasonably be seen to apply across all carriers, it is more difficult to understand why others such as equipment repositioning charges and paperwork filing charges should be identical in firms operating at different levels of efficiency. Furthermore, shippers report a general lack of transparency relating to these charges, which raises questions as to their real basis.[22]

21. United States Federal Maritime Commission, 2001, page 20.

22. As an example, the Singapore National Shipper's Council (SNSC) carried out a survey of their shippers regarding terminal handling charges (THC). Shippers reported that carriers would justify THC increases as being a result of increased port charges. However, the concerned port authority (PSA) confirmed that over the same period, port charges actually decreased leading the SNSC to conclude that carriers used THCs as a way to apply surcharges rather than cost-recovery mechanisms. ("Frustrated Shippers", 2001)

Some industry observers feel that these may indeed be a "back-door" price-fixing mechanism – especially as these are presented to shippers as linked to direct costs and therefore (unlike rates) generally non-negotiable in nature (and open to re-assessment during the life of a service contract, unless otherwise stipulated).[23] In this respect, it is telling that nearly all shippers polled in the context of this review indicated that the total number of surcharges applied by carriers was increasing.

99. Many have questioned the particular risk management strategy prevalent in the liner shipping sector where most of the risk associated with the major variable charges (such as currency and fuel price fluctuations) are passed fully through to shippers. Menachof and Dicer, in their investigation of risk management strategies in liner shipping, remark:

> "…liner firms have been able to pass many costs of doing business to the shipper with the major variable charges listed as separate charges…shippers are then faced with rates that vary highly from the published tariff, and they cannot rely on the rate to be the same from one month to the next…this variation makes it difficult to conduct business with a long-term outlook…" (Menachov, 2001)

100. They suggest that both carriers and shippers can benefit if the liner shipping industry develops are more balanced risk management strategy implicating both sides. In particular they point to the benefits other industries have reaped from the implementation of futures markets as a hedge against uncertainty in bunker and currency fluctuations.

3.2.1.2 Independent carriers

101. There is little direct evidence that independent carriers price off conference rates although it is widely recognised that many independents have done so in the past and continue to do so now.[24] At least in two instances involving the Europe-Asia-Europe trades competition authorities have documented and reprimanded conference carriers for seeking to manipulate prices and capacity with independent lines.[25] More recently, EU competition authorities were prompted to open an investigation of six independent lines in the North Atlantic trades after these simultaneously imposed the same empty equipment repositioning surcharge as the dominant conference in that trade. Shippers responding to the OECD questionnaire confirm these impressions – their experience is that in the majority of cases, independents apply the same surcharges as conference carriers.

3.2.1.3 Rate variability

102. Governments have upheld anti-trust exemptions for price and capacity-fixing arrangements partially on the understanding that these would serve to provide a stable price environment for shippers and ensure supply stability. While there can be little argument with the latter assertion (shippers rarely complain that there is a lack of overall capacity to transport their containers), shippers responding to the OECD questionnaire strongly questioned whether these arrangements have served to stabilise rate variability.

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23. "Shippers rail against 'boilerplate' clauses", 2001.

24. Industry observers have pointed out the difficulty independents currently are experiencing in developing pricing policies for the US trades now that they can no longer easily peg their prices to those of conference carriers since the advent of confidential contracting. Also *Lloyd's Shipping Economist*, October 2001.

25. In both the EATA and FETTCSA decisions.

103. European shippers pointed out that rates could vary considerably from year to year — especially in those trades where there is less competition. Rate changes of over 30% were not uncommon with some shippers reporting changes as high as 200% from one year to the next. North American shippers in both Canada and the United States report similar findings. US shippers report average annual rate changes of over 5% in almost every case with changes of over 10% from year-to-year not being uncommon. Canadian shippers report significant volatility in average rates with some individual shippers reporting changes of 50%-95% from one year to the next.

104. The data on rate volatility provided by shippers concerns a relatively small sample of shippers (an undetermined number of responses from the ESC and 15 responses each from the NITL and CSC questionnaires) and therefore can only been considered a general indication of recent trends in rate movements experienced by shippers in general. It should be noted that the rate volatility reported by shippers concerns both upward *and* downwards movements in rates. When compared to trade data, one can conclude that these price movements seem to indicate a market responding to supply and demand conditions. Carriers assert that capacity and price fixing arrangements have "buffered" the market from potentially greater rate volatility although this is an unsupported and a very difficult assertion to test. Data from shippers indicates that the opposite might even be true as some trades experiencing greater competition show relatively more stability than others (*e.g.* the Europe-Mediterranean trade where ocean liners face competition from short-sea shipping, inner waterway shipping and overland rail/road transport).

105. Older data from the 1989 US FMC study can provide some further insight into rate volatility from 1976 to 1988. The primary purpose of the 1989 FMC report's analysis of rate stability was to gauge the impact of the 1984 United States Shipping Act on the stability of rates in the US trades. It found that, although the United States-Germany trade experienced slightly more rate stability and the United States-Italy trade experienced slightly less stability after the 1984 act, overall changes in rate stability in the periods before and after the passage of the 1984 Shipping act were statistically insignificant. The Pacific trades studied in the report all experienced greater and often statistically significant instability following the passage of the 1984 Shipping act. The report concludes that two elements of the 1984 act likely contributed to this observed rise in instability: the provision for mandatory "independent action" on no more than ten days notice and the imposition of service contracting (which in the case of two of the dominant conferences was carried out individually by carriers from 1985 to 1986). These two provisions made it more difficult for conferences to maintain rate discipline in these trades and led to a sometimes-rapid decrease in rates. After a quick fall in rates, two of the major conferences in the Pacific trade (ANERA and TWRA) required their members to negotiate service contracts through the conference rather than individually, thus contributing to a rapid rise in rates from 1986 to 1987.

3.3 Economic performance of the liner shipping industry

106. Carriers often point out that theirs is an industry characterised by poor economic performance. The measurement of economic performance of an industry is notoriously difficult and fraught with problems. Nevertheless, the evidence in this report suggests that the liner shipping industry is a poor performing one, as are many other transport service provider industries. However, there is no evidence that average returns in the liner shipping industry have been significantly *worse* than returns in many other sectors of the transport service industry. Furthermore, it would be wrong to believe that all liner operators are faring so poorly. Like in any other industry, carriers have come and gone and many have changed in response to historical circumstances, yet most of the top 20 carriers have been in business for over 20 years - detracting from carrier claims that industry losses are unsustainable over the long-run.

107. Even today, in unfavourable trading conditions, not all carriers are performing badly and some are doing rather well compared to other transport industries (*e.g.* the top tenth percentile value for return on

equity performance in liner shipping from 1990 to 2000 is comparable to the average ROE performance of the Standards and Poors Transportation Index — 12.53% and 12.92% respectively — and better than the S&P Railroad Index performance and Worldstream Financial Data Services grouping of 84 Road, Rail and Freight Transport equities – 10.02% and 9.16% respectively). Even the *average* ROE performance of the liner sector from 1990 to 2000 (10.55%) outperforms the S&P Railroad Index and the Worldstream Road, Rail and Freight equities. Profit margins in the liner sector are tight, much as they are in other transport sectors. However, Table 3.2 shows that the average 10-year profit margins in liner shipping were still greater than the average net profit margin for other road, rail and freight transport firms (3.95% and 2.07% respectively). Over the same period, however, the average profit margin for firms in the S&P Rail and S&P Transport Indexes were 7.2% and 4.6% respectively. One can conclude from these figures that liner shipping results, while low, are certainly within the range of economic results from other transport service providers.

Table 3.2 Financial ratios for selected liner operators and industries (percent)[26]

Return on Equity (Average)	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	10-year average
Liner Shipping (16 equities)	8.34	7.73	7.42	7.02	13.54	9.65	9.48	6.94	16.18	6.18	6.87	10.55
Road Rail and Freight (84 equities)	23.09	7.88	8.60	8.43	11.23	7.75	10.92	15.53	4.42	-4.40	7.32	9.16
Net Profit Margin (Average)												
Liner Shipping (16 equities)	0.64	1.02	1.02	6.40	7.18	5.66	4.40	3.65	3.25	1.81	8.49	3.95
Road, Rail and Freight (84 equities)	6.90	4.37	5.70	7.87	-28.03	0.35	6.74	5.65	-3.82	8.25	8.81	2.07

108. Carriers put forwards many reasons for the industry's propensity for poor economic returns. These include the investment necessary to implement liner shipping services, the vagaries of international trade, the fact that unsold slots are forever lost and the general commoditised nature of the liner shipping product. Despite these factors, it is clear that some carriers are able to generate a reasonable return on their investments. Why this should not be the case for more carriers may be more linked to management and accounting practices than to industry-specific characteristics.

3.3.1 Cost control

109. Carriers point to wide-ranging efforts within the industry to cut costs and increase overall productivity. Strategies range from seeking operational savings through mergers, alliances and slot chartering arrangements, cutting staff and overhead costs, introducing new container tracking and asset management information systems, to deploying larger and more advanced ships (see discussion on this

26. Compiled from Company financial reports, Datastream Financial Data Services online (www.datastream.com), Containerisation International On-line for top-40 (in fleet capacity) liner operators publishing financial records (www.ci-online.co.uk). The 15 carriers used for ROE and Net Profit margin analysis were selected because they were the only ones publishing financial reports. They are: CSAV, Maersk (excluded from the profit margin analysis because their reported profit margins were for the entire Maersk group and grossly skewed the sample upwards), K Line, MOL, NYK, Hanjin, HMM, MISC, PONL, Evergreen, Hapag Lloyd, Yangming, Wan Hai, Uniglory and NOL. Carrier company reports for multi-activity groups tend not to disaggregate results for their liner operations vs. other company operations. Wherever possible, disaggregate results have been used.

below). However, a recent overview of pricing trends within the liner industry finds that most carriers have been slow to reap savings from detailed activity-based costing, explaining partially why the best managed carriers have performed better than others.[27]

110. Pricing regimes based on average costs (*e.g.* such as the net contribution to vessel programme) fail to provide detailed information on how specific activities and/or transactions generate costs. Without this information, it may be difficult for carriers to correctly identify sources of specific costs savings and price transactions accordingly. As illustrated in Table 3.3, real costs can vary considerably, such that any operators pricing on average costs may rapidly find themselves in trouble if the true costs they incur are more along the upper ranges of the distribution. This also explains the success of some independent carriers who used activity-based costing to identify and target more profitable cargoes. According to this study, many ocean carriers still lack the ability to accurately track and assign costs on a specific, rather than average, basis. This weakness may also go a long way towards explaining shipper frustration with carrier pricing regimes since many of the former have long since implemented detailed activity-based costing accounting in order to remain competitive.

Table 3.3. Analysis of average liner service cost distribution for North American Trades (USD per TEU)

Cost categories (USD/TEU)	Lowest	2nd quartile	3rd quartile	Highest
Corporate overhead:				
Sales cost	5	10	20	80
Customer service	5	10	40	100
Vessel costs	90	100	700	2800
Terminal costs	100	125	200	400
Inland transportation	0	150	1500	5000
Equipment costs	100	200	450	1500
All costs	300	595	2910	9880

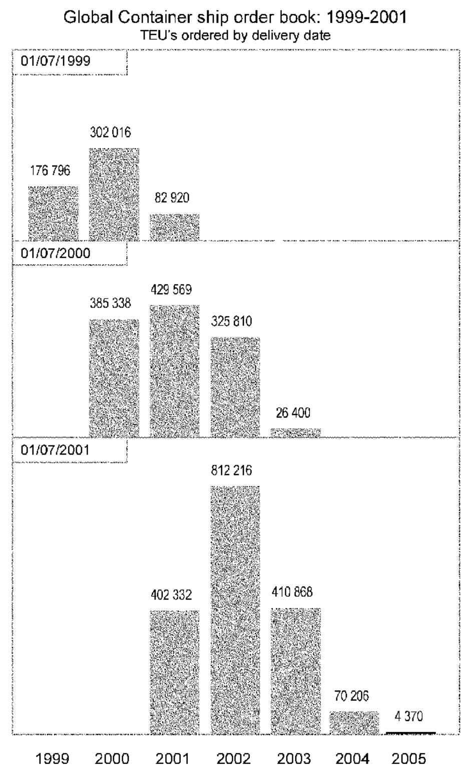
Source: "Easy as ABC", Containerisation International On-line (www.ci-online.co.uk), 1 March, 2001.

3.3.2 Over-investment in capacity

111. The liner shipping industry has a record of investing heavily in new capacity. As outlined in section 2, many carriers follow the route of ordering new and larger ships in order to achieve economies of scale which would hypothetically allow them to cut costs. Providing new capacity, especially when in the form of new service strings often requires not one but several new ships in order to provide a reasonable and attractive sailing schedule. While some of this capacity can be obtained through slot exchange/charter agreements or in the ship charter market, most carriers still have recourse to building new ships.

27. "Easy as ABC", 2001.

Figure 3.10



Source: Containerisation International On-line (www.ci-online.co.uk).

112. Long-term projections for world trade growth give reason to carriers who seek to expand their fleets. However, in many instances, the overall level of new capacity added to trades has outstripped short-term growth in trade – most recently during the Asian financial crisis and in the second and third quarters of 2001 as the US and European economies slowed down. Many industry observers have noted that the tremendous amount of new capacity ordered in recent years as carriers experienced strong financial results and low newbuilding prices (see Figure 3.11) will come on-line just as trade growth slows, leading yet again to a cycle of overcapacity, falling rates and falling returns on many trades.[28] According to Drewry

28. "Trigger happy lines shoot themselves in the foot", 2001 – The new capacity added to the Pacific trades in 2000 and 2001 has triggered a cycle of rate cuts and diminished returns which, in turn, has prompted the dominant conference (FEFC) to envisage "parking" 10-20% of their capacity (CI, "Nervous FEFC clutches at capacity management straws", 2001).

Shipping Consultants, global containerised trade will grow by 8.1% in 2001 (down from 10.8% in 2000) while the global containership fleet will grow by 12.5% in 2001 and 13.8% in 2002 ("Drewry predicts less growth in 2001", 2001). This growth will likely be weaker given the aftermath of the terrorist attacks on New York city and their chilling impact on US trades.

113. Carriers argue that this type of overcapacity is endemic to the industry since strong trade flows in one direction are not necessarily matched in the other – in order to provide for demand in the outward leg, carriers must necessarily oversupply capacity on the weaker return leg. However, many carriers are seeking alternative strategies to reduce the need to run unbalanced service strings. In particular, the increasing use of slot charter agreements across all trades and increasingly, between conference, alliances and independent operators, represents a less capital-intensive way of responding to growth in demand.[29] It is also telling that a growing proportion of the top 20 operators' fleets is made up of time-chartered vessels, indicating a trend away from self-ownership to relatively more flexible asset management arrangements.

114. Furthermore, it is not at all clear that the industry's conventional wisdom regarding the economies of scale brought about by ever larger ships is necessarily as well founded as carriers might hope to believe. In a 1997 speech, Theodore Prince, senior vice president and chief operating officer, of K Line America pointed out that:

> "One of the major contradictions within the shipping industry is the concept of 'scale versus scope'. (Prince) pointed out that it was the industry convention at present to build larger vessels that necessitate ever larger and more sophisticated terminals, supported by physical infrastructure with increasingly advanced technologies. Although this may look impressive, such an asset-intensive approach will only lead to higher fixed costs and an inability to survive in today's competitive, de facto deregulated trading environment. 'Scale is an opportunity to invest and you have to question whether these investments will pay off,".[30]

115. This view is also echoed by Martin Stopford, Managing Director of Clarkson Research, who points out that economies of scale brought about by larger ships diminish after a certain point and can easily be wiped out by increased transhipment costs.[31] In an environment where overall capacity is sufficient to carry available cargo, one might question whether new capacity construction is necessarily the most efficient route towards increasing operators' profitability.

116. Finally, one complicating factor in the capacity equation has been the low cost of newbuildings in recent years. Ships being delivered in 2001 and 2002 are between 30% and 40% less expensive than in 1991, tempting carriers to renew their fleets with more efficient ships before prices rise.[32] There are many reasons for current low prices in the shipbuilding sector and state support of certain shipbuilding industries is certainly an important factor in the current low prices for newbuildings. However, competition in the shipbuilding sector is a separate issue from competition in the liner sector and should be addressed accordingly.

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29. "Scale vs. Scope", 2001.

30. "Scale vs. Scope", 2001.

31. "A new Revolution", 2001 and "Revolution Revisited", 2001.

32. Freight rate indicators, Containerization International On-line (www.ci-online.co.uk) 9/21.

Summary Section 3

- In the absence of detailed data on real freight rates and carrier costs, it is impossible to irrefutably prove/disprove a causal relationship between the price of liner services and the anti-trust exemptions afforded to conference carriers.
- Average freight rates in all of the major trades have decreased over the past decade. The drop in freight rates has not been uniform between individual legs of these trades nor between the trades themselves.
- Also, while not conclusively proven, there is some evidence that in real terms freight rates are not dissimilar to those that prevailed in the mid-50s, despite the widespread introduction of containerised cargo. The steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades.
- Ancillary surcharges such as those charged by carriers represent a method of passing the most important variable costs (currency fluctuations, fuel costs and terminal handling charges) on to shippers. Shippers assume most of the risk associated with these costs. In some cases, lack of transparency regarding the basis for these costs raises serious doubts as to whether they really only serve to recover costs.
- Freight rate movements in liner markets are generally responsive to supply and demand conditions. The extent to which these movements are "buffered" by price-fixing is difficult to determine. Some European shippers' experience in fact shows that trades open to greater competition (and therefore less conference control) show relatively more rate stability than trades where conferences have greater power.
- While liner operations are not particularly profitable, many carriers, especially the top performing ones, are able to generate financial returns at least as good as, if not better than, other transport industry service providers. Poor financial performances in the liner sector may have as much to do with management decisions linked to cost control and investment in capacity as with any inherent structural problems within the industry.

4 Discussion of the impacts of Price-fixing and capacity agreements on both carriers and shippers

4.1 To what extent does anti-trust immunity for price-fixing deliver benefits to shippers by improving supply chain performance and enhancing business efficiency?

117. Supporters of price-fixing arrangements argue that these are a necessary pre-condition to the provision of continued and uninterrupted high-quality ocean shipping services. Carriers claim that without such arrangements, shippers would experience difficulty getting their goods shipped as sailing schedules would likely be perturbed by the bankruptcy of weaker carriers. According to this view, the sudden exit of these carriers from published service strings would strand containers dockside and would render shipping a much more uncertain exercise than it is currently. Anti-trust immunity for price-fixing, so its proponents explain, allows conference carriers to achieve adequate returns on their investment (irrespective of their differing operating and management efficiencies), avoid bankruptcy and thus allows shippers to benefit from stable services.

118. The line of reasoning exposed above is perhaps one of the most contentious issues surrounding the continuation of anti-trust immunity for price-fixing. The argument for retaining immunity is based on the belief that there is no natural short or long-term market equilibrium in liner shipping and that without collusion among service providers, there will be an overall decrease in welfare as supply becomes uncertain and trade becomes negatively impacted. Supporters of this view point out the spectre of "cut-throat" or "destructive" competition (such as that which occurred over a century ago with the arrival of the first steamship liner operators) as reason enough to artificially stabilise prices in these markets in order to ensure adequate and predictable supply. Many, however, disagree and argue that liner markets, like other markets, can and will reach an efficient outcome through more competition. They argue that it is completely normal that inefficient operators drop out of the industry leaving only those most able to provide cost-effective services. Supporters of this view note that while some short-term interruptions in trade may come about from time to time, welfare gains from a long-term reduction in shipping prices would end up having an overall beneficial impact.

119. Defenders of anti-trust immunity urge regulators not to attempt to "fix what isn't broken" and argue that the benefits of price-fixing outweigh any eventual costs. However, their arguments have a strong theoretical and somewhat untested underpinning. It was hoped that in the context of this report carriers and shippers might provide detailed cost and rate data either supporting or refuting the need for anti-trust immunity. Unfortunately this information was not forthcoming. This section will therefore focus on the theoretical models and assumptions underlying the retention of anti-trust immunity and attempt to supplement this analysis with real data and observations culled from various sources.

120. The following sections will examine to what extent anti-trust immunity for price-fixing in liner shipping has benefited shippers by allowing carriers to deliver high quality services and avoid disruptions from "destructive" competition.

4.1.1 Has anti-trust immunity allowed carriers to provide adequate liner services?

121. Not necessarily. Industry data and responses from the OECD questionnaire certainly support the contention that carriers deliver an adequate and reliable amount of capacity in the face of growing world trade. Containers are rarely left at dock and, if anything, the industry is characterised more by over, rather than under, capacity. The real question is to what extent would these services have been provided anyway without the protection from anti-trust immunity. Indeed, if anything the trade press and shippers' organisations all point to an improvement in the responsiveness of carriers to shippers' needs as conferences have lost their importance and strong independent carriers have emerged. More shipper-responsive strategies such as integrated supply-chain logistics services, simplified and/or single freight rate structures, better co-ordinated multi-carrier services, etc. have all come about not *because* of conference power to fix prices but precisely *because this power has waned* in recent years and carriers have had to seek new strategies to remain viable in a more competitive environment.

4.1.2 Has anti-trust immunity allowed the market to deliver an efficient outcome?

122. Another related question might be: to what extent has anti-trust immunity allowed the market to deliver an efficient outcome? Economic efficiency has a number of aspects. One element is productive efficiency which relates to suppliers' ability to produce a set level of output at the least cost. However, a market can include many efficient suppliers and yet still exhibit productive inefficiency if the other suppliers are inefficient. In addition, in its broadest sense, efficiency means that markets meet two further conditions: *1)* each unit of output is consumed by those most willing to pay for it and *2)* the right amount of output is produced so that prices reflect costs (Stoft, 2001). A strong case can be made that the liner shipping market has historically (with price-fixing among carriers) failed on both the first count (conferences and other price-fixing arrangements expressly have sought to protect the least efficient operators) and the third count (there has and continues to be a distinct trend towards over-capacity in the industry). Many shippers would strongly argue that it fails on the second count as well, given that they feel that freight rates are above what they might be in the absence anti-trust protection.

4.1.3 Does anti-trust immunity prevent destructive competition?

123. In order to answer this question we first need to address two other questions: What might we mean by "destructive competition", and is the liner shipping sector prone to this phenomenon? Having addressed these questions we can then determine whether or not anti-trust immunity can prevent "destructive competition". Even if destructive competition exists in the liner-shipping sector, is harmful and can be prevented by anti-trust immunity, this does not imply that anti-trust immunity is the correct public policy response. Anti-trust immunity may not be the sole and/or most effective recourse against this phenomenon.

124. The answers to these questions are determined by how one views the organisation of liner shipping markets. This section will examine these assumptions, the models of market structure that underlie them and will address the more pertinent question of to what extent has anti-trust immunity contributed to the most efficient market outcome in liner shipping.

125. The inefficiency inherent in the Conference system is often described as the price to be paid for stability. Carriers argue that shippers would not have access to regular and frequent liner services if they could not fix prices. The reasoning behind this view is that the "unique" economics of liner shipping lead to pricing at short-term marginal costs that are often below average costs. This in turn would lead to the sudden withdrawal of ships from service strings as their owners decided to cut their losses and exit from the trade. On the other hand, shippers have tended to view this argumentation as flawed since their view of

market structure in the liner sector does not support the notion of "destructive" competition and/or the existence of "destructive" competition in the current market. This section will examine some of the theories of market structure underpinning these views, starting with the shippers' view.

4.1.3.1 The neoclassical monopoly/oligopoly model

126. This is both the simplest and most controversial model to be used to analyse conferences. According to this model, conferences act as strong oligopolies exercising *de facto* monopoly power in the trades where they operate. According to this model, conferences charge "higher-than the monopoly maximising rates" which are negotiated downwards by the shipper so that in the end carriers earn the highest possible returns (Shashikumar 1995, p.11). This theoretically results in "maximum profits for carriers, tight control of capacity and suppressed demand for liner shipping services" (Meyrick, 1999, p. 29).However, many critics of this theory have pointed out that industry returns are not so high as to provide evidence of massive profiteering on the part of carriers (on the other hand, this paper has shown that returns are not necessarily as low as carriers portray them to be and aggregate data on profits might mask excessive returns on particular routes). This has led many supporters of this theory to postulate that the industry disperses their monopoly profits by engaging in expensive and unnecessary service competition and through investment in over-capacity.

127. In particular some have sought to explain the propensity for over-capacity in liner trades through a variant of the classic monopoly model — the "Open Cartel" model. In this model, carriers are viewed to act initially as collusive oligopolies that restrict capacity below what the market would provide and then by setting prices above average costs. However, since carriers cannot compete on price, they are soon drawn into a spiral of service competition based on either better quality or more frequent services. In the latter case, the resulting overtonnage leads carriers to agree on new remunerative rates in the face of overcapacity. The cycle continues as new capacity is drawn into the industry by the new freight rates.

128. While shippers and many anti-trust regulators share this view of the industry, both variants of the monopoly/oligopoly model face problems when confronted with empirical evidence concerning the recent evolution of freight rates and the action and attitudes of independent operators in trades where conferences are active. In recent years overcapacity has been accompanied by declining, rather than stable, freight rates. This implies that conferences, when operating in periods of overcapacity, are not able to effectively dictate or maintain excessively high freight rates in face of independent operators and conference defectors. However, this drop in rates must be seen both in the context of a drop from a peak in the 1980s and of an environment where competitors have every incentive to price off the conference "benchmark" rate rather than the rate quoted by the most efficient operators.

129. A second criticism of the "Open Cartel" model is that empirical evidence presented in a study examining capacity in conference trades fails to support the link between conference control and overcapacity (Meyrick, 1999 citing Deakin and Seward, 1973). However, the conferences in question were "closed" conferences and were therefore presumably able to better restrict their members' scheduling decisions than the typical "open" conference (*e.g.* one that any carrier could join). While certain "closed" conferences still exist today (they are not allowed in the United States trades), there is a general consensus that they exercise much less restrictive entry practices than in the past and more or less operate as "open" conferences. Therefore, the central hypothesis of the model, that conferences contribute to overcapacity in the trades where they are active, is still a plausible hypothesis.

4.1.3.2 "Rationalisation" View

130. This view, along with its variants, is the one that carriers believe most accurately depicts the liner shipping market. According to the proponents of the "rationalisation" argument, the liner industry is characterised by a unique set of circumstances that justifies regulation by either industry members themselves or by government regulators in order to stabilise the otherwise chaotic liner shipping market.

131. This view has several underlying assumptions that are worthy of being examined in more detail. The foremost of these are that the liner shipping industry displays significantly different characteristics than any other industry thus requiring special treatment under anti-trust statutes, the second is that normal competitive pricing would lead to "destructive" competition and the third is that price-fixing represents the best response to the challenges it faces.

4.1.3.3 Uniqueness of the liner shipping industry

132. When targeted by anti-trust regulation, industries almost invariably cite the fact that, unlike other industries, theirs is so unique that they should be exempt from laws prohibiting collusion. The liner shipping industry is not the only transport industry to have put forward this defence and, like airfreight and many rail and road carriers in the past, they have spent considerable energy and resources protecting the exemptions that allow them to collectively set prices. However, unlike these other transport industries, liner shipping is the only major international goods transport industry that has retained comprehensive anti-trust immunity for price-fixing.

133. The unique features of the liner shipping industry cited by carriers include high and "lumpy" capital investment costs, uneven demand (both seasonally and directionally), marginal costs below average costs in periods of excess capacity, chronic and necessary overcapacity and the need to avert trade-disrupting "destructive" competition. This list of features could be used to describe the principal challenges faced by any industry providing guaranteed and/or scheduled services – and certainly describes the situation of all fixed-schedule transport providers. Companies in the pipeline, rail and air transport sectors also face proportionally large capital outlays (*e.g.* rail companies in several OECD countries must pay for their rolling stock and the rail networks on which they run) and considerable seasonal and directional fluctuation in demand (Figure 4.1 illustrates capital outlays of three transport sectors). With the notable exception of carriers, there seems to be a growing consensus that "(the) technological characteristic(s) of liner shipping (are not) so unique as to receive its current special treatment".[33]

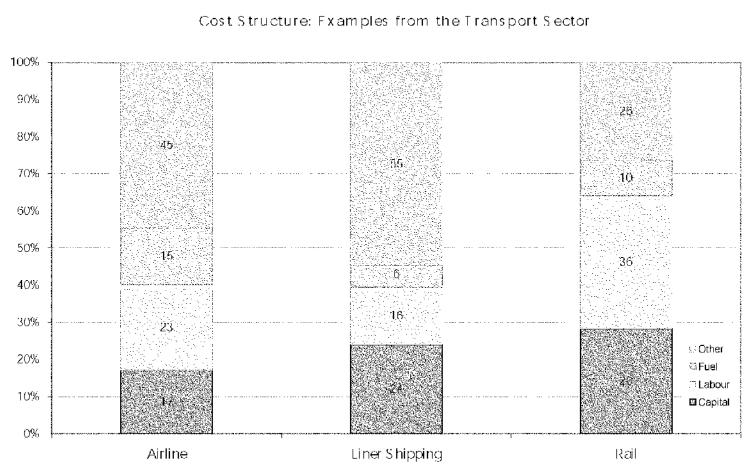
134. In particular, shippers are quick to point out that the other transportation intermediaries they work with have faced deregulation without experiencing the disastrous consequences that Conference carriers say are inevitable. While United States freight rail deregulation has resulted in large-scale consolidation, increased efficiency, lower rates and greater customer responsiveness, it has not experienced the downward spiral of "destructive" competition that rail operators predicted. Similarly, price-fixing in the road haulage sector of both the United States and the United Kingdom has been dis-allowed since deregulation and neither of these countries have suffered from the wide imbalances in service provision that many road operators said would result. While capital costs are typically proportionally smaller in the trucking sector, the variety of specialist vehicles requiring higher investment outlays, and uneven seasonal and directional goods flows has parallels to the liner shipping sector. The European Shippers' Council points out that the road haulage industry illustrates that "active price and service competition is not inimical to the provision

33. Shashikumar, 1999 citing the 1992 "Report of the Advisory Commission on Conferences in Ocean Shipping (ACCOS)".

of reliable services" (ESC, 2001). Finally, shippers worldwide can depend on regular and efficient air-freight services without this industry having recourse to price-fixing among competing firms.

135. In the end, carriers and shippers will likely not agree on the "uniqueness" of the liner shipping industry. Is the industry unique? – of course. Is the liner shipping industry *more* unique than any other transport service industry? – this report finds no compelling evidence supporting such a view.

Figure 4.1



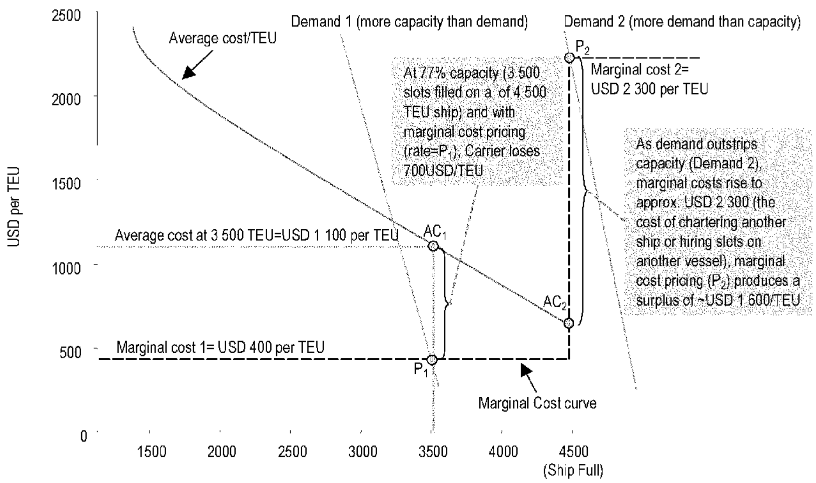
Source: Compiled from Transportation Canada, Stopford, 1997 and CI online.

4.1.3.4 *"Destructive" competition: Marginal vs. average cost pricing*

136. A transport provider offering an advertised regularly scheduled service must deliver that service regardless of the number of "clients" it has at the time of departure. In the liner shipping case, a ship scheduled to depart must depart irrespective of the number of containers it has on board. In times of over-capacity, any additional container that takes an otherwise empty place will be accepted and the price will be set at a price that could be as low as the marginal cost of handling that container. However, when supply exceeds demand, it is likely that this short-run marginal cost is below the average cost of providing the service string.

Figure 4.2

Liner Pricing: Marginal Cost Pricing vs. Average Costs



Source: Modified from Stopford, 1997.

137. Figure 4.2 illustrates the marginal pricing problem as described by supporters of anti-trust exemptions. In this case the only additional cost of accepting another container is the cost of handling that container (USD 400/TEU) until the ship reaches full capacity, at which point the marginal cost rises to USD 2 300/TEU which accounts for the cost of chartering a new vessel and/or hiring slots with a competing firm. At 77% capacity (3 500 TEUs out of a maximum of 4 500 TEUs) and in a market characterised by more supply than demand (Demand 1), carriers may be tempted to fill their remaining slots by bidding against other carriers until they reach their marginal cost (USD 400)/TEU. At this point the carrier would lose USD 700 per container carried since the average cost of handling a container (taking into account the costs of operating the ship) is USD 1 100. When demand outstrips capacity (Demand 2), however, carriers will align their rates on the higher marginal cost of USD 2 300/TEU since this is what they would face if they would accept the 4501st container. At this level, the company faces average costs of USD 700/TEU therefore ensuring a surplus of USD 1 600/TEU.

4.1.3.5 Average costs: Vessel purchase vs. Slot chartering

138. As illustrated in the above example (and as described by carriers), carriers' marginal costs are assumed to be flat until the full capacity of the ship is reached at which point they jump up to a much higher level that takes into account the addition of a new vessel (or vessels). The average cost of providing a service string is also calculated on the assumption that capacity can only be added in whole-ship units (*e.g.* by adding the full capacity of a new or time-chartered ship at a time). However, carriers are increasingly turning towards more flexible arrangements to add capacity in less-than-whole-ship units, in

particular through the use of slot charter or slot exchange agreements. When a market is characterised by overcapacity, it makes more sense to purchase slots on existing vessels than to build and/or charter a whole string of new vessels. The World Shipping Council argues that these slot purchase agreements are an important aspect of the industry since they:

> "...produce operating efficiencies and reduce costs. They have allowed participating lines to expand their service networks, reduce operating costs and optimise capital investment. They have also made it possible for carriers to enter new trades by sharing space with other lines rather than having to incur 100% of the costs and risks of developing their own string of ships in a liner service" (WSC, 2001b).

139. Slot chartering allows carriers to respond flexibly to demand without necessarily purchasing a new vessel. While the average cost of providing a service string based on the purchase of one or several vessels is indeed high, carriers have the option of chartering space at a much lower average cost curve thus enabling them, in theory, to close the gap between average and marginal costs.

4.1.3.6 Price variability and cost recovery on average

140. The market cycle that the liner shipping industry faces is fundamentally the same as that faced by other capital-heavy industries. Inefficient capacity and/or carriers would be forced out of the market in times when forecast future demand is low. This would reduce overall capacity and increase utilisation of the remaining capacity. When forecast future demand becomes sufficiently high, new capacity from existing and/or new carriers would come on-line to take advantage of the higher rates. When carriers are considering adding new capacity they make an assessment whether the money gained in times of high demand will allow the carrier to see through periods of low demand.[34]

141. Although the price for a marginal unit of cargo may vary widely according to the economic climate and the imbalances in trade, short-term fluctuations in price signals are irrelevant for decisions about whether to add or remove capacity. In addition, carriers and shippers can seek to reduce the disturbances linked to supply/demand cycles through various means (*e.g.* by chartering space and/or "fixing" prices contractually through carrier-shipper service agreements). Historically, however, carriers have sought to mitigate the negative impacts by bypassing discussions with shippers and fixing prices amongst themselves.

142. Figure 4.3 illustrates the effect of price-fixing in a situation where marginal costs are below average costs. Rates are fixed at a level such that the carrier can expect to reap what it deems a reasonable rate of return. Since other carriers agree to this tactic, carriers will not seek to underbid each other and rates remain at this level. At the same capacity as in the previous case, the carrier can expect to make a slight surplus (P_1-AC) since the rate charged is above the carrier's average costs. As demand goes up, the carrier can expect to make more of a surplus until the ship is full. However, unlike in the previous case, as demand outstrips supply the carrier finds itself operating ***under*** its new marginal cost of USD 2 300 (at P_2). The carrier has a strong incentive to revise the fixed rate upwards (or find an alternative strategy for increasing the amount paid per TEU moved). Price-fixing is said to smooth out the price volatility inherent in the marginal cost-pricing scenario. The theory is that the inefficiencies inherent in fixed-pricing are the "price" to pay for frequent, scheduled and stable ocean shipping services.

143. However, three points must be stressed when looking at the theoretical benefit of conference price-fixing. The first relates to the reality of price-fixing in a non-homogeneous conference, the second

34. Although, alternatively, carriers might choose to "cushion" their losses with revenues from other sources (from other revenue streams and/or subsidies).

relates to the inherent instability of such a system in the real world, and the third relates to liner shipping's historical dependence on this strategy.

Figure 4.3

Liner Pricing: Single Carrier with Price Fixing

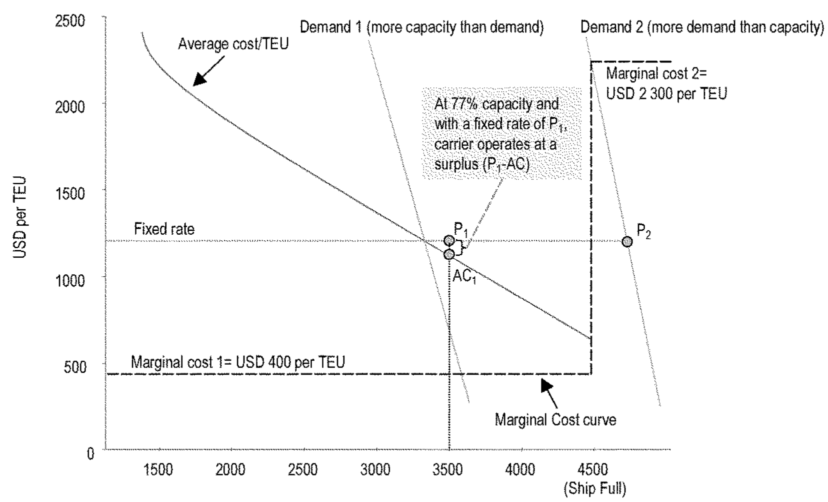
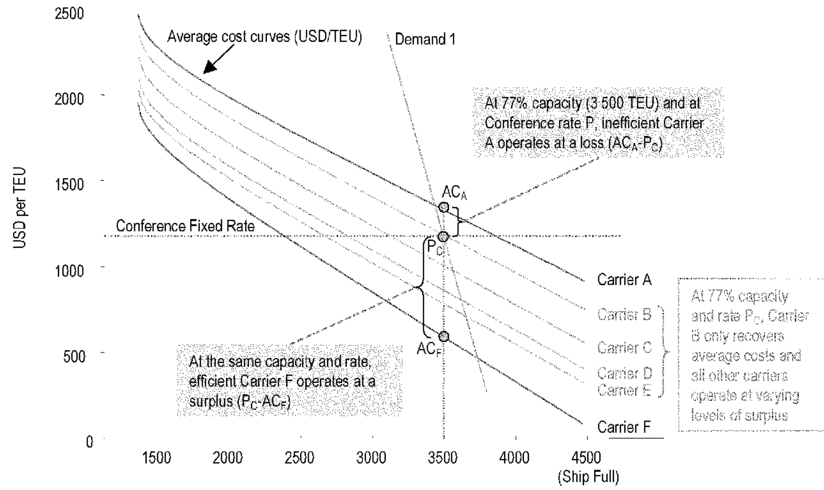


Figure 4.4

Liner Pricing: Conference Price Fixing



4.1.3.7 Not all carriers are equal...

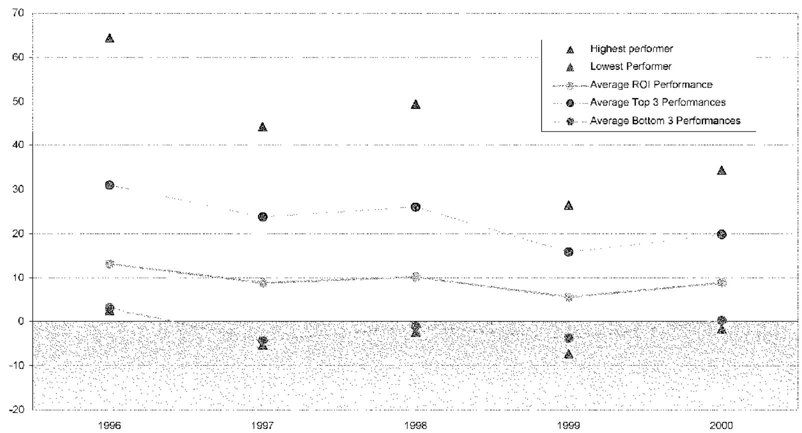
144. As explained above, conference pricing in theory allows carriers to charge rates more in line with their *average* rather than *marginal* costs in times of low demand. However, not all conference members are operating at the same efficiency and they therefore face different average (and to a certain extent, marginal) cost curves as illustrated in Figure 4.4. Figure 4.5 illustrates, for example, the return on investment performance of those members of the Far Eastern Freight Conference (FEFC) publishing their accounts. One can see that notable differences exist between the ability of the best and worst performing lines to produce economic returns.

145. Indeed, within any given conference (or amongst the members of any given discussion agreement) significant differences exist between the performances of individual lines. Conferences have historically aligned their rates on their least efficient members[35] thus allowing inefficient operators to ensure their livelihood while efficient operators reap benefits stemming from rates that are above their costs. This is clearly inefficient because the savings achieved by efficient lines are not reflected in final prices.

35 "Easy as ABC", 2001 – quoting a former K-Line Executive.

Figure 4.5

ROI performance: Published accounts of Far Eastern freight conference members (percent)



146. In the illustration given in Figure 4.3, at 77% capacity and conference rate P1, all carriers except for carrier A (especially carriers D, E and F) come out covering at least as much as their average costs — hence the attractiveness to them of price-fixing. In this example, all carriers except A could theoretically charge less and therefore their surplus represents a commensurate loss for shippers – unless one views this surplus as the "price" of fielding all the disparate ships necessary for the conference's service schedule. This argument can be turned around by saying that this surplus is in fact the price of keeping inefficient tonnage in the industry. With freight rates more in line with efficient carriers' costs, inefficient ships would be scrapped and the withdrawal of inefficient operators would liberate their tonnage to charter and second-hand markets. Certainly fewer carriers would remain although their rates would be more competitive. Some argue that this would give rise to quasi-monopoly power among the remaining industry actors. This is a valid concern, yet it is hard to see how the current system where multiple actors are allowed to fix prices is preferable to an industry characterised by fewer actors and strong anti-trust enforcement. Many industries are indeed characterised by such a system (a few economic actors operating in an effective regulatory framework) and OECD countries (and others, through the WTO process) are equipped to deal with possible market abuses through national anti-trust legislation and international arbitration.

147. Ultimately, however, the inefficiency of this type of pricing mechanism is only relevant if the resulting prices are able to "stick" in the market. For this to happen, one of two things must occur. Conferences must either have enough market power and internal discipline to impose their prices, or independent operators must tacitly or overtly construe to "peg" their prices on the conference/discussion agreement rates.

Box 4.1 What do we mean by "Destructive competition"?

One key argument put forward by the supporters of anti-trust immunity for conferences is the notion that co-operation amongst carriers is essential to prevent "destructive competition". It is therefore essential to understand this notion of "destructive competition". What is it? How does it come about? Is it harmful to the consumers of shipping services (*i.e.*, the shippers)? Did it occur in the past, and does it still occur today?

This box seeks to set out a simple coherent economic model which seems to capture the important features of destructive competition.

The shape of the marginal cost curve

Let's start by looking at the economic models of destructive competition put forward by supporters of antitrust immunity. As this paper has discussed, one line of argument is based on the shape of the marginal cost curve. The marginal cost of carrying an additional container is very low until a vessel reaches its capacity. At capacity, the marginal cost of an additional container is very high. Therefore, if competition is intense the price for marginal cargoes will fluctuate and, if demand is low, may not cover the average costs of operating a vessel. Proponents of this line of reasoning argue that shipowners will add capacity when prices are high. Conversely, when demand is low, with price below average cost, shipowners will make a loss, leading to bankruptcies and withdrawal of capacity. In this model, "destructive competition" refers to the tendency to cycle between episodes of over and under capacity with prices alternatively above and below average cost.

The problem with this model is that it assumes that carriers behave myopically. In practice, the decision to add capacity does not depend on the price today but rather on the forecast of price in the future, over the lifetime of a new vessel. Temporarily high prices today are no more an incentive to invest in new capacity than temporarily low prices are an incentive to withdraw capacity. In a stable industry, prices may fluctuate widely from year to year without inducing either widespread bankruptcies or excessive new entry. Of course, in practice, bankruptcies may occur. But these are the result of either inefficient operation or surprise events. Bankruptcies due to inefficient operation are not undesirable – on the contrary they are an essential part of the competitive process. Bankruptcies due to unusual events that could not be foreseen by investors are, by definition, exceptional events. In other words there is no reason to believe that, in an industry with capacity constraints such as liner shipping, there is a systematic tendency towards cyclical over or under-investment.

The Notion of the Empty Core

Another line of argument put forward by the supporters of antitrust immunity is that destructive competition arises because of the presence of the so-called "empty core" in the liner shipping market. A market has a "core" if there is a set of transactions between buyers and sellers such that there are no other transactions which can make some of the buyers or sellers better off. Such an outcome is "settled" in the sense that no group of buyers and sellers can get together and come to some agreement which disrupts the original agreement. In a market with an empty core no matter what outcome is proposed there will always be some buyers and sellers who can get together and make a deal which disrupts the original proposal.

It is clear that the empty core problem might apply to the liner shipping sector. Suppose a particular trade is such that when two ships service the route, the market price is above average cost, while when three ships service the route, the market price is below average cost. Suppose that three different carriers want to serve this route. Since demand is such that only two carriers can survive in the market, one firm will always be left out. If the other firms are making profit, the firm that is left out could (in this theory) seek to negotiate a deal with the customers of the other carriers, disrupting the original arrangement. The only possible stable outcome is when all firms are making zero profits, but, by assumption when all three firms are in the market, all must make a loss.[36]

Two studies stand out among the attempts to model liner markets using the "empty core" approach. The first, made in 1989 by Sjostrom, relies on a highly simplified model of liner markets and tentatively finds that:

> "The results [of the econometric analysis], although certainly not definitive offer further evidence for the proposition that market arrangements that appear to be cartels may be attempts to solve the problem of the empty core" (Sjostrom, 1989).

The second body of work by Pirrong, supports Sjostrom's findings and points to the longevity of conferences in the face of relatively easy entry as support for the theory that price agreements are a response to the "empty core" situation.

> "The ability of cartels to survive the constant pressure of entry is clearly at odds with the view that cartels are inefficient monopolisers... As long as the Conference attempts to raise prices above the level that generates normal profits for the efficient set of vessels, new firms will enter profitably. Unrestricted entry implies that colluders will earn only normal profits. So why collude in the first place? Core theory answers that riddle: collusion is an efficient response to competitive chaos" (Pirrong, 1992).

Both of these studies, and more generally, the applicability of the "empty core" approach to liner shipping have faced significant criticism on the part of certain government regulators and economic theorists. (See, for example, United States Department of Justice, 2000). The principal difficulty faced by this approach is the fact that it is difficult to find real-world empirical support for its conceptual appeal. For example Sjostrom points to price fixing as an efficient response to the "empty core" problem, however, price-fixing, at least hard-core price-fixing as practised by conferences, is on the wane due to new regulatory frameworks in many trades, and in the United States trades in particular. Whereas in the past, carriers sought to provide trade stability by setting prices among themselves, this same stability, as expressed in one-year service contracts, is being achieved through negotiated agreements with shippers. Current industry trends certainly do not support the antiquated notion that price-fixing is the only and/or most efficient strategy for ensuring stable and efficient liner services.

Another example of the difficulty in applying the "empty core" hypothesis to liner shipping is the fact that the model postulates that the longevity of the conference system is strong evidence of its necessity in order to respond to structural instability in the sector. While it is true that conferences have been a feature of liner shipping for over one hundred years, this longevity only relates to the institutional arrangement itself and not to individual conferences (that typically only last a few years) and/or individual conference membership (that fluctuates along with carriers' business strategies) (Shashikumar, 1995).

Destructive competition and stable schedules

More generally, however, the problem with the empty core notion is that, in the case of liner shipping, proponents make the assumption that the presence of the empty core implies a particular and undesirable form of market behaviour. For example, proponents might argue that the absence of a core in the market just described will lead to an endless cycle of price fluctuations and entry of new capacity and exit of bankrupt firms as the three firms seek to contest this market. The empty core concept is a theoretical notion of equilibrium which says nothing about what behaviour will arise in practice. What is the most likely

36. The empty core problem can arise in a market where "(1) Demand is uncertain or periodic; (2) Plant capacities are large relative to demand; (3) Plants exhibit increasing returns to scale; (4) Plants have fixed capacities; (5) There are avoidable fixed costs; (6) It is costly to store the produce". McWilliams, 1990.

outcome in the market just described? The two existing firms in the market are unlikely to passively give up their market share in the face of new entry. Foreseeing this, the third firm will not enter the market, even though the existing firms are making excess returns. This is an illustration of result which has long been recognised by industry economists. What is important for the entry decision of the third firm is not the existing market price but the market price post-entry. If the third firm can foresee that its decision to enter will force the price down below average cost he will not enter. There is no cycling of entry and exit.

Are we then left without a model of destructive competition? Not necessarily. Consider the following model:

Suppose we have a port which is served by a number of shipping lines. Assume that cargo arrives at this port continuously and uniformly over time. Assume also that the cargo owners care only about the time required to get their cargo to its destination and not the ship or the shipping line that carries the cargo. All of the ships are assumed to travel at the same speed. Given these assumptions, the cargo owners will put their cargo on the first ship at the port going to the correct destination.

In this market, is it possible for any one shipping line to maintain a fixed schedule? Let's assume that one shipping line does decide to sail its ships on a fixed schedule. It then makes an investment in its schedule by advertising the schedule and making it known to cargo owners and shippers. Other carriers can then profit from this investment by running their own ships in such a way that they leave just before the scheduled ships. In this way other carriers can steal all of the cargo of the scheduled ships.

It is straightforward to verify that in this market it will never be possible for a shipping line to operate according to a schedule – it will not only lose any investment it makes in advertising the schedule, it will also lose cargo to competing lines which time their ships to depart just before the scheduled ships.

This model captures some of the key elements of "destructive competition". In particular, competition under these conditions prevents shipping companies from offering a key service that shippers require – a reliable, predictable service. It may also lead to economies of scale – larger shipping lines, with more frequent service are more likely to capture a larger share of the cargo than lines with a smaller number of ships. Shipping lines are also forced to operate smaller, less efficient ships in an attempt to increase the number of sailings. Many of these effects have been seen in the local deregulated bus industry in the United Kingdom.

Is there a solution to this problem? There are two possible solutions – one is to ensure that ship departures are spread out in time – to prevent one ship from encroaching too closely on the departure time of another. A variant of this approach was imposed in the bus market in the United Kingdom. The other solution is the use of cargo bookings or space reservations. Once a shipper has committed to place its cargo on a certain ship, that cargo is no longer vulnerable to being captured by a ship with a slightly earlier departure time.

This last point makes clear that although this model may have once applied to the liner shipping industry, its relevance for today is limited. Over 100 years ago, cargo booking procedures were limited. Mail travelled no faster than the fastest ships, making advance reservations difficult. In other words a large proportion of cargo at the dock was uncommitted to a particular vessel, making it vulnerable to capture by the first suitable vessel to arrive. Today, with modern sophisticated cargo management systems the bulk of cargo is committed to a particular vessel. Destructive competition of this type, if it were ever a problem, is unlikely to remain an issue today.

4.1.3.8 Theory vs. reality in liner shipping

148. The preceding sections have dealt with the theoretical justification for price-fixing in liner shipping and its ramifications for conference carriers. However, it is difficult to use these theoretical models of liner shipping to prove or disprove whether or not, absent price-fixing among competitors, the liner shipping industry would necessarily devolve into "destructive" competition. Liner shipping, as an industry, has not been exposed to the full extent of free markets for over 100 years when, as explained in section 2, the industry faced a unique set of conditions linked to the demise of the sailing ship. Many have even questioned whether the theoretical problem of "destructive" competition is indeed a "problem"—citing the similarities between the latter (as described by proponents of price-fixing) and what many have observed to be beneficial market cycles leading to greater industry efficiency and lower prices for consumers in other situations. In any case, making the case for or against the claim of "destructive" competition and below-average-cost marginal pricing would require detailed cost and rate information that was not forthcoming from either carriers or shippers. Two observations, however, can be made regarding the link between the theory supporting price-fixing arrangements among conference operators and the reality of the liner market.

Observation No. 1: Conferences are increasingly unable to make their prices "stick".

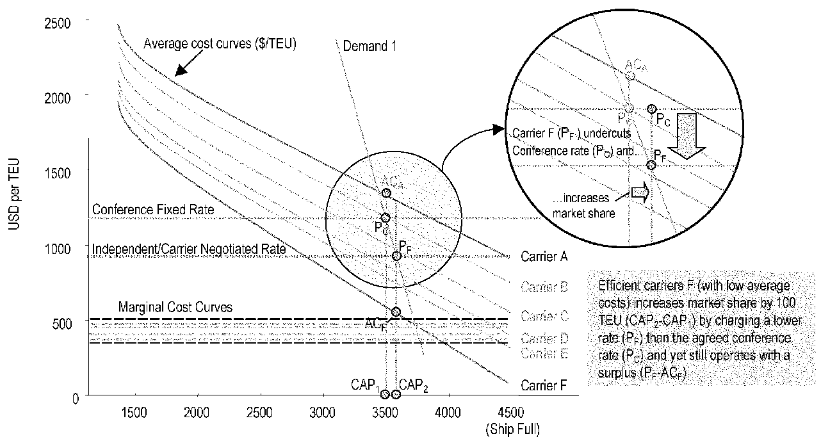
149. Efficient conference carriers have a natural incentive to underprice less efficient carriers in times of low demand and overcapacity. This situation is illustrated in Figure 4.4. As in the previous Figure, it illustrates a typical conference where several carriers operate at different levels of average costs. The most efficient of these (for example, Carrier F) can envisage charging a lower rate (P_F) than the conference rate (P_C) and still earn a surplus (Carrier F's freight rate minus Carrier F's average costs or P_F-AC_F in the figure). The lower rate would allow this carrier to increase the load factor of its ships (from CAP1 to CAP2), partly to the detriment of less efficient carriers in the conference [37]. The same mechanism holds for the case of an independent operator underbidding conferences.

150. This model explaining downward pressure on prices assumes that price discipline is weakened by the ability of opportunistic conference members to get away with deviating from the official conference rate and/or the presence (or threat of entry) of independent operators in the trade. The lack of barriers to conference defection (even if temporary) and to market entry is, therefore, a necessary pre-condition for this model to hold true. A great deal has been said about the "contestability" of liner shipping markets and most of it points to the fact that these markets are not characterised by important barriers to entry (Meyrick, 1999 and Shashikumar, 1995). This is not to say that the markets, as such, are perfectly contestable but rather that important segments of the market, and, in particular, specific trades, display relatively few and small barriers to the arrival of competing carriers.

37. In one econometric study conducted in 1995 (Clyde & Reitzes, 1995), researchers from the United States Federal Trade Commission estimated that trades where such deviations from Conference pricing were allowed would experience an approximately 19% drop in average freight rates. This finding is consistent with the model outlined in figure 4.6 and is supported by recent trends in freight rates.

Figure 4.6

Liner Pricing: Deviation from Conference Price Fixing

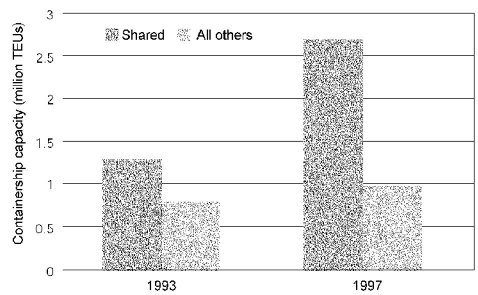


151. The downward pressure on rates predicted in Figure 4.6 can be confirmed by looking at developments in the industry over the past 15 years. The arrival of the first strong independent operators in the 1980s signalled the end of a prolonged era of conference power in the world's major trades. These newcomers typically underbid conference carriers and rapidly gained new markets. Faced with this competition, conference carriers increasingly departed from the agreed-upon conference rate in order to retain or increase their own market share in the face of competition. This trend increased as regulatory changes in certain OECD countries (especially in the United States) have made it easier for carriers and shippers to negotiate service contracts including confidential freight rates. In an environment characterised by the presence of strong independents, more supply than demand and confidential contracting, the power of conferences to make their rates "stick" has considerably eroded – especially in times of weak demand. Adding to this situation has been the industry's propensity to build significantly more capacity than demand would warrant.

152. Conference price-fixing is becoming less and less relevant to many carriers' business strategies as they seek more effective ways of ensuring their survival in a changed environment. The explosion of alliance agreements, slot charter arrangements and mergers and acquisitions all point to carriers seeking market alternatives to the traditional conference price-fixing agreement (see Figure 4.7). However, the price-fixing reflex has not been set aside by some carriers as they seek to "discuss" and suggest common pricing and incidental charge levels through discussion agreements.

Figure 4.7

Shared world containership capacity



153. The second observation is really a question.

Observation No. 2: If conference power is waning, why retain anti-trust immunity for price-fixing at all?

154. Given that traditional rate-fixing conferences no longer seem to be able to ensure and/or enforce strict rate compliance, why are carriers so intent in protecting their immunity from anti-trust regulations? Again, without specific input from carriers on their particular cost models, it is difficult to provide a detailed answer to this question.

155. Preserving the ability to fix prices allows conference carriers to set a common "benchmark" off which to price. Preserving the ability to discuss sensitive rate information among members of a discussion agreement similarly allows carriers to signal to each other a non-binding "benchmark". As pointed out by carriers:

> "insofar as published tariff rates are concerned, they largely serve nowadays as benchmarks for the negotiation of steep discounts reflected by confidential service contracts, time-volume rates and, in the case of TACA, independent action rates. The market nevertheless whispers and if one's ears are attuned, one hears them..." (TACA, 2001).

156. At first, in the case of discussion agreements, "market whisperings" as alluded to above, seems a rather understated and innocuous description of the rate discussions that take place among competitors within the structured setting provided by these agreements – the market is not whispering, carriers are. And there are other reasons why carriers would wish to retain anti-trust immunity for price fixing.

157. The full "benchmark" rate principally applies to those shippers who do not have the size or regularity necessary for a longer-term service contract where discounts can be granted. Anti-trust immunity also allows carriers to agree on common ancillary surcharges. Also, from a carrier's perspective, retaining anti-trust immunity in less competitive trades may allow them to keep rates from falling as they might under competition.

158. Most importantly, however, is the fact that competition in a market where price-fixing is allowed will not necessarily ensure a fully competitive outcome. As can be seen in Figure 4.4, efficient conference and independent operators have every incentive to price below the conference rate and above their average

costs thus still ensuring a surplus over the competitive outcome. Pricing off the *conference rate* will enable many inefficient carriers to still ensure adequate returns (given overcapacity), pricing off the *most efficient operators* would force inefficient capacity out of the market and ensure a competitive outcome.

159. Another important issue to consider is that the downward pressure on rates illustrated in Figure 4.4 is only valid when the market faces overcapacity. In "tight" markets where demand outstrips supply, carriers can seek to increase their surplus over and beyond what might have been possible without anti-trust immunity. On some occasions, carriers have even sought to take advantage of tight market situations to impose rate hikes on shippers with signed service contracts. In general, rate "spikes" allow carriers to recover their average costs in the long run. However, the downward pressure on rates that comes about in periods of overcapacity is actively resisted by Conferences. One can imagine that carriers are able to benefit more from rate increases in times of high demand than shippers can benefit from rate decreases in times of low demand – precisely because the role of the conference price-fixing is to avoid marginal cost pricing in those situations. The competitive result, where rate spikes would annul rate troughs, does not come about since there is downward friction on rate decreases imposed by the ability of carriers to fix prices.

Box 4.2 When price-fixing has another name. Capacity Discussion Agreements

The way in which a company organises itself to deliver services typically is of no concern to competition authorities except in those instances where a monopoly exists. It follows that individual carriers who do not represent a significant share of the market should be able to make decisions as to what level of capacity they wish to make available and modify this supply as trade conditions warrant. It also seems normal that competition authorities should be interested in these actions in those instances where one company's decision has a significant impact on the entire market.

However, as pointed out in section 2 decisions to withdraw capacity from a trade are often made collectively on the part of carriers under the aegis of Conferences, Discussion Agreements, Consortia or Alliances. In some cases these decisions involve otherwise independent operators. While it is reasonable to assume that such carrier groupings need to address operational issues, including the co-ordination of capacity offered, it is less understandable why these decisions, when they account for a significant share of the market, should not be open to scrutiny from competition authorities.

Indeed, the more carriers involved and the greater market share represented by the capacity agreement, the less the agreement can be said to be a purely "operational" arrangement. When these agreements impact entire trades, one can reasonably ask whether the intent (or outcome) is simply to manipulate prices by cutting supply relative to demand. The further these agreements stray from single operators and small market shares, the more authorities should seek to restrict their application in order to avoid an anti-competitive outcome.

This is especially true as shippers do not have the same ability to manipulate demand as carriers can potentially manipulate supply under these agreements.

160. Finally, conferences and other price-fixing and rate discussion arrangements from time to time are still able to organise the market in such a way as to influence rates. This market control is becoming more and more difficult as competition has increased, but the ability remains — as described by one United States Federal Maritime Commission economist in 1999:

> "[…] the winter of 1992-93 saw the formation of a new liner conference that demonstrated real market power. The traditional conference carriers in the North Atlantic brought several formerly independent lines into the new conference - called the Trans-Atlantic Agreement, or TAA. By setting up a double-tiered rate system, high market share was achieved. And by

> establishing internal solidarity and a good information exchange process, after two years of very severe competitive discounting of rates, the new conference achieved a remarkable pricing turnaround. The first act of the new conference was to radically raise rates - and made the increase stick! That demonstration of effective collective pricing [...] got groups like the National Industrial Transportation League working hard on a political effort to change the regulatory system. Skipping ahead a bit, in mid-1997 a second really effective cartel was created. This new agreement was different from the traditional conference-style cartel. Like TAA, the new transpacific cartel - called the Transpacific Stabilization Agreement, or TSA - brought in several formerly independent lines. TSA set up an excellent internal information exchange process and got the members' CEOs to exercise tighter control over their marketing divisions as they sold vessel space. Competitive discounting among TSA members was brought to a halt. So, by the end of 1997, there were two examples of very effective, non-traditional cartels - TAA and TSA." (Blair, 1999).

4.2 To what extent is price-fixing the best option for efficient liner markets?

161. Many capital intensive industries (*e.g.* the power-generating sector, telecommunications, rail and air cargo transport) have in the past argued that they should retain the same anti-trust immunity for price-fixing still afforded to the liner shipping sector. The same issue of below-average cost marginal cost pricing was raised in many of these sectors as authorities sought to deregulate markets and bring about greater efficiencies. In many of these, suppliers sought to band together and set prices amongst themselves for the same supposed "greater benefit" of stability over economic efficiency. Setting aside for the moment that there is evidence that the opposite may be true, at least in certain liner trades (section 3.2.1.3), it is not at all clear that *price-fixing* per se is necessary to deliver consistent and co-ordinated services. Indeed, in virtually all of these sectors, governments have seen fit to prohibit price-fixing among competitors. Firms have come up with other, more market-oriented strategies to resolve supply/demand imbalances and consumers have benefited from greater and truer competition. Could it be that liner shipping is the unique exception to this rule?

162. Many carriers, through their actions, are implicitly recognising that price-fixing may no longer be the most effective response to the market conditions they face. Indeed many carriers already operate as either conference members or independents depending on the particular trade in question. Carriers are under pressure to decrease costs on the one hand and stabilise or increase revenue on the other. Retaining anti-trust immunity in this context can be seen as a stop-gap measure to put off the inevitable – the alignment of rates towards the costs of the most efficient carriers. On the cost side, carriers have sought to achieve lower operating costs through scale (both in ship and in fleet) effects and through broadening the scope of their services through partnerships and mergers (13 of the top 20 operators have formed some sort of strategic partnership). Importantly, carriers have resorted to chartering less-than-shipload space on other partner and, in some cases, competing independent vessels.

163. On the revenue side, carriers have sought to better capture shipper value by negotiating service contracts more suited to individual shipper needs. These are significant since they represent a co-operative mechanism whereby carriers *and* shippers can seek to stabilise market conditions to their mutual benefit. Many carriers have or are developing more value-added services such as logistics management in order to generate other forms of revenue and retain market shares. All of these represent alternative approaches to address the pricing and revenue challenge in liner shipping. One can imagine that as this trend continues, there will be relatively fewer liner operators left. However, it does not seem unreasonable to postulate that all of the changes towards consolidation and greater efficiency in the industry will only lead to greater

overall efficiency and consumer benefit if the regulatory framework within which carriers operate disallows anti-competitive practices such as price-fixing among erstwhile competitors.

164. More generally, a substantial weakness with the current state of affairs is that the ability to fix and discuss prices is not counterbalanced by regulatory control over those prices as is typically the case in other non-competitive sectors. If the argument is that price-fixing is necessary and that more competition is undesirable (a questionable view) then economic regulation by an independent regulator should also be required. This seems a less desirable outcome than removing anti-trust immunity.

Summary: Section 4

- Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price-fixing, but, rather, has accompanied a decline in conference power and an increase in competition.
- Marginal-cost pricing is unsustainable only as long as overcapacity exists in the market. As inefficient capacity exits the market, marginal costs become more in line with average costs and carriers cover their costs. Conference pricing, by its nature, acts to reduce the exit of inefficient capacity.
- As competition increases in many trades, conferences are becoming less and less relevant to carriers' business strategies. Price-fixing is no longer a sustainable option (in the sense that conferences can make their prices "stick") and only serves to act as a brake to keep freight rates from becoming aligned with those of the most efficient carriers.
- Conference price-fixing seems to be less and less a feature of liner markets as carriers have sought to address potential instability in the sector by actively negotiating medium-term service contracts with shippers. This represents a break with past practices where conference carriers fixed prices among themselves without seeking shipper involvement.
- Current trends in the liner shipping sector (e.g. increased participation by independent operators, greater ease of "independent" action by conference carriers, increase in slot chartering agreements, massive rise in confidential service contract negotiations, etc.) all support the contention that price-fixing is not an inevitable feature of a stable liner shipping industry.
- The ability for competing carriers to discuss, agree on and/or fix prices detracts from the ability of shippers and carriers to reach an efficient negotiated outcome when discussing service contracts. Price-fixing, when it remains as an industry "benchmark" does not allow an efficient outcome insofar as rates are still oriented towards inefficient rather than efficient operators' costs.

5 Assessment of the effects stemming from the removal of anti-trust exemptions for Liner Shipping

165. Any attempt to assess the impact of the removal of anti-trust exemptions in the liner shipping sector is bound to be speculative, as this sector has co-evolved with these exemptions for its entire history. As described in the previous sections, the relative weakening of the ability of conferences to fix prices can give some indication as to the probable evolution of the industry absent these exemptions. In the end, however, there is no certainty as to the specific form the industry would take under a different regulatory framework and one can only make educated guesses as to the impacts of these changes on both shippers and carriers.

166. Shippers, carriers and regulators each have their ideas as to the impact of removing anti-trust exemptions. These serve as a useful starting point to assess how the industry might change in a more competitive market environment.

167. Many carriers, consistent with their views on the utility and necessity of anti-trust exemptions for price fixing and rate discussions, feel that the removal of these would have severe and lasting impacts on world trade and consumer welfare. In particular, they believe that the removal of anti-trust exemptions for liner shipping would lead to increased rate volatility and, consequently, service disruptions as below-cost pricing would lead to bankruptcies. Another fear is that a more competitive liner shipping market ultimately would not benefit the most efficient carriers but those best poised to cross-subsidise their liner operations with other sources of revenues. This, they argue, would benefit state-owned and supported carriers and/or large diversified shipping groups. Finally, some carriers and regulators feel that the removal of anti-trust exemptions would lead to further consolidation of the industry resulting in a more monopolistic/oligopolistic market environment.

168. Many anti-trust regulators and a majority of shippers believe these fears to be unfounded. While recognising the possibility of greater rate variance (which in itself is not necessarily a negative outcome), proponents for the removal of anti-trust exemptions generally feel that any pro-competitive development of the liner shipping market will lead to lower overall rates and have little impact on service. Furthermore, they point to the experience with regulatory reform and increased competition in other sectors as being generally positive, and do not share carriers' view that their industry is so fundamentally different that more competition will not lead to a similarly positive outcome. They believe that the weight of evidence gathered from past experiences with more competitive markets overwhelmingly supports their contention that competition, not collusion, delivers greater public welfare in the end.

169. It is difficult to arbitrate between these two views but given that there is a general trend towards more competition in the liner market, one can reasonably assume that an extrapolation and acceleration of current trends would result in an approximation of an anti-trust exemption-free market. These trends cover issues of service provision and capacity, rate variance and stability, and concentration and anti-trust scrutiny.

5.1 Service provision and capacity

170. As pointed out in previous sections, the past ten years have been characterised by a reduction of conference power, a relative increase in competition from both independents and conference defectors and a generalised decrease in freight rates across all trades. Contrary to what might be expected from the fear by carriers of more competition, these trends have been accompanied by more, rather than less, service quality. This can be seen as a natural outcome of market competition where carriers attempt to attract and retain market share from other competitors by offering the most customer-oriented services. One can reasonably expect that shippers and consumers would continue to benefit from service competition among carriers if anti-trust exemptions for price fixing were removed and markets became even more competitive.

171. Shippers presently benefit from a "buyer's" market in liner shipping given current levels of overcapacity. As pointed out in sections 2 and 3, there are many underlying reasons for this overcapacity, including state support for shipbuilding leading to exceptionally low (and attractive) costs for newbuildings. Carriers are also seeking to achieve greater economies of scale through the purchase of larger vessels. However, the attraction of low rates and the need for greater economies of scale are not, in themselves, sufficient reasons for carriers to purchase new capacity. Their experience and market research must also lead them to expect that the new capacity will ultimately pay for itself.

172. Market forecasts are notoriously tricky and companies can often miss the mark. It seems, however, that several bouts of new ship ordering in the recent past have occurred despite many industry observers' warnings of impending and lasting overcapacity. One can assume that in the past, many carriers have made new capacity purchasing decisions under the implicit assumption that they would have some control over prevailing freight rates through conference price-fixing and/or rate discussions. While most carriers can no longer expect to set precise rate levels for an entire trade, they can reasonably assume that market rates will not completely bottom out as long as competing carriers can discuss and suggest mutually beneficial pricing guidelines for freight rates and ancillary surcharges. Were anti-trust exemption for rate discussions removed, it would follow that many carriers would think twice before taking advantage of low newbuilding costs.

173. Finally, it is becoming increasingly obvious that carriers no longer view the provision of new ships as their sole option for increasing supply — many now turn to more slot chartering or sharing agreements to more flexibly respond to new demand.

174. Given these trends, what might one conclude regarding the impact on supply of removing anti-trust exemptions for common pricing or rate discussions? Carriers would make investments in new supply only when they could make the commercial judgement that, in a competitive market environment, their investments would pay for themselves. This means that the level of oversupply seen in past years would likely diminish, especially as many carriers pursue slot chartering agreements to bring on new capacity at less-than-whole-ship (or service string) units. One might expect that liner shipping supply might come more in line with demand for services.

5.2 Rate variance and stability

175. Freight rates in the major trades already respond to competitive pressures – they rise when supply becomes tight and fall when demand relative to supply is low. As pointed out in section 4, however, the ability for carriers to fix and/or discuss pricing guidelines potentially biases the pricing towards the least, rather than the most, efficient operators. This means that rates never fall as low as they might in times of oversupply (to protect inefficient operators) and can rise much above where they might otherwise settle in

a more competitive environment (given that carriers covering a majority of concerned trades can discuss and suggest pricing structures).[38]

176. Based on what can be observed in liner markets as competition has increased over the past decade, one can reasonably imagine that if the market were open rates would continue to fall becoming more in line with the most efficient operators' costs. Rates, however, would not fall indefinitely as supply gravitated more towards levels of demand. Ultimately, freight rates would vary following the supply/demand cycle. The lows would likely be lower in the past and the peaks not as high. This view is supported by evidence provided by the European Shippers Council indicating that the sea routes most open to competition tend to reflect the *most*, not the *least*, stability.

5.3 Concentration and anti-trust scrutiny

177. Several opponents of the removal of anti-trust exemptions point to the risk of increased market concentration that might occur in a more competitive environment. This concentration, however, has been underway for several years as carriers have sought to seek cost savings in the face of competition through alliances, mergers and other co-operative arrangements. In mid 2001, the top four alliances, plus the five or six other top 20 carriers controlled 80% of fully cellular capacity. Given that in late 1997 the top 20 container lines at the time accounted for only about 48% of the cellular fleet, it is clear that substantial concentration has taken place in the last four years – despite the existence of anti-trust exemptions.

178. Also, the announcement in late September 2001 of a possible new alliance between the shipping lines that currently participate in the United Alliance, and the Cosco/K Line/Yang Ming alliance would control a fleet of around 650 000 TEU, and would represent a substantial increase in concentration in the liner sector. The new alliance would challenge both the Grand Alliance and Maersk-Sealand in size, and would reduce the number of individual players in the sector.

179. One can reasonably assume that the removal of anti-trust exemptions in the sector would do little else than slightly accelerate an already existing trend towards greater industry concentration. This would likely have a number of impacts.

180. On the positive side, carriers would continue to enhance the variety of services, and the coverage of those services, that are now available to shippers. The major operators, through their growing list of subsidiaries could also spread their service offerings to niche markets which earlier may have been subject to haphazard and unsatisfactory services. Greater economies of scale and of scope would enhance the ability of carriers to offer multi-modal door-to-door services.

181. However, as well as some positive aspects, greater concentration also carries with it some potential problems. First, any reduction in the number of participants in any given route or trade will also mean reduced choice, and fewer options for shippers. This, however, does not mean that there will be a reduction in *competition* insofar as the remaining operators strive to increase the attractiveness of their services to shippers and avoid the temptation to set and or otherwise jointly influence market prices. Many global industries are characterised by increased concentration and anti-competitive outcomes are kept in check through the action of competition authorities. Liner shipping would likely follow this trend as industry oversight would be carried out by the appropriate national and/or international bodies that have responsibility for protecting consumers from industry abuses.

38. These episodes are referred to as "rate recovery" in carrier parlance, a term that implies that there is an historic freight rate that the market should artificially gravitate towards – a freight rate that, incidentally, was often reached when carriers could better set market rates in the late 80s and early 90s.

5.4 Overall assessment

182. Current trends in the liner shipping sector are indicative of how increased competition might impact liner markets. One can reasonably expect that removing anti-trust exemptions for price-fixing and rate discussions, insofar as they contribute to more competition in the liner industry, would lead to an acceleration of current trends relating to service quality, decreasing rates and increasing industry concentration. Increasing concentration in the sector, in itself, would not necessarily have a detrimental impact as long as regulatory authorities treated liner shipping as any other globalised industry.

6 Conclusions and Recommendations

183. This paper has sought to investigate three issues in relation to competition policy in liner shipping that emerged from the May 2000 OECD workshop on Regulatory Reform in Maritime Transport. These were:

1. The positive and negative impacts to both carriers and shippers of common pricing under anti-trust exemptions.

2. The impacts of conference, discussion and stabilisation agreements on both carriers and shippers.

3. The possible effects stemming from the removal of anti-trust exemptions for liner shipping.

184. This investigation has sought to analyse these issues by bringing together multiple strands of inquiry regarding such factors as the structure of the liner industry, short-term and long-term movements of freight rates, changes in the regulations governing liner shipping, financial performance of the industry, and carrier and shipper experiences. These are the conclusions that can be drawn from this investigation.

The world has changed since 1875…

185. The liner shipping industry is not what it was over 100 years ago when the principle of conference price-fixing was first institutionalised. The sailing ships that engaged in rate competition with new and more expensive steamships have long since become historical curios. The advent of containerisation and the arrival of new strong and efficient independent operators have successively disrupted relatively tight-knit conferences. Countries that, at first, supported the principle of rate-fixing within conferences, have increasingly sought to reduce the power of liner conferences and provide shippers with countervailing powers. These efforts have led to a limitation of anti-trust exemptions, greater power for shippers and carriers to enter into one-on-one confidential contract negotiations and greater restrictions over the manner in which, and the purposes for which, carriers have sought to establish relationships with their competitors.

186. The process of government review and oversight is an ongoing one in the liner shipping sector, although it should be noted that the majority of OECD Members have not explicitly reviewed their competition policies relating to liner shipping in over 15 years. Carriers, shippers and regulators have in the past centred their discussions on the ability for carriers to collectively set and discuss rates. Those countries that have recently reviewed their policies have generally chosen to retain some form of anti-trust immunity for rate-fixing and/or have extended this immunity for rate discussions and capacity agreements among competitors in return for the implementation of more shipper-friendly measures. As this cycle of policy review winds its way through OECD countries, the perennial question of whether efforts to discuss, control and manipulate supply conditions in liner markets are justified and/or relevant to the pursuit of broad public welfare goals still remains.

Liner shipping is as unique as any other industry…

187. Many have portrayed the liner shipping sector as "unique" and therefore requiring special treatment under competition law. This is true insofar as any industry is unique and certainly there are convincing reasons to allow carriers to co-ordinate certain operational aspects linked to the provision of ocean shipping services. However, it is more difficult to perceive in which manner liner shipping is more "unique" than other industries, or why it should be treated more favourably or even differently than other transport providers with respect to price-fixing and rate discussions. The cost structure of the industry is not significantly different from that of other transport industries and returns in liner shipping are similar to those of other scheduled transport providers. While it is true that ships cost considerably more than say, a new lorry or locomotive, each ship can also earn significantly more revenue. Seasonal and directional trade imbalances are not unique to the liner sector and must be faced by most transport service providers – in some cases these imbalances pose much more of a problem since some vehicles are not as standardised as container ships. In the end, liner shipping is about as "different" from other like industries as, for example, trucking is to freight air services or freight air is to rail freight – with the exception that price-fixing is allowed in liner shipping and nearly universally dis-allowed in these other industries.

No consensus exists as to liner shipping's alleged propensity towards "destructive" competition

188. It is difficult to address the issue of "destructive" competition in liner shipping without access to specific cost data from carriers. This paucity of data is not matched by an equal paucity of sometimes-contradictory theories on the matter. Indeed, while many models of liner markets have been developed, no consensus exists on the most appropriate one for describing the dynamics of liner shipping. Two points are important to keep in mind, however:

- Some have argued that the economics of liner shipping are unique in that overcapacity is an unavoidable feature of the sector and that this, in turn, leads to marginal cost pricing at a level below the average costs of providing the service schedule. The "problem" of marginal cost pricing in liner shipping only exists in times of overcapacity. As inefficient capacity exits the market, the supply of liner services will become more in line with demand and prices will move away from the marginal cost to (and above) the average cost of providing those services. above the average costs of providing those services. However, conference pricing, by its nature, acts to reduce the exit of inefficient capacity.

- As competition increases in many trades, conferences are becoming less and less relevant to carriers' business strategies. "Hard-core" rate-fixing is no longer a sustainable option (in the sense that conferences experience difficulty making their prices "stick") and only serves to act as a brake to keep freight rates from becoming aligned with those of the most efficient carriers.

The recent fall in freight rates can be seen to have occurred precisely because conference power has weakened

189. Traditional conferences are weaker (to the point of being irrelevant in some trades) today than they probably have been at any time in the past. At the same time, rates have generally dropped over the past 15 years in many trades across the world. In fact, some of the steepest declines in observed freight rates have occurred as conference power has eroded in the face of competition from strong independent operators and following the implementation of competition-enhancing legislation in major trading nations.

Liner shipping is now arguably more competitive than at any time in the past 126 years ... and predicted trade instability has not emerged

190. Despite increased competition, many carriers, especially the top performing ones, are able to generate financial returns at least as good as, if not better, than other *transport industry* service providers. Widespread bankruptcies have not occurred and the industry is not becoming characterised by more service instability. More competition in liner shipping, far from leading to less reliable services has led to increases in service innovation and quality.

New carrier strategies are emerging in order to ensure the stable supply of liner services.

191. As conference power has weakened, carriers have sought to develop alternative strategies to ensure their ability to deliver regular liner shipping services. New and more flexible inter-carrier relationships have emerged allowing carriers to reduce their costs, widen their scope and increase service quality. Consortia, alliances and mergers all seek to gain greater operational efficiencies and ensure carrier profitability in the face of growing competition. Slot-chartering agreements have allowed carriers to flexibly address changes in demand at lower costs.

In particular, there is an emerging trend towards *co-operation with* - rather than *co-ordination against* - shippers

192. The changes brought about by the United States Ocean Shipping Act of 1998, and in particular, the emergence of confidential contracting, signal a significant change in the regulatory framework of liner shipping. Whereas in the past, carriers have sought to "stabilise" liner markets by fixing prices *among themselves*, under OSRA carriers *and* shippers seek to determine mutually agreeable terms. This means that price-setting in the market has shifted from the collusive sphere of carrier rate discussions to the contractual outcome of carrier-shipper negotiations. This seems a more commercially oriented and sensible method of setting liner rates. However, this new approach is only currently valid in the US and Canadian trades – leaving out liner movements between Europe and Asia and other non-US/Canadian trades.

Yet problems remain…

Residual price-fixing artificially keeps prices from aligning with the costs of the most efficient operators

193. Conference and suggested discussion agreement tariffs and ancillary surcharges now serve principally as "benchmark" values for rate negotiations. Final negotiated rates often make reference to, and are influenced by, these fixed rates rather than set in relation to the costs of the most efficient operators. Indeed, so long as inefficient operators receive some protection through common rate-setting and rate discussions, the natural tendency will be for the market to align itself with these operators' costs rather than with those of their more efficient partners/competitors. Furthermore, independent operators have also been thought to use conference/discussion agreement rates and ancillary surcharges to set their own prices, which may be above their costs. Confidential contracting has made the "discount" off the conference/discussion agreement rate more opaque but it has not changed the fact that the price is set in relation to that tariff and not solely in relation to carriers' own costs. The remnants of price-fixing in the liner trades, even in an environment of greater competition, introduces a potentially distorting element in the liner rate-setting exercise that can impact shipper costs.

Carriers have not lost the price-fixing reflex:

194. This is especially true in regard to conferences in non-US trades, discussion agreements in non-EU trades and capacity agreements everywhere.

195. Non-US trade conferences are not concerned by the legislative changes brought about by OSRA. This means that conferences can still potentially set rates more effectively than in the US trades. While competition from independents has also increased in many of these trades as well, the lack of one-on-one confidential contracting makes it more difficult for carriers to defect from conference pricing. In this environment, independents have every incentive to strongly price off of the conference rate, which represents a more visible and robust "benchmark".

196. The EU does not extend anti-trust exemptions for conferences to discussion agreements. This means that among the three trades, only in the Pacific do these agreements benefit from anti-trust exemptions. However this poses problems as the Pacific trade is also the world's largest trade. The first is that competing carriers are given the ability to freely discuss all issues of concern to the trade, including rate and market information, and issue general "voluntary guidelines" for rate levels. This type of organisation bears a striking resemblance to a soft cartel where key messages can be communicated and acted upon by erstwhile competitors. This is unfortunate since, even if such interactions do not take place, carriers open themselves to this type of criticism by the very structure and scope of these discussion agreements. While it is true that shippers can contractually prevent carriers from discussing negotiated rates, the reality is that many carriers do not encourage the confidentiality of rate information and/or exempt themselves from this confidentiality when discussing rates with other carriers. Finally, the ability of carriers to discuss, in aggregate, rate levels emerging from negotiated agreements can still be seen as prejudicial to shippers.

197. Carriers also argue that they need to retain the ability to organise the operational aspects of running service strings with other carriers. This paper has not challenged that contention and indeed agrees that carriers should be able to discuss operational details. However, sometimes these operational discussions, especially those pertaining to the co-ordinated withdrawal of capacity, can have a direct impact on market conditions and prevailing rates. Capacity agreements that involve one clearly-defined operational grouping (say a conference, consortia or alliance) can be seen to deliver operational benefits. Capacity agreements that go beyond operational groupings (or, if within an operational grouping that has a large market share) can be seen to have the anti-competitive effect of manipulating rates through reducing overall capacity. In this case, such operational arrangements would benefit from explicit anti-trust review.

Recommendations: A way out of the impasse

198. The debate surrounding the anti-trust exemptions given to the liner shipping sector is a highly polarised one where neither party is likely to radically change their view. The positions are hardened and ingrained and, while certain individual shippers and/or carriers may be persuaded by the opposing sides arguments', the existence of strong trade associations ensures that the voice of the lowest common denominator will generally prevail.

199. And who can blame them? Carriers generally feel they have everything to gain by perpetuating the century-old organisation of their industry – and this review indicates that they probably do benefit. Shippers, on the other hand generally feel they have everything to gain by doing away with the anti-trust exemptions granted to liner shipping – and this review indicates they are probably right. Given the state of data available about the liner shipping sector and its practices, there is no single line of query that results in an uncontroversial finding for or against continuing liner shipping anti-trust exemptions for price fixing and rate discussions. However, this report has investigated several strands of evidence that, taken together, lead to the conclusion that anti-trust exemptions for conference price-fixing no longer serve their stated purpose (if they ever did) and are no longer relevant.

200. By extension, voluntary and non-binding rate agreements and discussions would seem to fall under the same category. The ability for competitors to discuss sensitive market information regarding

rates and to suggest pricing guidelines potentially serves to distort the market pricing mechanism, despite assurances from carriers to the contrary.

Recommendation:

201. Based on the analysis in this report, it is recommended that Member countries, when reviewing the application of competition policy in the liner shipping sector, should seriously consider removing anti-trust exemptions for price fixing and rate discussions. Exemptions for other operational arrangements may be retained so long as these do not result in excessive market power.

202. Carriers may have legitimate operational needs that require co-operation with other (sometimes competing) carriers. These needs may involve closer working synergies through global alliances and consortia or more trade-specific requirements, such as the sharing of ship capacity through slot sharing/chartering arrangements. Countries have in the past recognised this need and have offered carriers protection from domestic anti-trust laws in those instances where these arrangements are not grossly anti-competitive. This report also recognises that some of these arrangements may be necessary and indeed, beneficial, and does not call into question the principle of limited anti-trust exemptions for operational arrangements in liner shipping. This review, however, has not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and consumers.

203. However, it would be naïve to think that this finding will change carriers' minds and/or that carrier counter-arguments to these findings will change shippers' views. Given the degree of polarity in the debate, it is also unlikely that countries will be able to continue the status quo or, alternatively, radically change it. And yet any commercial arena where such a disconnect exists between service providers and customers calls for resolution.

204. Perhaps a way forward out of this impasse can be built on those points that are mutually agreeable and or recognised by both sides. In light of the findings of this report, countries should review their existing regulations and anti-trust exemptions, as appropriate, to ensure that they best take into account changed market circumstances. Such a review should focus on those points that are mutually agreeable and/or recognised by both sides. In particular four points stand out:

1. Both sides agree to the concept of direct negotiations between shippers and carriers.
2. Both sides, based on their acceptance of OSRA and individually negotiated rates and conditions, are not averse to contractually protecting (and rendering confidential) key elements of those negotiations.
3. Both sides are relying less on collectively agreed rates and conditions.
4. Both sides view that carriers can and should seek to co-ordinate with each other on the operational aspects of providing liner services.

205. These four points of agreement serve to frame the following principles that represent the "second-best" way forward on the matter of the organisation of liner markets. While elements of these principles can be found in the 1998 United States Ocean Shipping Reform Act or the EU's competition policies pertaining to consortia in liner shipping, it would be incorrect to view these principles as redundant, if only because OSRA only covers the US trades, just as the EU consortia policy only covers the EU trades. The vocation of these principles is to provide a framework for governments *throughout* the OECD within which to craft their competition policies for the liner shipping sector when these come up for examination.

Principle 1: Freedom to negotiate

206. Shippers and carriers should always have the option of freely negotiating rates, surcharges and other terms of carriage on an individual and confidential basis.

207. Shippers should be able to seek direct one-on-one negotiations with carriers. The current trend towards one-on-one negotiations should be strengthened, and, in particular, should be extended to reach into trades where such negotiations are not possible, or are rendered difficult, by national legislation or carrier actions. It is understood that some conferences, in the past, have rendered such negotiations more difficult, and in some cases have actively worked against this goal. The freedom for shippers and carriers to freely meet and discuss the terms of their relationship should not be constrained by outside parties.

Principle 2: Freedom to protect Contracts

208. Carriers and shippers should always be able to contractually protect key terms of negotiated service contracts, including information regarding rates, and this confidentiality should be given maximum protection.

209. While this freedom is currently law in US and Canadian trades, this is not the case for the rest of the world. Carriers *and* shippers should be able to stipulate which details of their negotiations they wish to protect from other parties. Carriers should be able to contractually stipulate that shippers will not reveal negotiated rates to other shippers and shippers should be able to ensure that carriers will not divulge or discuss negotiated rates with other carriers. Where both parties contractually agree to confidentiality terms, these confidentiality terms should be given robust protection. Breach of contractually agreed confidentiality terms should be treated with credible and deterring sanctions [39]. Shippers and carriers should have the freedom to protect their privacy. In this way, discussion agreements can still operate by focusing on matters that are not considered confidential by shippers or carriers.

210. The strong protection of confidentiality in these contracts is necessary so that both shippers and carriers can be assured that privileged information resulting from their negotiations cannot provide the other party with market signals or the basis for "benchmarks". Simply put, when confidentiality clauses prevent parties from divulging contract terms, neither side should be able to use these items for any purpose when this involves a third party. Much of the value of individual contracting would be lost if confidential terms were able to be utilised, since this would mean that one side would enter into negotiations with prior and undue knowledge of their "competitors" negotiated rates and terms [40]. These market signals are precisely what anti-trust regulations are intended to prevent, and they are also the intended aim of the confidentiality provisions in individual contracts contained in this Principle.

211. Both carriers and shippers have indicated their support of the twin objectives of individual contracting and confidentiality provisions, and so this report presumes that they would also fully support

39. How these sanctions are put in place depends entirely on each country. In the United States contract law governs the imposition of penalties for breach of contract and penalties are often defined in the governing contract. Other countries may wish to allow for the possibility of punitive damages above and beyond those set out in the contract as a deterrent, whereas yet others may wish to allow for the possibility of a third party (*e.g.* such as a Justice Ministry) to initiate judicial actions against parties breaching confidentiality terms in a contract.

40. Even if confidential terms were aggregated before being communicated to other parties, the basic problem would remain — confidential market information and trends related to privately negotiated contracts would still form the basis for future negotiations, at the detriment of market efficiency and the parties sitting on the opposite end of the negotiating table.

the allowance for, and strong protection of, these desirable elements in the regulatory framework surrounding liner shipping. Indeed, from the perspective of this report, the benefits of ensuring strict confidentiality are such that as well as contractual provisions, governments should give serious consideration to enhancing confidentiality protection through public law requirements, which should include appropriate sanctions and penalties for breaches. These could, for example, include the removal of other anti-trust exemptions available to the parties involved.

Principle 3: Freedom to co-ordinate operations

212. Carriers should be able to pursue operational and/or capacity agreements with other carriers as long as these do not confer undue market power to the parties involved.

Carriers should be able to rationalise their operations in order to better deliver, or improve, their services and/or lower their costs. While capacity agreements within an existing operational grouping such as a conference and/or alliance, can be seen to have an operational character, arrangements further outside of such groupings can be seen to be increasingly anti-competitive – especially as they involve a greater share of the market. The ultimate expression of the potential anti-competitive impact of these arrangements would be a capacity agreement that covered all (or virtually all) of a trade. Such an agreement would be tantamount to manipulating an entire market and should not be allowed. Any new legislative provisions should therefore include protocols (like the EU's market share test for alliances and consortia) to determine the acceptability of such arrangements. The freedom for carriers to manage their affairs should not lead to abuses of market power.

213. The approach encapsulated in the three principles would go far to remedy the fact that generally shippers do not have the power to manipulate demand in the way in which carriers can potentially manipulate supply. Of course, an alternative solution to this problem would be to grant shippers anti-trust exemptions allowing them to rig prices in liner shipping markets thus paralleling carriers ability to discuss and/or set rates. This, however, is the worst possible solution, and is certainly not supported by this report.

214. These three principles represent a way out of the carrier/shipper impasse since they allow shippers and carriers to better control what contract information the other parties to their negotiations can share. They can, and are meant to, co-exist side-by-side with a regulatory regime that continues to extend anti-trust exemptions to price-fixing and rate discussions in the liner-shipping sector. However, while under this format the ability of carriers to agree on common rates for customers not covered by individual contracts is unimpaired, their ability to utilise confidential information to set common rates and/or benchmarks would be limited.

215. These principles have built on recent developments in the liner sector that have received support from carriers, shippers and governments alike. Currently, while elements of these principles apply to some trades, they do not extend uniformly to all carriers and shippers within the OECD, and we suggest that they should. We therefore present them here as a resource for governments to seriously consider when they next re-evaluate their national liner shipping provisions as a means of improving the competitiveness of that industry.

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WTSA

Westbound Transpacific Stabilization Agreement

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FOR IMMEDIATE RELEASE

TRANSPACIFIC LINES ADOPT REFRIGERATED TRADE MANAGEMENT PROGRAM FOR 2002

Plan addresses shrinking cargo base and depressed rates in high-cost, high-value market segment

Oakland, CA / February 4, 2002 – With no end in sight to the steadily declining market for refrigerated exports, and with plunging freight rates from the U.S. to Asia, major shipping lines have adopted a program to help stabilize the trade and avoid potential negative impacts to service levels.

Member container lines in the Westbound Transpacific Stabilization Agreement (WTSA) note that during the past year, the overall westbound refrigerated cargo market has shrunk by nearly 7 % – some 31,000 20-foot containers – and that refrigerated freight rates have fallen 15% from already depressed levels. The resulting revenue losses threaten the lines' ability to maintain state-of-the-art equipment and service levels.

In response, WTSA carriers have announced a one-year Refrigerated Trade Management Program that:

- Designates a market share percentage to each WTSA carrier based on historic liftings;
- Allows a 0.5% market share cushion to each carrier to meet unexpected customer needs; and
- Provides that carriers exceeding their allocations will pay compensation to carriers unable to meet their assigned shares.

-more-

The program covers all refrigerated shipments in the WTSA trade except Indian Subcontinent, Alaska and military cargo. It will have an initial duration of one year. Liftings will be reviewed on a quarterly basis and applicable charges will be paid at the end of the one-year period.

Carriers say some kind of trade management is needed given extensive carrier investment in refrigerated equipment and service, and the dramatic slowing in Asian demand for refrigerated cargoes during the current economic downturn.

Depressed volumes and rates have placed serious cost pressures on carriers. For example, a typical refrigerated container/generator set costs $35-50,000 in today's market. Special terminal monitoring and loading costs alone can run from $160-310 per container, and carriers incur additional expense in pre-trip cleaning and preparation; special rail protective costs; monitoring and handling in transit; and additional claims and insurance costs because of the high value of the cargoes involved.

Equipment repositioning costs are especially significant, given the difficulties in scheduling complimentary loads within Asia, from Asia back to the U.S., and within the U.S. to and from port locations.

"For much of the refrigerated segment, huge dollar amounts are at stake per container and there is really zero tolerance for error or for cutting corners on service or costs," explains WTSA executive director Albert Pierce. "Competition and low rates have helped U.S. perishables exporters open new markets and compete with low-cost third country producers, but rates have now reached unsustainable levels. We want to ensure confidence in the lines' ability to meet future service commitments."

Pierce adds that, in recent years, a booming eastbound market and equipment demand from Asia to the U.S. has provided somewhat of an economic cushion for carriers to support westbound service. Now, however, eastbound volumes are flat and rates have fallen sharply.

-more-

WTSA lines point out that extensive worldwide demand for refrigerated container equipment has intensified competition to secure those assets for customers in multiple trade lanes. Carrier managements, meanwhile, are under growing pressure to deploy expensive refrigerated units in trade lanes offering maximum utilization and earnings. While they remain committed to meeting the equipment and service needs of perishables shippers in the Pacific, carriers say revenue stabilization is the key to ensuring a steady, adequate short-term and long-term supply of up-to-date refrigerated equipment in the Pacific.

WTSA is a voluntary discussion and research forum of 13 major container shipping lines serving the trade from ports and inland points in the U.S. to destinations throughout Asia. Members include:

American President Lines, Ltd.
COSCO Container Lines, Ltd.
Evergreen Marine Corp. (Taiwan), Ltd.
Hanjin Shipping Co., Ltd.
Hapag Lloyd Container Linie
Hyundai Merchant Marine Co., Ltd.
Kawasaki Kisen Kaisha, Ltd. (K Line)
Maersk SeaLand
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha (N.Y.K. Line)
Orient Overseas Container Line, Inc.
P&O Nedlloyd Ltd./B.V.
Yangming Marine Transport Corp.

# # #

WORLD SHIPPING COUNCIL
PARTNERS IN AMERICA'S TRADE

June 25, 2002

Ms. Michele Utt
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20575

Dear Ms. Utt:

Per the Chairman's letter of June 14, enclosed please find my technical and grammatical corrections to my testimony from the Committee's June 5 hearing, which can be found on pp 25-29.

I have also enclosed a copy of the letter referred to for inclusion in the record at page 40, as well as the attached additional statement of information for the record.

Thank you.

Sincerely yours,

Christopher L. Koch
President & CEO

June 3, 2002

The Honorable Jim Sensenbrenner, Jr., Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the undersigned American maritime labor organizations and United States-flag shipping associations, we are writing to express our opposition to legislation to repeal the limited antitrust immunity applicable to the liner ocean shipping industry. As representatives of the companies and workers who provide our nation with efficient and economical ocean transportation, we are vitally interested in the government policies – and proposed changes in these policies – that affect the continued operation and viability of the United States-flag merchant marine.

In 1999, Congress enacted the Ocean Shipping Reform Act, landmark legislation that reformed the way international liner cargo shipping is regulated. This statute, developed by the Congress with input from maritime labor and management, shippers and ports, was the product of five years of painstaking negotiations. The final product, intended to strike a delicate and proper balance between all interests affected by liner shipping, including the American consumer, American importers and exporters, American ports, and American transportation and longshore workers, is in every positive sense, a delicate compromise. The Act, administered by the independent Federal Maritime Commission, addressed the regulatory issues involved in international liner shipping and resolved them in a fair, balanced and effective way.

It is our understanding that the Committee on the Judiciary will hold a hearing on June 5 on HR 1253, legislation to repeal the liner industry's limited and regulated antitrust immunity. If enacted, HR 1253 would have the practical effect of repealing the Ocean Shipping Reform Act and eliminating the need for the Federal Maritime Commission.

We strongly oppose HR 1253. Its enactment would, at a minimum, create chaos and confusion within the liner industry, and cause severe and negative disruptions within our nation's ports. Equally important, there is no demonstrable need for this change. Importers and exporters are today benefitting from record low shipping rates, and the liner shipping industry is dominated by intense competition. The Act continues to work well; it is internationally accepted; and, as evidenced by the Federal Maritime Commission's recent two-year study, has produced a highly competitive liner shipping environment that is working as Congress intended.

No nation applies domestic antitrust laws to international shipping. Rather than enacting HR 1253 and proceeding unilaterally to apply antitrust laws to liner shipping, the internationally accepted regulatory regime put in place by the Ocean Shipping Reform Act and overseen in the United States by the Federal Maritime Commission should be retained and allowed to continue to work as intended by the Congress and the national and international maritime industries.

There is another important concern that should be considered. In the wake of our Nation's crucial ongoing war on terrorism, and in view of recent government warnings that the next attack against our country could originate in a container aboard a ship, railcar or truck, we urge you and your Committee to reconsider taking action on this legislation. During these extraordinary times, as the United States and its trading partners around the world struggle to protect their shores and ports from terrorist attack, our Nation cannot afford to deal with the instability and general chaos that HR 1253 could ignite in the international shipping industry. In order to maintain trade stability in the global environment in which we operate, it is of paramount importance that the current international shipping regime, as embodied in the Ocean Shipping Reform Act, be retained.

We again wish to express our strong opposition to HR 1253.

Sincerely,

Captain Timothy A. Brown, President, International Organization of Masters, Mates & Pilots
Ron Davis, President, Marine Engineers' Beneficial Association
James L. Henry, President, Transportation Institute
Michael McKay, President, American Maritime Officers
C. James Patti, President, Maritime Institute for Research and Industrial Development
Michael Sacco, President, Seafarers International Union
Gordon Spencer, Legislative Director, American Maritime Officers Service
Gloria Cataneo Tosi, President, American Maritime Congress

ADDITIONAL STATEMENT OF THE WORLD SHIPPING COUNCIL

The World Shipping Council submits these follow-up comments to the Committee for inclusion in the record of its June 5 hearing on the Shipping Act and the limited antitrust immunity contained in that Act. These comments provide the Committee with necessary responses to several allegations made during the hearing.

1. *The Liner Industry's "Record Profits"*

During his oral testimony faulting the existing regulatory system for the liner industry under the Shipping Act, Teamsters President Hoffa alleged that shipping lines are "making tremendous amounts of money", and that "the companies are making record profits." In his written remarks, he recites figures on the growth of global container traffic over the last decade, the selected profit figures for two lines (Hapag-Lloyd for 2001, and P&O Nedlloyd for 1999 and 2000) and then states that: "Based on these promising statistics, one could easily assume that everyone associated with the flourishing shipping industry is reaping its rewards. This is certainly true for the large, foreign-owned carriers and port authorities, which directly benefit from increased container traffic at their ports." His statement also alleges that carriers are benefiting from "increasing profits". (Hoffa, pages 2–3.) This is simply false.

Of the long-term growth of container traffic in U.S. trades and its importance to the American economy, there is no doubt. However, the statements that ocean carriers are generating substantial profits for their services is grossly inaccurate.

Falling Rates and Financial Losses

A more accurate picture is presented in a recent (4/29/02) Lloydslist.com article entitled "Stark Warning to Industry." It begins: "Fund managers will continue to shun container shipping until the whole industry has demonstrated an ability to produce a sufficient long term rate of return, a financial analyst warned last week." It goes on to provide comparative data to support the claim that the liner industry has performed very poorly over the last decade compared with other transport sectors.

That warning is supported by the detailed analysis of ocean carriers' financial situation that appears in the most recent, July 2002 issue of *American Shipper* magazine, entitled: "Who's Making Money?". The analysis concludes:

- "Effects of overcapacity and lower rates pushed ocean carriers into the red."
- "2001 was one of the worst years for the containership industry, and 2002 is expected to be worse."
- "Some shippers are concerned about the viability of their ocean carrier vendors."
- "Cost-cutting programs are top priority for many carriers."
- "Trend towards carrier mergers and takeovers has slowed, but there are more instances of ocean carriers withdrawing from certain markets or closing down."
- "With uncertain prospects of a return to fast cargo growth, carriers and their customers continue to face market instability."
- "If the decline in rates isn't stopped, and with operating margins now lower than they have been for years, the alternative scenario would have to be that some carriers will be driven out of the industry."[1]

While cargo volumes have indeed grown rapidly in past years, freight rates have generally declined over the long-term (see WSC testimony pages 10–14). In 2001

world merchandise trade declined by 1% in volume and 4% in value, the worst performance since 1982.[2] That decline in trade also represents a decline in the demand for ocean shipping services that, unfortunately, has coincided with significant increases in new vessel capacity. The result: Falling freight rates and carrier financial losses that made 2001 one of the worst years for container shipping. Furthermore, quarterly financial reports for January through March suggest that 2002 may well be even worse.

Recent Financial Figures

The financial figures provided below are from the cited American Shipper study. Contrary to the impression created by the Teamsters' allegation of a "flourishing" liner industry "reaping its rewards" and enjoying increasing profits, the industry is going through a crisis of falling rates and financial losses that has even generated

[1] "Who's Making Money?" *American Shipper*, July 2002, p.20, 26.

[2] "World Trade hits 20-year Low," JOC-online, 5/2/2002.

concern among the lines' client shippers in key U.S. export trades. (See WSC testimony, pages 13–14.)

Some WSC Member Lines	U.S. Trades Market Share[3]	% change in annual operating profit from 2000 to 2001	Net profit/loss as a % of revenue 2001
Maersk Sealand	13.2 %	- 46%	-0.4 %
Evergreen	7.1 %	- 35 %	3.1 %
NOL/APL	6.5 %	- 77 %	-1.2 %
Hanjin	6.1 %	- 40 %	-1.7 %
P&O Nedlloyd	4.3 %	- 57 %	0.8%
OOCL	3.8 %	- 35 %	2.5 %
Hyundai	3.9 %	- 36 %	-5.8 %
K-Line	3.7 %	- 51 %	0.8 %
Yang Ming	3.8 %	- 172 %	-1.5 %
NYK	3.4 %	- 30 %	1.5 %
Hapag Lloyd	3.3 %	+ 16 %	N/A
MOL	2.3 %	- 29 %	1.2 %
CP Ships	2.7 %	- 39 %	2.9 %
Zim	2.1 %	- 43 %	0.8 %
CMA-CGM	1.9 %	- 66 %	1.3 %
CSAV	0.6 %	- 54 %	1.5 %
ACL	0.6 %	- 3 %	7.3 %
Wan Hai	0.5 %	- 59 %	2.1 %
United Arab	0.3 %	+ 2 %	5.7 %

(Source: American Shipper, July 2002)
3. Source: JOC/PIERS, Jan. - March 2002

The poor financial performances in 2001 are prelude to worse news in the first quarter results in 2002. Take for example the two "success story" carriers cited in the Teamster testimony, Hapag Lloyd and P&O Nedlloyd:

- Hapag Lloyd, which has ranked among the most profitable of container shipping lines, posted first quarter losses of $4.6 million this year.[4]
- P&O Nedlloyd also suffered significant first quarter losses. A recent (5/10/2002) trade press article begins: "Anglo-Dutch carrier P&O Nedlloyd has been galvanized into action by plunging freight rates that have sent revenue figures into a tailspin and losses sliding into the red. The company reported a $66m loss in the first quarter of the year, a deterioration of almost $100m over the past 12 months." The action to which the line has been galvanized includes "jobs being axed" and "back office work transferred to cheaper offshore centres."[5]

And, while the return on investment in 2001 and early 2002 may be miserable, poor returns are hardly atypical for the industry. As one industry analysis recently put it: "One of the most extraordinary features of shipping is the low return on investment (ROI) prevalent in the industry. The *Rochdale Report* examined the postwar decades, while Stopford continued the analysis through the mid-1990s: both found dismal returns for shipping."[6]

A brief explanation of the unique set of economic and political factors that contribute to the chronic financial problems faced by ocean carriers can be found in the World Shipping Council's June 5th written testimony (See WSC, "International Liner Shipping Market," pages 22–26.). Given those factors, and the financial problems and uncertainties that follow from them, it is important to understand that

[4] "Hapag-Lloyd slips into the red despite higher cargo volumes," Lloydslist.com, May 30, 2002.

[5] "P&O Nedlloyd battles to stem mounting losses," Lloydslist.com, May 10, 2002

[6] "Dejavu," *Containerization International*, June 2002, p. 46. [Note: The *Rochdale Report* refers to the 1970 investigation into the desirability of shipping conferences by the U.K. Committee of Inquiry into Shipping (the Rochdale Committee).]

the liner industry uses the limited, regulated antitrust immunity granted by the Shipping Act to try to help mitigate the structural overcapacity problem it faces.

2. Certain Allegations Regarding Charges on Shippers

Mr. Robert Coleman's written testimony for Committee's June 5, 2002 hearing contains two references to $1,000 charges.

The Westbound Transpacific Stabilization Agreement ("WTSA") Reefer Program

The first reference, on pages 2–3, is to a proposed one-year management program for refrigerated ("reefer") container service by WTSA, filed with the FMC for their review on February 1, 2002 and withdrawn (without ever taking effect) on March 21, 2002 after several shipper organizations had expressed concern about the reefer program's possible longer-term impact.

The program would have established a mechanism to stabilize the sharply declining rates on reefer container movements by assigning each line a market share percentage based on the lines' historic reefer liftings. (See attached press release.) The $1,000 per 40-foot container charge ($500 per 20-foot) referred to by Mr. Coleman was the payment that participating member lines would have paid under the proposed program if they exceeded their market share by more than 0.5 percent of the total market. It was not a charge to shippers.

In fact, the WTSA's reefer management proposal contained no rate increases for shippers. It was designed to help stop the significant rate declines on the 15 percent of the trade (reefer cargo) that requires expensive refrigeration equipment and related special services - and thereby preserve a revenue base sufficient to support continued provision of premium reefer service. In any event, as noted, the program was withdrawn and never became effective.

The US/South America Trades

The second reference by Mr. Coleman, on page 6 of his testimony, is to an allegedly "recent" and "suddenly" announced $1,000 per container rate increase in the U.S./South America trades. The absence of clarifying detail in the written testimony made it difficult to determine what announcement was being referred to and in which particular trade. Subsequent inquiries, and a review of recent trade press, produced no information about any such announced rate increase.

However, the apparent solution to the mystery can be found by comparing Mr. Coleman's June 5, 2002 testimony on H.R. 1253 with his March 22, 2000 testimony on its predecessor bill H. R. 3138. Mr. Coleman's June 2002 reference to the "recent" announcement of a $1,000 price increase turns out to be a word-for-word repetition of his testimony of more than two years earlier. There has in fact been no "recent" announcement of a $1,000 per container rate increase in the U.S./South America trades. Indeed, it is well recognized that rate levels in these trades have declined significantly in 2002, and southbound (U.S. export) rates in particular remain weak.[7]

As for the now dated March 2000 testimony, it neglected to point out that in 1998 and 1999 rates in the then highly imbalanced and overtonnaged East Coast U.S./East Coast South America trade had declined severely - to the point where all lines were reporting losses. The announced increase (of $500 per TEU) was aimed at restoring rates to reasonable levels and were a response to changed market conditions - i.e., the north/south trades had come back into balance by early 2000, and over the previous 12 months excess capacity had been cut in response to non-compensatory freight rates.[8]

Neither a tax nor a surcharge

During the hearing, Chairman Sensenbrenner questioned Mr. Coleman's about the WTSA reefer management program and the referenced $1,000 per container "tax on refrigerated containers" that would make U.S. products much less competitive overseas. In response, Mr. Coleman acknowledged that the WTSA proposal had been withdrawn—without what he characterized as "the $1,000 surcharge" ever being imposed—following informal conversations with shipper organizations.

From the question and response, it appears that there is a misunderstanding as to the nature of WTSA proposed (but never implemented) reefer management program and the $1,000 charge. To clarify:

- The $1,000 was neither a "tax" nor a "surcharge" that would have been imposed on shippers. Freight rates in U.S. trades are established by individual negotiations between shippers and the individual lines they select as their preferred carriers.

[7] *JoC Week*, March 25–31, 2002. pages 15 and 16.
[8] *Containerization International*, July 2000, Page 39.

- The $1,000 charge was a proposed charge on carriers aimed at encouraging WTSA lines that would have participated in the reefer trade management program to abide by their agreement not to seek higher market shares in a trade that had at the time been experiencing extremely low rates, an excess of very expensive reefer containers, and declining demand for reefer service.
- The lines elected not to go forward with the reefer program when their customers expressed concern about the management program—hardly behavior indicative of an ability or intent to impose unwarranted collective rate increases by virtue of antitrust immunity.

I

MARITIME TRADES DEPARTMENT

AMERICAN FEDERATION OF LABOR and CONGRESS OF INDUSTRIAL ORGANIZATIONS

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International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Communications Workers of America
International Brotherhood of Electrical Workers
International Union of Elevator Constructors
International Union of Operating Engineers
International Association of Fire Fighters
United Food and Commercial Workers International Union
Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO/CLC
Graphic Communications International Union
Hotel Employees and Restaurant Employees International Union
International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
Laborers' International Union of North America
AFL-CIO Laundry and Dry Cleaning International Union
International Longshoremen's Association, AFL-CIO
International Association of Machinists and Aerospace Workers
Marine Engineers' Beneficial Association
United Mine Workers of America
International Union of Allied, Novelty and Production Workers, AFL-CIO
Office and Professional Employees International Union
International Union of Painters and Allied Trades
Operative Plasterers' and Cement Masons' International Association of the United States and Canada
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada
Retail, Wholesale and Department Store Union, UFCW
Seafarers International Union of North America
Service Employees International Union, AFL-CIO
Sheet Metal Workers International Association
American Federation of State, County and Municipal Employees
United Steelworkers of America
Transportation • Communications Union

June 4, 2002

Honorable Jim Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington DC 20515-4909

Dear Chairman Sensenbrenner:

Since it was enacted, the Ocean Shipping Reform Act of 1998 (OSRA) has created a stable regulatory environment for the international liner industry while promoting increased competition. The law is supported by significant segments of the maritime industry—shoreside and seagoing labor, shippers, port authorities, marine terminal operators and carriers. To anyone who remembers the four tortured years of intense and sometimes acrimonious debate leading up to the bill's enactment, this near-unanimity of support is in itself a remarkable achievement.

Preliminary studies demonstrate that OSRA is working as envisioned. The industry is providing high-quality service at reasonable prices; in real terms, rates are anywhere from 50 to 75 percent lower now than they were in 1978. According to a two-year study recently conducted by the Federal Maritime Commission (FMC), service contracting has more than doubled since OSRA took effect. At the same time, there has been a proliferation of new companies entering the liner trades. Clearly, there is no compelling reason to revisit the issue at this particular time. Simply put, there are other, more urgent matters that demand congressional attention during this critical juncture of our nation's history.

To state the obvious: in the wake of September 11th, the need for long-term capital investment in the $150 billion liner industry is even more crucial than ever before. For this to happen, a stable regulatory framework is required. As noted by numerous defense and governmental figures over the past nine months, the maritime industry remains a high-risk target for future terrorist attacks. By all accounts, making it more secure will require additional investments by both the U.S. government and the private sector.

Unfortunately, legislation (HR 1253) has been introduced that would gut OSRA, threaten long-term investment in the industry and destroy the delicate regulatory framework that, so far, has worked so well. That is why the Maritime Trades Department, AFL-CIO (MTD) and its 30 affiliated unions strongly oppose any changes to the present system.

Much is at stake, starting with the more than 1 million American jobs and $38 billion in U.S. wages that the liner industry generates. To place this in a larger context—more than 1 million Americans have lost their jobs since September 11th. The unemployment rate is at its highest level in nearly a decade. American workers *need* the 1 million jobs that the liner industry generates.

Equally important, the U.S. government needs the skills that these workers possess, skills that have enabled the U.S. to build and maintain one of the world's finest intermodal transportation networks—a network that will play a vitally important role in moving U.S. troops and supplies overseas during international crises. Moreover, the international liner industry is responsible for the efficient and seamless movement of $500 billion worth of American exports and imports each year. In other words, on any given day, more than $1.3 billion worth of cargo will move through U.S. ports.

Among its many other benefits, OSRA has facilitated the dissemination of information about shipping rates and contracts without compromising the job security of longshore personnel. This carefully wrought balancing act could be undermined if the present regulatory system were changed.

Two provisions in HR 1253 deserve careful scrutiny. One would negate OSRA's limited antitrust immunity. Another would give the FMC's regulatory control over the international shipping industry to the Department of Justice.

The limited antitrust exemption contained in OSRA has promoted a fiercely competitive U.S. industry while respecting international norms. No one company controls more than 14 percent of the U.S. market. Indeed, taken together, the top 10 companies control little more than half of all trade.

Moreover, the present system has not prevented new entrants from taking on existing vessels operators for business. In 1999, when trade between the United States and the Pacific Rim was hitting record highs, half-a-dozen companies that had never seen action on this front joined the fight to carry cargo on these high-volume shipping lanes.

It is important to remember that no country applies its national antitrust laws to international liner shipping. Changing the present system would put U.S. companies at a severe disadvantage, destabilize the existing market, reduce the quality of services now offered and create tensions between the United States and its trading partners where none presently exist.

It is impossible to underestimate the benefits that a stable regulatory scheme provides. Thanks to it, carriers have been able to enhance service and introduce new technologies. Capacity has been added; there has been more frequent service. Transit times are shorter. There is less waiting time and more port calls. American companies have been well served by the present system.

Moreover, today's regulatory system is well understood and internationally accepted. By making the United States the only country in the world to apply its antitrust laws to the international liner industry, the U.S. government could be setting up a situation where other nations could refuse to apply our antitrust laws, leading to an uneven and inconsistent regulatory framework.

By all accounts, the FMC has performed its oversight mission with distinction. It has the institutional memory to perform its duties and an innate understanding of the international maritime industry. Its fine work should not be disrupted.

In summary, OSRA has helped enhance the competitive nature of the international liner trade without compromising long-term capital investments and important strategic goals. At a time when numerous defense experts are urging enhanced security maritime measures, it does not make sense to overturn a regulatory system that has worked so well and replace it with one that engenders chaos and instability. On balance, OSRA has performed its task beyond all reasonable expectations and should not be overturned.

We respectfully request that this letter be made a part of the record for the hearing on HR 1253 that will be conducted by the Judiciary Committee.

Sincerely

Michael Sacco

Michael Sacco
President

AAPA

American Association of Port Authorities

Serving the Ports of Canada, the Caribbean, Latin America and the United States

KURT J. NAGLE
President

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June 14, 2002

The Honorable Jim Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Representative Sensenbrenner:

The American Association of Port Authorities (AAPA) strongly opposes H.R. 1253 (Sensenbrenner, R-WI), the Free Market Antitrust Immunity Reform (FAIR) Act, currently before the Judiciary Committee. The legislation would unravel a long and hard-fought compromise reached by shippers, carriers, labor interests and ports in the development of the Ocean Shipping Reform Act of 1998 (OSRA) by eliminating the limited antitrust immunity of ocean carriers.

Founded in 1912, AAPA represents virtually all major public port authorities and agencies in the Western Hemisphere. This letter represents the views of our U.S. delegation members. AAPA members are public entities mandated by law to serve public purposes, primarily the facilitation of waterborne commerce and the consequent generation of local and regional economic growth.

International trade has been the impetus for public investment in our nation's ports and related infrastructure, which has led to the generation of significant national economic benefits, as well as to local and regional economies. In 1996 the port industry, port users and capital expenditures generated 13.1 million jobs nationwide, $742.9 billion to the Gross Domestic Product; and $199.5 billion in taxes at all levels of government. Since 1946, U.S. public ports have invested almost $21 billion in port facilities, and capital expenditures through 2004 are projected to be $8.3 billion.

AAPA believes that enactment of H.R. 1253 would be injurious to the maritime industry at a time when further adverse impact to the carriers' already precarious financial condition could cause irreparable harm and could put the significant investments made by public port agencies at risk. OSRA has only been in effect for three years (since May 1, 1999) and should be given a chance to work before any other significant changes are made. In a recent report, the Federal Maritime Commission (FMC) concluded that the Act is working well. We agree with the comments made by FMC Chairman Creel in his statement to the Judiciary Committee for the June 5 hearing on H.R. 1253, namely that "Carriers do not enjoy unlimited, unfettered antitrust immunity to manipulate the market at will. They are subject to major pro-competitive checks on the privilege of antitrust immunity…"

The Honorable Jim Sensenbrenner, Jr.
June 14, 2002
Page 2

We urge the Judiciary Committee not to act on H.R. 1253. Thank you for your consideration of our views on this important issue.

Sincerely,

Kurt J. Nagle

Kurt J. Nagle

KJN/jcg

South Carolina State **PORTS AUTHORITY**

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President and Chief Executive Officer

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May 30, 2002

The Honorable Lindsey Graham
S. C. Congressman
1429 Longworth House Office Building
Washington, D.C. 20015

Dear Congressman Graham:

The Port of Charleston provides a gateway for both our State and regional economy to connect to world markets. This year, over $33 million of goods will move through out ports in an exceptionally efficient and cost effective manner. We are proud of our contributions and role in the creation and operation of an industry that efficiently and reliably serves the needs of American commerce, and we are vitally interested in government policies that affect the industry's health.

In 1999, landmark legislation – the Ocean Shipping Reform Act – reformed the way international liner shipping was regulated. This legislation, which labor, shippers, carriers, and ports painstakingly helped fashion, took five years to negotiate. It was a difficult and delicate compromise. That Act, administered by the Federal Maritime Commission (FMC), resolved the regulatory issues involved in international liner shipping in a fair, balanced and effective manner. It is working well, is internationally accepted, and, as the FMC's recent two-year study of the Act shows, has produced a highly competitive environment that is working as Congress intended.

We understand that the House Judiciary Committee is holding a hearing June 5 on H.R.1253, which would repeal the liner industry's limited and regulated antitrust immunity and, in effect, repeal the Ocean Shipping Reform Act and eliminate the FMC.

We strongly oppose this bill. No nation applies its domestic antitrust laws to international liner shipping. Instead the internationally accepted regulatory regime, ably overseen by the FMC, is working as Congress intended and should not be changed. H.R. 1253 would cause substantial destabilization and chaos in the industry. Importers and exporters are benefiting from record low shipping rates and the industry is financially struggling under intense competition. As a Member of the House Judiciary Committee, we hope you will agree that this bill should not receive the Committee's favorable consideration.

The Honorable Lindsey Graham
Page 2
May 30, 2002

Thank you for your consideration of our views.

Sincerely,

Bernard S. Groseclose, Jr.

BSG,Jr:jrl

National Association of Manufacturers

Michael Elias Baroody
Executive Vice President

June 7, 2002

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The National Association of Manufacturers, representing 14,000 member companies from nearly all industry sectors, is pleased that you held a hearing on June 5 regarding H.R. 1253, the Free Market Antitrust Immunity Reform (FAIR) Act. The NAM strongly supports enactment of H.R. 1253, and is encouraged that the bill is moving through the legislative process.

The NAM opposes sectoral treatment of the antitrust laws, and believes that any exemptions should be well justified and narrow. Thus, the NAM has successfully supported the repeal or substantial curtailment of antitrust exemptions for other modes of transportation, *i.e.*, airlines, railroads and trucking. It is worth noting that although there were some disruptions in these industries following deregulation and the loss of the antitrust exemption, including several bankruptcies, this was for the better. As a result of regulatory and antitrust protection, shippers were forced to pay above-market rates and to do business with companies that were able to dictate terms. The associated excess costs were, of course, ultimately borne by the consumer.

As a strong advocate of the antitrust laws, and their fair and effective enforcement, the NAM opposes any antitrust exemption that helps only those companies subject to the exemption. This is bad public policy, as it runs counter to even elementary economics and the best interests of the consumer, whom the antitrust laws are supposed to protect.

The NAM urges the Committee on the Judiciary, as well as the Committee on Transportation and Infrastructure, to consider and approve the FAIR Act in time for consideration by the full House and Senate, prior to adjournment. If you have any questions or need additional information, please contact Larry Fineran, the NAM's vice president, regulatory and competition policy, at (202) 637-3174 or lfineran@nam.org.

Sincerely,

Michael E. Baroody

cc: Members of the Committee on the Judiciary
Members of the Committee on Transportation and Infrastructure

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June 10, 2002

Mr. F. James Sensenbrenner, Jr., Chairman
U.S. House of Representatives, Committee on the Judiciary
2110 Rayburn House Office Building
Washington, DC 20515

Re: H.R. 1253, THE FREE MARKET ANTITRUST IMMUNITY REFORM ACT OF 2001

Dear Mr. Chairman:

Please allow us to present you with conclusive evidence of some of the activities taking place at the majority of the discussion group meetings of the major shipping lines serving the United States, in hope of satisfying any possible doubts as to the urgency in adopting H.R. 1253.

Attached to this cover letter, please find as (Exhibit A) a copy of one of the uncensored minutes taken at an 1999 East Coast South America Discussion Agreement Meeting, (ECSADA) which alone should remove any doubts regarding the anti-competitive practices and arrangements being discussed and agreed upon by the carrier-members of discussion groups but also the fact they are not only in complete violation of the 1984 Shipping Act, as amended by 1998 OSRA and FMC Regulations, but also various sections of the Sherman and Clayton Anti-Trust Acts. (See Exhibit A (8) pages)

These practices are further complemented through carrier mergers, acquisitions, affiliations, and pooling arrangements, coupled with statistics on shipper performance and space management agreements in order to create illusionary space allotments, used in conjunction with a series of other concerted activities, all specifically aimed at controlling the cargo-market and raising the rates to the trade.

In short term, these practices could only possibly benefit certain carriers and perhaps, certain large intermediaries, shippers, suppliers, Congress's intent to distinguish a distinctive difference between Section 8 (c)(1) Remedies and Section 11 (g) Reparations, particularly Sections 10 (a)(2) and (3), Sec 10 (b)(3), and 10 (c)(1) Reparations and Sec 13 Civil Penalties which can only be enforced by FMC, the ALJ ruled for dismissal on a meritless motion from the respondent carrier, essentially on the alleged basis of; A) Collateral Estoppel (issue preclusion), when none of the issues had been previously litigated; B) for Section 8 (c)(1) allegedly limiting a shippers remedies to arbitration or an action in a court of law, when Sec 11 (g), clearly provides specific FMC Remedies for Shipping Act Violations, to even include additional remedies for certain violations up to twice the amount of the actual loss; and C) for the complaint allegedly not showing a cause of action for which relief could be granted, when the entire complaint involves purely misconduct under the Shipping Act, the pertinent Sections which were violated and all the rules and Sections of the Act under which relief was being sought.

We have since filed an appeal from the judge's preliminary ruling, requesting for a Commission's review, which we expect the Commission to rule on shortly. But, in light of the Administrative Law Judges shallow interpretation of OSRA Sec 11 (g) Reparations, and with all due respect, the stigma surrounding the Commission's present policies with respect to carrier agreements, intermediaries Vs carriers, policing for Section 10 violations, Etc, we cannot help but suspect that at least part of some of these unlawful agreements mentioned and agreed upon by the carriers of ECSADA, may have possibly somehow been filed with the Commission and actually even authorized under Section 6.

It would be interesting to find out whether this was simply the policy and interpretation of the particular Commission Administrative Law Judge, and whether the Commission will remand the case on our appeal, as well as whether or not the unlawful agreements were somehow actually filed in accordance with Section 5 and approved under Section 6, and whether the Commission would actually be willing to enjoin the agreements or whether The Commission will allow them to continue, thus involving the entire Commission Review Policies in whole.

In the meantime, it would not be fair for us to have to be the guinea pigs, so if there is anything you can recommend we do at this point, we would greatly appreciate your advise, otherwise we will leave this in your hands in hope that something can be done quickly before the FMC

A perfect example is through our own experience. Here is a case where Anchor had entered a 500 TEU Service Contract in April 1999, which among its various markets included a north bound service from the East Coast of South America (ECSA) to the United States, covering shipments of General Department Store Merchandise (GDSM) formally a widely accessible commodity to intermediaries and other shipping public, at what at the time was at the going rate on the market for a 500 TEU contract but;.

Due to the fact that just a couple months later, carrier-members of ECSADA had agreed to turn in their contracts below the newly established floor rate levels, eliminate GDSM for intermediaries and number of other arrangements, apparently done behind closed doors, the carrier with whom we had the service contract, along with its (2) two affiliated carriers by ownership, along with a group of other carrier-members to the agreement, not only reneged on the service contract after 150 TEU's, but by the carrier having disclosed our contract to their affiliates, as well as to the other carrier-members to the agreement for comparison with the other contracts, the carriers had clearly coerced one another into collectively respecting the newly established floor rates and commodity descriptions, Etc, and began working in concert to where only the (2) two affiliated carriers would offer us a contract (at a higher rate), while none of the other carriers would even respond to our numerous requests. Next, as soon as we threatened to file a complaint, the carrier(s) at the advise of the carrier(s) attorneys, began to use every possible form of retaliation and deception to attempt to remove us from the market or at least, from being able to prosecute our case.

The sad part of it all is that, after having filed a formal complaint with the FMC, involving over (20) twenty Shipping Act Violations, including Sections 10 (a)(2) and (3) Un-filed Agreements, Section 10 (b)(3) Retaliations, and Section 10 (c)(1) Concerted Actions and the fact that our complaint clearly mentioned the fact that we had copies of ECSA discussion group minutes which demonstrated that the carrier-members of the ECSADA had fixed rates and turned in contracts, ETC, as well as the fact that only the affiliated carriers by ownership had offered us replacement contracts at higher rates, while none of the other carriers-members to deal with us. The Administrative Law Judge (ALJ) to which our case had been assigned, completely overlooked the carrier(s) misconduct with total disregard for the civil penalties which were associated with such violations and blatantly lapsed in his interpretation of law, failing to acknowledge importers or manufacturers, as they have already proven to have eliminated significant amounts of small businesses like forwarders, intermediaries, traders, ETC, yet, ultimately in long term, will not only eliminate our small and mid-size shippers, carriers, intermediaries, ETC, but also lead to endangering our bigger shippers and manufacturers as well, not to mention our economy and the significantly negative affects these activities and practices by major carriers are already causing to our entire economy while our trading partners in other counties are essentially strengthening theirs.

As a concerned small business owner, (NVOCC, Ocean Transportation Intermediary) who has personally had the unfortunate experience of having been directly affected by the present limited antitrust immunity on agreements between carriers, I appreciate this opportunity to comment on our views respecting proposed H.R. 1253 and why it is so important.

While we fully support the amendment, we must first make an effort to better harmonize the policies and applications of the law between the different branches of the U.S. Government and their respective Government Agencies, so that the laws are mutually interpreted and accomplish what they are intended to accomplish.

The fact is that even the present verbiage of the 1984 Shipping Act, as amended, does not totally exempt carriers from Antitrust. It essentially just exempts certain types of agreements, e.g. foreign marine terminals, foreign inland segments, agreements filed with the Commission under Sec 5 and effective under Sec 6, Etc, as listed in unchanged Section 7, all presumed to be lawful under Section 10, thus leaving the ultimate responsibility of rejecting unlawful agreements and enforcement of the Act to the FMC, yet because of the Federal Maritime Commission's policy and/or interpretation of the Act, carriers have been permitted to flout practically the entire spirit of the Act.

The DECLARATION OF POLICY "The purposes of this Act are—" in Section 2 of the 1984 Shipping Act was virtually unchanged by OSRA only augmented to place a greater reliance on the market place, as with the unchanged definition of "antitrust laws" in Section 3 with respect to Section 7.

Amending the Shipping Act, can only be as affective as the policies that are implemented and effected in order to enforce the Act.

compounds our situation for the worse.

If there is anything else we can assist with or if you have any questions, please do not hesitate to contact me.

I would like to add one last comment respecting H.R. 1253. By H.R. 1253 removing the antitrust immunity from the various carrier agreements presently exempted under Section 7. Sections 4, 5, 6 and 8, should be amended to where the presently exempted carrier agreements and/or concessions, as well as the "carrier(s) minimum tier rate levels applicable to confidential service contracts" be required to be published in either the carrier's public tariff(s) and/or essential terms publication(s).

This would not only level the playing field, but would also alleviate a significant burden from the FMC.

Thank you very much for your attention and cooperation.

Respectfully yours,

Alfred Hernandez, President
Enclosures: (8) pages ECSA Minutes

Exhibit A

Evergreen	Mr R Ekres / J Cochrane
Libra	Mr E Arteaga / M Hermes
Lykes Lines	Mr H Schlaepfer
Maersk	Mr L Torres
Mediterranean Shipping	Mr C Duppen / F Rey
Mexican Line	Mr J Hernandez
P&O Nedlloyd	Mr J Elias
Pan American/Montemar	Mr J Grumwaldt
Sea-Land	Mr C Azevedo
ZIM Lines	Mr D Sagie / R Ribeiro
Administration (Continental)	Mr R Pereira

The Chairman opened the meeting at 9:20 AM, by welcoming all participants and expressing his appreciation for counting on the attendance of all Members to this important round.

1.CONTRACT'S INFORMATION (commodity/mqc/validity)

As agreed during previous rounds, Members submitted to the administration their contracts which are not complying with the agreed minimum floor levels as of 7.1.99. Upon Members request, Continental prepared a comprehensive report comprising commodity, minimum quantity and validity of each contract. Such a report was duly handed over during this meeting for Membership review and reference.

Evergreen reps in Brazil received no specific instructions from their Principals for providing information related to their contracts. On the other hand, confirmed to the Chair that they are prepared to discuss any issue pertaining to the restoration program.

2.FOLLOW-UP OF MINIMUM FLOOR RATES

Prior to the opening of discussions on specific commodities the Chairman reminded Membership of Principals agreement to adjust the floor rates so far agreed at USD 500 per container, observing, however, the following minimum levels: USD 1800/20' and USD 2500/40',subject to all applicable charges and surcharges.

Furthermore,the Chairman stressed,that unless otherwise specified, all commodities shall bear to the agreed adjustments. In this connection, and referring to the previous meeting, Members were invited to voice on those commodities whereas the market could not afford Principals' targeted levels.

In light of the above and after extensive exchanges the following exceptions were identified by Members:

2.1 Auto-Parts, NOS

From Base Ports

USD 1750/20' plus charges (inclusive of US THC) + 250^{00} + B/L = \$2,050^{00}/20'

USD 2400/40' plus charges (inclusive of US THC) $+ 500^{00} + B/L = \$2,950^{00}/40'$

From Other Ports

USD 1900/20' plus charges (inclusive of US THC)
USD 2600/40' plus charges (inclusive of US THC)

Effective : 7.1.99 / Expiration: 12.31.99
Note: Any Line electing to assess THC separately is requested to ensure that the total, including the ocean rate observes the above agreed levels.

2.2 Break Parts, NOS

From Base Ports

USD 1750/20' plus charges (inclusive of US THC) $+ 250^{00} + B/L = \$2,050^{00}/20'$
USD 2400/40' plus charges (inclusive of US THC) $+ 500^{00} + B/L = \$2,950^{00}/40'$

From Other Ports

USD 1900/20' plus charges (inclusive of US THC)
USD 2600/40' plus charges (inclusive of US THC)

Effective : 7.1.99 / Expiration: 12.31.99

2.3 CC Beef

From All Ports

USD 1600/20' plus charges $+ 250^{00} + 415^{00} + B/L = \$2,315/20'$

Effective : 6.11.99 / Expiration: 12.31.99

2.4 Cellulose, Woodpulp

From Base Ports

USD 1600/40' plus charges (inclusive of US THC) $+ 500^{00} + B/L = \$2,150/40'$

From Other Ports

USD 1800/40' plus charges (inclusive of US THC)

Effective : 7.1.99 / Expiration: 12.31.99

2.5 Chemicals, in tank containers N/A

Current levels are maintained through 12.31.99. It was agreed to split this item into two categories, i.e. harmless and hazardous.

2.6 Chemicals, viz: Harmless N/A

Current levels are maintained through 12.31.99.

2.7 Chemicals, viz: Hazardous N/A

Current levels are maintained through 12.31.99.

2.8 Coffee

Green Coffee - From All Ports

USD 1300/20' plus charges (inclusive of US THC) + 250⁰⁰ + B/L = $ 1,600⁰⁰/20'

Soluble Coffee - From All Ports

USD 2000/40' plus charges (inclusive of US THC) + 500⁰⁰ + B/L = $ 2,550 /40'

Effective : 5.24.99 / Expiration: 12.31.99

2.9 Compressors

From All Ports

USD 1600/40' plus charges (inclusive of US THC) + 500⁰⁰ + B/L = $2,150⁰⁰/40'

Effective : 7.1.99 / Expiration: 12.31.99

2.10 FAK

Please refer to item 5 herein.

2.11 Fiberglass

From All Ports

USD 1600/20' plus charges (inclusive of US THC) + 250⁰⁰ + B/L = $ 1,900⁰⁰/20'
USD 2500/40' plus charges (inclusive of US THC) + 500⁰⁰ + B/L = $ 3,050/40'

Effective : 7.1.99 / Expiration: 12.31.99

2.12 Footwear

Montemar advised that they have a contract in place acct Payless, valid through 8.31.2000 basis 2000 TEUs. Columbus Line confirmed that will withdraw their offers made to several customers, but will stick to the very one made to Messrs. Payless.

Membership agreed to set up the current rates listed in IAFC's s/c acct FRASA as the floor levels for such commodity, i.e.:

From All Ports BRASIL/USA

USD 1650/20' plus cap-THC only N/A
USD 2400/40' plus cap-THC only
USD 2600/HC plus cap-THC only

Effective : 7.1.99 / Expiration: 12.31.99

Furthermore, the current 27 port to point rates under FRASA's s/c with IAFC shall be observed. In this specific regard, Sea-Land and CSAV will revert on 5.24.99 with their final confirmation.

2.13 Forgings and Castings

Forgings + Castings

From All Ports

USD 1600/20' plus charges (inclusive of US THC) +250.00 + B/L = $1,900.00/20'

Effective : 7.1.99 / Expiration: 12.31.99
Note: Lines agreed to delete the 40' rate

2.14 Furniture, Doors, Mouldings, NOS

From All Ports

USD 1600/20' plus charges + 250.00 + 415.00 + B/L = $2,315.00/20'
USD 2500/40' plus charges + 500 + 550.00 + B/L = $3,600.00/40'

Effective : 7.1.99 / Expiration: 12.31.99

2.15 GDSM

Item to be deleted from the floor rates table. FAK rates to be applied as of 7.1.99. Zim and MSC will be checking the possibility to cancel/terminate their current GDSM contracts and then follow FAK levels.

2.16 Honey and Peanuts

From All Ports

USD 1600/20' plus charges = 250.00 + 415.00 + B/L = $2,315.00/20'

Effective : 7.1.99 / Expiration: 12.31.99

2.17 Juice, Wine and Must (ex River Plate) N/A

It was reported that Evergreen would be quoting below the agreed floor. In this connection, MSC informed that have just lost 50 TEUs and will be activating the Hot Line at Principals level to review the current practices in the market for this group of commodities.

As per info provided by some Members, the cargo originated from Cordoba is facing major competition from the WCSA as their rates are much lower than ESADA's. In this sense, it was agreed to recommend Principals to consider an increase over WCSA rates, being the only alternative to overcome this conflicting situation.

This issue is continued on dockets for further review.

2.18 Lobster N/A No Boston? N.B.

From All Ports

USD 6000/20' plus charges (inclusive of US THC)
USD 9000/40' plus charges (inclusive of US THC)

Effective : 7.1.99 / Expiration: 12.31.99
Note: Subject to a max TA of USD 500/container

2.19 Lumber, viz: Sawn Wood and Clear Blocks

From All Ports

USD 1700/20' plus charges (inclusive of US THC) + 250 + B/L = $2,000/20'
USD 1700/40' plus charges (inclusive of US THC) + 500 + B/L = $2,250/40'

Effective : 7.1.99 / Expiration: 12.31.99
Note: Lines agreed to increase level to USD 1900 effective 1.1.2000. O$O, Effective 1/1/2000 Increase.

2.20 Machinery, NOS (ex ECSA) ?

Current levels are maintained through 12.31.99. CSAV will revert to inform date of expiration of their contract with acct Romi.

2.21 Paper all kinds

From Base Ports

USD 1800/40' plus charges (inclusive of US THC) + 500 + B/L = $2,150/40'

From Other Ports

USD 1800/40' plus charges (inclusive of US THC)

Effective : 7.1.99 / Expiration: 12.31.99

2.22 Shrimp

From All Ports N/A no Rostons N.B.

USD 5000/20' plus charges
USD 7500/40' plus charges

Effective : 7.1.99 / Expiration: 12.31.99
Note: Subject to a max TA of USD 500/container

2.23 Steel Pipes N/A. ?

Continued on the dockets for further review.

2.24 Steel Wire (ex ECSA)

From All Ports

USD 1600/20' plus charges (inclusive of US THC) + 250 + B/L = $1,900/20'

Effective : 7.1.99 / Expiration: 12.31.99

2.25 Tiles, Ceramic ?

Current levels are maintained through 12.31.1999.

2.26 Tires

From All Ports

USD 2500/40' plus charges (inclusive of US THC)
USD 2500/HC plus charges (inclusive of US THC) + 500 + B/L. = $3,050/40'

Effective : 7.1.99 / Expiration: 12.31.99
Note: Above rates are inclusive of the equipment positioning cost.
TA and commission to be applied on top of the floor levels, therefore, no reduction/discount shall be granted to the basic rate.

2.27 Wheels

Some Members reported that Messrs. Meritor received three s/c proposals at USD 1000/40' "all in" basis 100 FEUs/month.

It was agreed to adjust the floor levels to:

From All Ports

USD 1800/40' plus charges (inclusive of US THC)
USD 1800/HC plus charges (inclusive of US THC) + 500 + B/L = $2,350/40'

Effective : 7.1.99 / Expiration: 12.31.99

Continental will be updating the minimum floor rates table and will make available to the Members (at Continental's web site www.admcontinental.com.br) a separate table with the new levels effective 7.1.1999.

Once again, it was made very clear that Base Ports encompass Santos, Buenos Aires and Rio de Janeiro only.

3.CASHEW NUTS (EX FORTALEZA) N/A

Members agreed to establish specific rate for this commodity at USD 1650/20' plus charges, effective 7.1.1999.

4.FLOOR RATES ESTABLISHMENT FOR CARGO N.O.S.

The following levels shall guide all commodities not listed so far:

From Base Ports
USD 2550/20' plus charges + 250 + 415 + B/L = $3265/20'
USD 3500/40' plus charges + 300 + 550 + B/L = $4,600/40'

From Other Ports
USD 2700/20' plus charges
USD 3700/40' plus charges

Above mentioned rates shall become effective on 7.1.1999.

5.FAK RATES

It was proposed and agreed to adjust description to read "Freight All Kinds, in straight or mixed loadings". Members Lines agreed to adjust floor rates to the following levels, effective 7.1.99:

From Base Ports
USD 2550/20' plus charges + 250 + 415 + B/L = $3265/20'
USD 3500/40' plus charges + 500 + 550 + B/L = $4,600/40'

From Other Ports
USD 2700/20' plus charges
USD 3700/40' plus charges

6.SERVICE CONTRACT GUIDELINES

Issue to be further explored during next gatherings.

7.ADMINISTRATION/SECRETARIAT EXPENSES

Upon Chairman's request,and in line with Principals understanding, the administration made a brief presentation on the costs related to the ESADA meetings and activities in ECSA.

All Lines recognized that involved administrative costs are common and should be shared by the whole group.

In light of the above, Continental proposed a monthly fee to read USD 200 per Member Line/month payable on a quarterly basis. Monthly fee covers interface between Principals and committees, Preparation of agendas and minutes, arrangement of meetings in São Paulo, issuance and maintenance of reports on agreed rates/charges and handling of all Hot Line issues.

A motion was duly made, seconded and unanimously approved to accept the proposal of overall monthly fee made by Continental as of second quarter 1999. Formal details of this agreement will be reviewed by the Chairman accordingly.

8.ANY OTHER BUSINESS

With the aim to ensure the steps taken towards the restoration program the Membership expressed a common intent that the validity to the offers made to the clientele should not exceed 5 (five) days. In this connection, the administration was requested to check with legal counsel whether such a procedure would acceptable on a legal basis.

9.NEXT MEETING

Next ESADA meeting is scheduled to take place on 6.10.1998 in Sao Paulo at 9:00 AM to assess the progress and effectiveness of the program as well as to review open points and COD issues.

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As there was no further business this meeting was adjourned at 7:10 PM.

Respectfully Submitted,

ESADA Administration
c/o Administracao Continental Ltda