

**Shipping Conferences and Antitrust Exemption in North America from a
Canadian Perspective: New Life in an Old Debate**

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1. Introduction

Transport Canada defines shipping conferences (herein “conferences”) as follows:

“Ocean liner shipping companies [which] offer regularly scheduled ocean transportation services, as opposed to irregular or non-liner services, primarily consisting of the carriage of containerized cargo rather than bulk commodities. A conference is an association of liner companies operating under an agreement to provide service on common trade routes and which collectively agree on rates and terms of service.”¹

Conferences have existed since 1875 when the first agreements were established between carriers on routes between the United Kingdom and Calcutta.

Canada established its first Shipping Conferences Exemption Act (herein the “SCEA”) in 1970 in response to recommendations by the Restrictive Trade Practices Commission.² The SCEA 1970 permitted conferences to engage in certain activities which were exempt from the Competition Act.³

On March 1, 2001, Transport Minister David Collenette introduced Bill C-14, the Canada Shipping Act, 2001 (herein the “CSA”), in the Canadian House of Commons (herein the “House”) which modernizes shipping and navigation and amends the SCEA. This is the latest proposed amendment to the SCEA. Until Bill C-14 is passed into law, the SCEA 1987 governs.

¹ Report of Transport Canada, *Shipping Conferences Exemption Act, 1987* (Consultation Paper) by Marine and Policy Programs Branch (Ottawa: Transport Canada, July 1999) see <http://www.tc.gc.ca/pol/en/scea/SCEA%20Disc%20Paper%201..htm#PURPOSE>

² R.D. Anderson & S.D. Khosla, “*Canada’s New Shipping Conferences Legislation: Provision for Competition within the Cartel System*” (1988) Canadian Competition Policy Record, vol.9, no. 1, March 1988, at 51

³ *Ibid*, at pp.51 and 52 - conference members were permitted to: ‘use collective tariffs, implement loyalty contracts, allocate ports of call, regulate the timing of sailing and other conditions of service, share cargo and/or earnings and losses from the transportation of goods and regulate admission and expulsion of members to and from a conference.’

With respect to Bill C-14 Mr. Collenette has stated that, "The proposed amendments to SCEA will encourage greater competition, and streamline the administration of the Act," and, "They will also ensure that Canadian legislation covering shipping conferences remains in balance with that of our major trading partners." ⁴

Prior to this, in January of 2000, Andre Pageot, Director-General of Marine Policy at Transport Canada, referring to the proposed amendments to the SCEA stated, "We will make the system more flexible for shippers, but have to be careful to maintain a good balance for the shipping lines who have served the ports well."⁵ Prior to this, in 1999, the Canadian Shippers Council had warned that, "without substantial changes in the SCEA, Canadian exporters could be tempted to switch some of their business away from Canadian ports to carriers using American ports."⁶

The decisions that have been made concerning the current reform of the SCEA are to a large extent dictated by Canada-United States (herein "U.S.") trade relations. In particular, this paper will argue that Canada has made the decisions that it has regarding conferences legislation in order to remain consistent with the policies of the U.S., its largest trading partner, and to a lesser extent, with other major maritime states around the world.

Less certain is whether Canadian policymakers considered the agenda of the World Trade Organization (herein the "WTO") to promote globalization of world trade in formulating the current amendments to the SCEA. In particular, the proposed amendments do not abolish antitrust immunity for conferences.

In this context it could be argued that the amendments are not consistent with the WTO's globalization mandate and that Canada, as a member of the WTO, should abolish antitrust immunity for conferences altogether, thereby ensuring a free market

⁴ Transport Canada, Ministerial News Briefing (1 March, 2001) see http://www.tc.gc.ca/releases/nat/01_h033e.htm

⁵ Lloyds News Release, "International Regulation: Division over Canadian ocean shipping reform" (20 January, 2000) at <http://www.lloydslist.com>

⁶ Ibid

system that would determine freight rates solely by the principles of supply and demand. It has been argued that this would result in a considerable cost savings to shippers and therefore, theoretically, consumers.⁷ If this is the case, there should be a benefit to consumers, not only in developed countries, but also in less developed countries. If lower shipping costs in fact led to lower prices for consumer goods in developing countries, this would be consistent with the WTO goal of poverty alleviation through trade liberalization.

1.1 Scope of this enquiry

In this paper I intend to examine the phenomenon of conferences as a unique exception to antitrust legislative condemnation of organized cartels, with a focus on Canada and the U.S. I intend to limit my inquiry to Canadian and U.S. legislation and policy. Since it appears that similar legislation introduced in the European Union and countries such as Australia, New Zealand and Japan has not had the same impact on Canadian policy makers as the recent reform of the U.S. Ocean Shipping Reform Act 1998 (herein the "OSRA"), this discussion will take place in the "North American" context.

This paper will conclude with a discussion of shipping conferences and antitrust immunity in the general context of the WTO and trade liberalisation, including a summary of the economic arguments that have been advanced in this context and in general.

2. Shipping Conferences

2.1 Recent Decline in Importance

The historic justification for the existence of conferences with reference to the Canadian context was summarized by Brenda Johnston, then Manager of the Canada Westbound Rate Agreement (herein "CWRA") before the Standing Senate Committee on Foreign Affairs on April 8, 1997,

"Liner conferences such as CWRA exist in most of the world's trade lanes today. They date back to the British system established in the 1870s to bring order to what was at that time a highly cyclical and volatile

⁷ See discussion later in this paper

transportation system on which the British relied to carry their trade. Sailing ships of that day were completely mobile assets and their owners unaccountable to any authority except the marketplace. Ships called at most ports on an "inducement" basis; in other words, they would determine through their agents whether sufficient cargo was booked and waiting at a port to warrant a call and adjust their schedules accordingly.

When conditions in a particular trade lane were favourable, ships flocked to the ports in question and abandoned en masse those routes where cargo volume did not justify the cost of service. Importers and exporters could find themselves with many sailings at deeply discounted rates one month, and irregular sailings, indefinite schedules and high rates in the next month. Conferences were seen as a low-cost means of leveling out these cycles, assuring a more consistent level of transportation service, providing ship owners with a more predictable revenue stream, and enabling shippers in turn to more effectively plan costs and price their products.

The result was that, although rates at the time might be higher than in a purely market-based system, service was more reliable and a wider choice of carriers remained in a trade through cycles marked by over-capacity, unfavourable exchange rates, restrictive trade policies and other difficult conditions. The same situation is true today in Canada."⁸

In recent years there has been a decline in the number of conference agreements negotiated between carriers or carrier groups. There are two reasons for this, first, the emergence in the market of competitive independent carriers made possible through the introduction of containerization and other technological advances and second, recent changes in legislation governing international shipping, notably the OSRA. In particular, the OSRA has preserved the antitrust immunity of the rate-setting conference system

⁸ Ottawa, Canada, Parliament of Canada, Standing Senate Committee on Foreign Affairs, Proceedings, Issue 28 (8 April, 1997) see <http://www.parl.gc.ca/english/senate/com-e/fore-e/28ev-e.htm>

but has to a large extent diminished its importance by allowing confidential contracts between shippers and carriers.⁹

In response to these developments, two trends have emerged. The first trend is that carriers are now primarily entering into so-called “discussion agreements” which allow conference and non-conference carriers serving a particular trade lane to discuss and share information about rates, costs, capacity, and service. This supply of market data on a commodity-by-commodity and country-by-country basis helps members in their pricing, cost control and resource allocation.¹⁰ Under the discussion agreement, members may also adopt voluntary rate, capacity, and service guidelines. The second trend is for shipping companies and conferences to enter more wide-ranging organizations, such as consortia, alliances and global alliances.¹¹

Under the U.S. Shipping Act of 1984, and its predecessor, the Shipping Act of 1916, carriers formed into steamship conferences where they would, by virtue of the antitrust immunity granted by federal statute, collectively set freight rates, rationalised shipping space, and do other things collectively which normally would be violations of law but for the immunity granted. In theory, under those statutes, competition was still protected, to some degree, by the participation of independents (or non-conference lines) in most important trade lanes. In other words, independents ensured that the conference activities were more or less responsive to the marketplace.

One of the difficulties that shippers faced as a result of the conferences was the inability of individual carrier members of the conferences to take independent action on behalf of

⁹ According to the U.S. Federal Maritime Commission, the volume of service contracts entered into between May 1, 1999 and May 1, 2000 was up over 116 percent compared to the same period in the previous year. Data from the FMC, as well as information obtained by the League from its members, clearly indicated that service contracts had become the preferred way to do business in the U.S. international liner trades-source: Submission of the National Industrial Transportation League (United States) to the OECD on Regulatory Reform in International Maritime Transport March 27, 2001 pages 3 –4 see www.oecd.org

¹⁰ Lloyds News Release, “Liner expert braced for changes in discussion accords” (20 June, 2001) at <http://www.lloydslist.com>

¹¹ Carsten Fink, Aaditya Mattoo, & Ileana Cristina Neagu, “Trade in International Maritime Services: How Much Does Policy Matter?” (January 2001) World Bank Report, p.10 see <http://econ.worldbank.org/view.php?type=5&id=1338>

shippers or classes of commodities in competition with the conference. This was due to the laws relating to independent actions, the fact that the conference membership was aware of intended independent actions to be taken by carrier members and the pressures that this awareness brought to bear on the process.

Under the OSRA, this process was altered to facilitate Independent Actions ("IAs") by members of conferences utilizing a shortened notice period without any obligation to inform the conference of the negotiations (confidential service contracts) and without fear of sanctions by the conference as the conferences are prohibited from disallowing IA's.

Ronald Jacobson believes that this change with regard to IA's has become the death knell to the traditional concept of the conference and that in fact there is very little difference now between Conference agreements and Discussion agreements. In highly competitive trade lanes, the conferences have all but disappeared, or at least have diminished in size and importance. In anticipation of the disappearance of conferences, the so-called "discussion agreement" arose. While these can only provide "voluntary guidelines," in fact, the result is what on the surface appears to be the creation of "mega conferences." The so-called talking agreements are now comprised, not only of members that were traditionally considered conference carriers, but also those who were traditionally considered independent competitors. This is so much so that even COSCO, the Chinese state-owned and operated line, never a conference member, is now a member of TSA (herein "Transpacific Stabilisation Agreement"), presumably following the "Voluntary Guidelines." No wonder Commissioner Won of the Federal Maritime Commission has stated that in 1999 he found no competition in the inbound Far East trade lanes."¹²

¹² , *Antitrust Aspects of the OCEAN SHIPPING REFORM ACT OF 1998*, 106th Cong., 1st Sess. (5 May, 1999) at http://commdocs.house.gov/committees/judiciary/hju62447.000/hju62447_0.htm, (Submission of Ronald Jacobson, Vice President of Northstar Drawback Consultants Ltd, appearing on behalf of the Customs Brokers and Foreign Freight Forwarders Association of Chicago) Serial No. 30 with reference as well to the conclusions reached by FMC Commissioner Won and presented during the same hearing

3. The Canadian Legislation

3.1 The Competition Act

Section 1.1 of the Competition Act describes the overall purpose of Canadian competition law as follows:

“to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets, to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and to provide consumers with competitive prices and product choices.”

Amendments to the Competition Act tabled in 2001 aimed at building a more efficient and competitive marketplace to ensure that Canada keeps pace with a rapidly changing global economy include a brief policy statement updating the purposes of the Competition Act. In background information accompanying amendments to the Competition Act and Competition Tribunal Act tabled in the House on April 4, 2001, the Minister of Industry, Brian Tobin states that “The Competition Act is designed to promote competition and efficiency in the Canadian marketplace. It forms a major part of the economic legislative framework for the conduct of business in Canada, applying with few exceptions to all industries and levels of trade.”¹³ Conferences are clearly one of the exceptions.

3.2 The Shipping Conferences Exemption Act 1987

The current SCEA 1987 exempts conferences from the provisions of the Competition Act. Transport Canada takes the position that although the Canadian SCEA legislation does not contain a specific purpose clause, “the Act has the purpose of exempting conference agreements and practices from provisions of the Competition Act on the

¹³ Industry Canada, News Release Minister of Industry Tables Amendments to the Competition Act and Competition Tribunal Act (April 4, 2001) see <http://www.ic.gc.ca/cmb/Welcomeic.nsf/261ce500dfcd7259852564820068dc6d/85256a220056c2a485256a240064f1a8!OpenDocument>

basis that conferences play an important role in Canada's foreign trade and provide a measure of stability and reliability in shipping services.", thereby concluding that the purpose of the SCEA is to allow liner shipping conferences to operate under agreements to and from Canada without fear of violating its competition laws.¹⁴

The SCEA 1987 replaced the 1979 Act which, in turn, replaced the 1970 Act. The SCEA 1987 was a further attempt by the Government of Canada to balance the interests of conferences, shippers and other interested parties. Although the SCEA retains antitrust immunity for conferences, it is also intended to encourage price competition between conference members. The legislation also attempts to maintain transparency in conference operations through the filing with the Canadian Transport Agency (herein the "CTA") of agreements and other information concerning rates and services.

Conference agreements that permit the following are exempt from the provisions of the Competition Act, namely those that:

- (1) require a member of the conference to use a tariff;
- (2) require a member of a conference to carry out a loyalty contract (subject to conditions);
- (3) establish terms and conditions respecting the use of service contracts;
- (4) provide for the allocation of ports;
- (5) regulate the time of sailings and kinds of service;
- (6) provide for cargo or revenue sharing; and
- (7) regulate the admission and expulsion of members.

With respect to the above, conferences are only exempt once a copy or a description of the agreement has been filed with the CTA.¹⁵

There are provisions in the legislation that prohibit predatory practices in general and specific provisions, dealing with the use of a vessel for preventing or lessening

¹⁴ Report of Transport Canada, *Regulation of Liner Conferences in Canada and the United States* (Comparative Information Paper) by Marine Policy Branch (Ottawa: Transport Canada, December 1998) see <http://www.tc.gc.ca/pol/en/scea/Compare%20SCEA-OSRA%20paper%20Dec98.htm>

¹⁵ *Supra*, Note 1

competition, discriminating against a particular shipper for using a carrier that is not a member of a particular conference or preventing or limiting such a shipper's use of a port or other facilities or services.¹⁶

Of particular importance in the Act is the right given to member lines to take independent action (herein "IA") on a conference rate or service item, whereby the line is able to offer to shippers a rate or service that differs from the published conference tariff.¹⁷ This is probably the most pro-competitive provision of the SCEA 1987.

3.3 The Current Amendments to the SCEA

Changes in the industry since 1987 and changes in the international trading climate led Transport Canada to undertake a review of liner conference legislation in Canada. Since ports in Canada and the U.S. on both coasts operate in direct competition with each other, the Government of Canada determined that in order avoid hindering the competitiveness of Canada's shippers, ports and other transportation interests, it was necessary to revisit how these two major trading partners legislate liner conferences.

In considering the approaches that could be taken to amend the SCEA 1987, Transport Canada had the opportunity to review a number of possible options – some of which represented quite particular interests and others which were more reflective of the current international trading environment:

Maintain the Existing Act

Acknowledging the advancement of globalisation and liberalisation of trade and seeing it as important that Canadian legislation support these trends, Transport Canada concluded that the SCEA can directly influence the flow of goods into and out of Canada and that the legislation should be subjected to periodic review to ensure it continues to support Canada's international trade objectives and domestic industries.

The importance of international comparability and compatibility in legislation covering liner shipping conferences being maintained in Canada was emphasized since the

¹⁶ Supra, Note 1

¹⁷ Supra, Note 1

country heavily relies on international carriers to provide reliable and cost effective services for Canadian shippers. The department recognized the need for some level of harmony with Canada's major trading partners in the legislation governing liner conferences and noted that some important trading partners, notably the U.S. and the EU, have recently embraced new features supporting greater liner shipping competition which must be considered in today's international shipping environment.

In addition, Transport Canada reviewed the following developments in the industry since 1987:

- (1) new organizational arrangements of shipping lines
- (2) the creation of larger operators through mergers and acquisitions and larger container ships
- (3) increased levels of investment, and
- (4) the current round of regulatory reviews by trading partners

These developments strongly suggested that Canada's legislation governing liner shipping conferences needed to be reviewed and changes made to maintain Canada's position as a competitive trading nation, so it was determined that it was not in the best interests of Canada to maintain the status quo with respect to the SCEA.

Abolish the Existing Act

Transport Canada sees the abolition of the SCEA as a radical departure from current international practice and takes the position that it would isolate Canada among its trading partners, particularly the U.S., the EU and Asia, where most conference exports are destined. Since Canada's major trading partners maintain some form of protection for conference operations, if Canada was to remove the exemption while others do not Transport Canada foresees that this would result in a shift of some cargo being moved through U.S. ports rather than through Canadian ports, due to the imbalance in antitrust protection. The Government therefore associates the abolition of the SCEA with significant economic harm to Canadian shippers, ports, railways and trucking firms.

Upon examining testimony from the National Transportation Act Review Commission review, the government accepted the Commission's recommendation not to repeal the SCEA until the United States and other major trading partners are prepared to do the

same since many sectors in Canada could be negatively affected if Canada abolished the SCEA while the U.S., in particular, continues to maintain antitrust immunity for liner conferences.

The Government of Canada believes that it is important to maintain a “level playing field” with respect to liner shipping and have determined that while it is not sensible to maintain the status quo, it is also not in Canada’s economic interests to move unilaterally to withdraw antitrust immunity for liner conferences at this time.

Introduce Changes by Order in Council

Under SCEA it is possible to make changes by Order in Council with respect to:

- (a) the number of days which notice must be given before taking IA; and
- (b) access through an electronic network to documents filed with the CTA.

Section 4(3)(a) of the SCEA allows the Governor in Council to establish the number of days that notice is required to be given by a conference member of its intention to take IA in respect of a rate or service that is different from that provided for in a tariff established by the conference. Reducing the number of days for notice by Order in Council is one way to introduce greater competition within the conference system.

Section 22(3) allows the Governor in Council to make regulations respecting access, through an electronic network, to documents filed with the CTA in accordance with section 6 of SCEA. Documents that may be subject to electronic access include conference and interconference agreements, changes in conference membership, service contracts, tariffs, standard forms of loyalty contracts, and amendments to tariffs and loyalty contracts.

Transport Canada does not see this approach as sufficiently comprehensive because even though allowing electronic access is a needed change, accomplishing this through section 22(3) does not provide any opportunity to alter the number or type of documents required to be filed with the CTA. The use of Section 22(3) is limited since it refers to documents listed in section 6 and only an amendment to section 6 can change the documents required to be filed with the CTA. Therefore this approach is not seen to

allow the Government to take full advantage of this opportunity to review and update the legislation in order to maintain Canada's competitive edge.

Amend the Act by Introducing Pro-Competitive Provisions

While maintaining antitrust immunity for liner conferences, Transport Canada has determined that this approach will allow for the most thorough revision of the SCEA while still balancing the original purpose of the legislation with a pro-competitive effect. The recommended changes are responsive to the current environment, continue to protect Canada's competitiveness in international trades, and maintain Canadian legislation in step with major trading partners. Transport Canada predicts that the result of these proposals will introduce greater competition in the process of carrier-shipper relationships, reduce burden on industry and move Canada's legislation for shipping conferences closer to a state where antitrust immunity may no longer be warranted.¹⁸

The main amendments introduced by Bill C-14 are:

1. A provision for the filing of conference documents with the CTA by electronic means.
2. A provision that requires a conference to make its documentation, including tariffs, available to the public in electronic and "hard copy" form
3. With respect to enforcement, to determine that "If a member of a conference fails to comply with an obligation imposed on the member by this Act or the regulations, that member is guilty of an offence punishable on summary conviction and liable to a fine not exceeding \$10,000 for each offence."
4. Introduces the right of conference members to take IA on five, instead of fifteen days and when a member gives such notice then "any other member of the conference may, after giving to the other members of the conference notice in writing of the member's intention to do so, take the

¹⁸ Supra, Note 1

same independent action as soon as the first independent action becomes effective; and further, when a member of the conference gives the initial notice, "the members of the conference shall publish or cause to be published the new rate or service item in a tariff not later than five days after the day on which the notice is received by the members of the conference."¹⁹

5. Permit Conferences to establish the terms and conditions regarding the use of service contracts by its member lines.²⁰ While individual lines are permitted to take IA on service contracts, it is often the case that the conference precludes their use by requiring agreement by all member lines and as a result, the majority of service contracts have been conference-wide. Filing of service contracts with the CTA is required under the SCEA and their content as far as the CTA is concerned is kept confidential. There is no corresponding provision in the SCEA for carriers entering into service contracts to keep the contents of those contracts confidential. According to the Canadian Shipping Council (herein the "CSC"), the provision only states that the carrier is not obligated to divulge the terms of such contract, but nothing prevents it in the law from doing so anyway. It is the case that under the OSRA individual confidential service contracts are now permitted which disclose only a few general terms of the contract such as origin/destination port ranges, commodity, minimum volume, and duration. The key pricing information is kept confidential thereby promoting price competition. This is one of the

¹⁹ Bill C-14, An act respecting shipping and navigation and to amend the Shipping Conferences Exemptions Act, 1987 and other Acts, 1st Sess., 37th Parl. 1 2000-2001.see http://www.parl.gc.ca/common/Bills_House_Government.asp?Language=E&Parl=37&Ses=1#C-14

²⁰ Transport Canada defines and comments on service contracts as follows: [a] service contract is an agreement in which a shipper commits a certain minimum volume of cargo over a fixed time period to conference member lines in exchange for a guarantee in respect of rates, and/or service commitments. Service contracts were introduced in the 1987 version of SCEA in order to provide increased flexibility in contractual agreements and pricing between shippers and conferences. The intent was, at least in part, to introduce greater competition and more competitive rates.'

features that Canadian shippers' have been lobbying for in the current proposed amendments to the SCEA.²¹

It is interesting to note that the reluctance to abolish antitrust immunity for conferences appears to be universal among major maritime states. During an Organization for Economic Cooperation and Development (herein "OECD") workshop in May 2000, several member governments that had recently re-examined their position with respect to antitrust exemptions saw no compelling reasons to change their positions. It was noted that, "none of the members that considered the matter wished to be the first to eliminate immunity without co-ordinated action from its trading partners."²² This is the primary reason that the Canadian government endeavors to keep the SCEA in line with the OSRA and similar legislation in other maritime states.

4. The American Legislation

4.1 The Ocean Shipping Reform Act 1998

The OSRA has a broader aim and is more encompassing than its counterpart Canadian legislation. It contains specific purpose clauses that can be summarized as follows:

- (1) to provide an efficient and economic transportation system;
- (2) to encourage development of a U.S.-flag liner fleet for national security needs;
- (3) to promote the growth and development of U.S. exports by placing a greater reliance on the marketplace; and to regulate the common carriage of goods by water.

²¹ *Supra*, Note 1

²² OECD News Release (31 May 2000) at www.oecd.org

Transport Canada's review of the U.S. legislation, which is relevant in relation to their response to it, sees the OSRA as "designed to deregulate ocean shipping in the United States."²³

Therefore, a primary difference in policy between the legislation on each side of the border arises out of the differing nature of shipping itself in each country. Transport Canada sets out this difference as follows, "whereas the U.S. may wish to promote their U.S.-flagged fleet and has a national security interest in maintaining this fleet, Canada's interest in international shipping lies primarily in access to efficient and economic ocean transportation services."²⁴

Referring to the SCEA 1987 and the predecessor of the OSRA 1998, the US Shipping Act 1984, Anderson and Khosla state,

"The Canadian and US acts, nevertheless, have substantial differences in their overall design and specific provisions. While SCEA is primarily an exemption act, which imposes some related conditions on the liner conferences, the US Shipping Act is a comprehensive regulatory statute. The greater degree of government involvement in regulating the liner shipping industry in the US reflects the greater importance of carrier interests in that country. Whereas Canada has essentially no deep sea liner fleet of its own, the US has an extensive merchant marine which is historically linked to US strategic interests."²⁵

The most significant change in the OSRA 1998 is the inclusion of the right of an ocean carrier that is also a member of a shipping conference to take IA and individually negotiate a confidential service contract with a shipper at rates of the parties' own choosing. The "confidential" nature of the service contract is permitted by a provision in

²³ Supra, Note 14

²⁴ Supra, Note 14

²⁵ Supra, Note 2, at 56. In this regard, however, see Congressman Hyde's comments hereinafter regarding whether or not OSRA is a useful tool today in protecting US Carrier interests having regard to the significant decline in the number of US owned carriers

the OSRA that prohibits shipping conferences from requiring disclosure of service contract rates of individual members. It has been argued by John M. Nannes that, "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."²⁶

Under the Shipping Act of 1984, a shipping conference was able to prohibit its members from entering into individual service contracts. This prohibition was based on the theory that if service contracts involved a significant volume of business over a given period of time, carriers would have a strong incentive to compete for these contracts by offering discounts from the published conference tariff rates. This would ultimately lead to more goods being shipped pursuant to independent action and less goods shipped under rates set by the conference.²⁷

4.2 The OSRA 1998- Specific Terms

Consistent with the specific purpose clauses and the analysis referred to above, the U.S. meets specific policy objectives through the OSRA by:

- (1) providing for an efficient and economic transportation system;
- (2) encouraging development of a U.S.-flag liner fleet;
- (3) contributing to national security needs;
- (4) promoting growth and development of U.S. exports; and
- (5) regulating the common carriage of goods by water.

To achieve these policy objectives, the main legislative provisions of the OSRA are:

- (1) the requirement to file agreements with the Federal Maritime Commission;

²⁶ "The Free Market Antitrust Immunity Reform Act of 1999" (Statement of John M. Nannes, Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice) before the House Committee on the Judiciary on H.R. 3138 Washington, D.C March 22, 2000. see <http://www.usdoj.gov/atr/public/testimony/4377.htm>

²⁷ Ibid

- (2) open conference membership;
- (3) electronic access to carrier tariffs by the public;
- (4) independent action on 5 days notice by a conference member;
- (5) confidential service contracts between individual shippers and individual conference lines with publishing of only a few general terms of the contract;
- (6) joint ocean carrier negotiation of inland (e.g. rail and truck) rates, but still subject to antitrust laws;
- (7) a revised section on prohibited acts;
- (8) provisions covering non-profit shippers' associations and protection of the interests of shippers;
- (9) a complaints mechanism; and
- (10) enforcement provisions and penalties.²⁸

This Act is seen by industry analysts to have transformed ocean shipping in the United States from the concept of "common carriage" to "contract carriage" whereby tariff filing with federal authorities and strict enforcement of these tariffs have been replaced by confidential contracts between shippers and carriers.²⁹

4.3 Proposed U.S. Legislation

In November 1999 Congressman Hyde introduced legislation entitled The Free Market Antitrust Immunity Reform Act which is intended to repeal immunity for carriers. Congressman Hyde stated that,

"Since the passage of OSRA in May, a number of points had become apparent, the justification for antitrust immunity-the protection of American-owned carriers-has largely gone with the sale of Sea-Land's international operations to Maersk. There are no major global American-owned carriers left to protect. Antitrust immunity now almost exclusively

²⁸ Supra Note 1

²⁹ Supra, Note 1

benefits foreign-owned carriers at the expense of American shippers and consumers."³⁰

Janet McDavid, Chair of the American Bar Association's Antitrust Law Section, added similar sentiments,

"The reality is that there are virtually no U.S. flag ocean carriers today (or at least few, if any, ships owned by U.S. firms), so the exemption largely protects foreign ship owners, many of whose customers are U.S. firms that are paying higher prices than they would pay in a competitive market. Moreover, if there is a national interest in maintaining U.S. flag carriers, there are far more efficient, pro-competitive ways to do so than by maintaining an antitrust exemption."³¹

On March 27, 2001, House Judiciary Committee Chairman F. James Sensenbrenner introduced H.R. 1253, a bill to amend the Shipping Act of 1984. The Bill is identical to the legislation introduced previously in the Congress by Representative Henry Hyde.

To date there has been no further action taken with respect to either Bill. This is not surprising given the reluctance among individual maritime states to be the first to eliminate antitrust immunity.

5. The Carriers' position – in General

The classic arguments advanced by carriers in favour of retaining antitrust exemption for conferences, many of which have not changed since conferences were established, are set out by the World Shipping Council (herein the "WSC") as follows:

- (1) There are high fixed costs involved in operating a regularly scheduled service.

³⁰ Lloyds News Release "United States: Top Republican says liner pacts must end" (28 October, 1999) at <http://www.lloydslist.com>

³¹ Report of The Bureau of National Affairs, Inc., D.C., "*Witnesses Discuss Future of Ocean Carrier Immunity*" Antitrust and Trade Regulation Report Vol. 78 Number 1952 (Washington, D.C.: Friday March 31, 2000) see full report at <http://www.house.gov/judiciary/mcda0322.htm>

- (2) There is relatively inelastic demand for services (i.e. rate reductions very rarely can increase the market demand for services).
- (3) Significant mismatches in demand result from chronic trade imbalances (import and export volumes often differ widely) and therefore, there are significant fluctuations in demand.
- (4) Inelastic supply exists because carriers must maintain supply at consistent levels sufficient to meet peak demand, yet are very limited in their ability to rapidly “flex” supply because their large fixed, sunk costs and the nature of liner shipping, which requires regular service and strings of vessels that call at numerous ports in a single voyage.
- (5) “Lumpy” supply is a problem and therefore, 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 variations in demand.
- (6) There are no barriers to new entry or capacity expansion.
- (7) Government subsidization leads to distortion of competition in shipping and shipbuilding.³²

The common thread that runs through all of these arguments is the attempt to justify the antitrust exemption on the basis of the substantial capital investment and related economic risk associated with the carrier business.³³

³² World Shipping Council presentation to the OECD Secretariat: *International Liner Shipping Regulation Its Rationale and Its Benefits* (March 2001) see www.oecd.org

³³ Ibid, wherein as a matter of interest the following facts concerning capital expenditure were presented, 'Owing to the inherent mobility of sea-going vessels, it is extremely difficult to assess investment in containerships on a discrete trade lane basis. As OECD will no doubt glean from other sources, major multi-billion dollar new-building programs today involve the construction of very large container ships in the 5,000 TEU and over range (China Shipping Group has announced plans to build two in excess of 9,000 TEUs) to serve the expanding routes from Asia to Europe on the one hand and from Asia to North America on the other. For instance, the Hong Kong/Pearl River delta basin alone reached the unprecedented volume of over 18 million TEUs in the Year 2000 and growth to 30 million by 2010 and 40 million by 2020 is projected. These very large containerships, already in service, under construction or planned, have displaced and will displace many prior generation vessels serving those routes and the latter will be shifted to other routes to institute new services or upgrade existing ones. Thus, it may be seen that as a general matter, investment in containership capacity may be best evaluated on an industry-wide global basis and not on a trade lane by trade line one.'

Referring to the role that antitrust exemption has played in the creation of a cost efficient worldwide shipping network, the WSC states that:

“Today a VCR can be transported from Hong Kong to the West Coast of the United States for 70 cents; a bottle of wine or spirits can be transported from Europe to North America for less than 1% of its price; a pair of athletic shoes can be moved from Asia to North America for 40 cents.”³⁴

While this may or may not be a good price, the problem with presenting these types of figures is that they are selective, they are put forward with no frame of reference and there is no indication if the prices would be higher or lower in the absence of antitrust exemption.

Masaharu Ikuta, Chairman of the Board, Mitsui O.S.K. Lines, on 14th May, 2001, gave a speech at the BIMCO³⁵ Container Shipping Conference in Beijing. The speech was titled "Containerization, Today and Tomorrow - for Sustaining Economic Growth"³⁶ Mr. Ikuta clearly favoured the preservation of a certain level of antitrust immunity for conferences stating,

“Liner trade routes connecting Europe with India and China were formed more than a hundred years ago by the British shipping industry. However, as a result of intense competition, the market repeatedly suffered drastic fluctuations due to supply-demand imbalances. When available space became deficient even by a little, freight rates skyrocketed to prohibitive levels. On the other hand, during bad times, many carriers went bankrupt and traders suffered from the loss of the facilities of transportation. It was under these circumstances that the Indo-Calcutta Conference came into being in 1875, followed by the emergence of the parent body of the

³⁴ Ibid

³⁵ BIMCO (Baltic and International Maritime Council) comprises of nearly 1,000 ship owners, 1,550 brokers and agents, and 100 associate members who represent the views and opinions of the world ocean shipping industry.

³⁶ Copy of speech at www.mol.co.jp/research-e/report/containerization.pdf

- present Far Eastern Freight Conference (FEFC) in 1879. Such shipping conferences have since been granted antitrust immunity by various countries, based on the recognition that they are necessary for maintaining the health of commerce, not simply for the shipping but for trading...Today, the dominant thinking and rules governing the management of liner shipping are to be found in the amended U.S. Shipping Act of 1984, which approved service contracts and independent action (I/A) as a condition for allowing the exemption from the antitrust act of liner conferences and agreements, and the U.S. Ocean Shipping Reform Act of 1998 (OSRA) which, as an amendment to the Shipping Act, provided for the introduction of confidential, individual service contracts."

During a meeting in late May 2000, The OECD workshop on Regulatory Reform in International Maritime Transport met with industry representatives to discuss the current state of antitrust immunity in the shipping industry. Supporters of the continuation of those exemptions, ship owners and a number of OECD Governments, argued that the current system was working, that the liner industry was structurally different from other industry sectors and that the exemptions were necessary to ensure the stability of services to shippers. They argued that the need for change had to be established by those advocating change.³⁷

5.1 The Carriers' position - Canada

Canadian exporters rely solely on foreign-flag carriers to handle their shipping requirements. Canada has never explored subsidies or promoted a ship's registry in an effort to establish a national flag shipping fleet.³⁸

The Shipping Federation of Canada has expressed its support for continued antitrust exemption conferences in Canada. It has stated,

³⁷ OECD News Release (31 May 2000) at www.oecd.org

³⁸ Ottawa, Canada, Parliament of Canada, House of Commons Standing Committee on Transport and Government Operations on Bill C-14, submission made by the Shipping Federation of Canada see [http://www.shipfed.ca/Library/canada_shipping_act/CSA%20with%20Appendices%20\(eng\).htm](http://www.shipfed.ca/Library/canada_shipping_act/CSA%20with%20Appendices%20(eng).htm)

“In addition to ensuring that Canada remains in step with the US, the amendments proposed by Bill C-14 continue to recognize conferences as a reasonable and stabilizing mechanism...” Echoing the sentiments expressed by the World Shipping Council, the Federation states, “If the majority of trading nations did not grant such immunity, carriers would forego risking massive investments in new vessels and wait for the lack of capacity to drive freight rates up. In the long run, this would be detrimental to the interests of shippers as they would be faced with fewer options, more delays, and higher rates.”³⁹

With specific reference to the Canadian context and in particular the negative effect that repealing antitrust immunity might have on Canadian ports the Federation has noted that during the past decade, the antitrust immunity system has resulted in considerable development of the container service and it is their position that this has served the growing need of importers and exporters for international transportation services by maintaining excess capacity and driving freight rates down, compared with the rising costs of other goods and services.

The Federation has reported that half the container traffic in Canadian ports is bound to, or originates from the U.S. and that if Canadian legislation on antitrust immunity were to be less competitive for shipping lines than the U.S. OSRA,

“it would act as an (other) incentive to serve the US market via US rather than Canadian ports. It is highly doubtful that Canadian ports could afford to lose such a significant share of their traffic. SCEA as amended will continue to encourage shipping lines to serve Canadian ports, encourage affordable ocean transportation and ensure an adequate and reliable level of service for Canadian industries. Further amendments to SCEA would likely jeopardize the transportation options currently enjoyed by Canadian shippers and reduce the competitiveness of shipping lines serving Canadian ports.”⁴⁰

³⁹ Ibid

⁴⁰ Ibid

The position of carriers in Canada was explored before the Standing Senate Committee on Foreign Affairs on April 8, 1997. Brenda Johnston, then Manager of the CWRA argued that, "Conferences in their current form contribute to overall service stability without insulating carrier pricing from external market forces. The image of cartels dictating price and stifling competition simply does not apply in today's environment." She continued,

"It is hard to know where to add value for members that are getting good service at low rates through direct negotiation with carriers. It is hard to attack a conference for being non-responsive when it is offering contract terms and rates customized to individual customer needs, when rate spreads between conference and independent carriers are practically non-existent, and when conference member lines are as aggressive in their group and independent actions as their non-conference competitors on behalf of individual shippers."⁴¹

Ms. Johnston concluded with what is clearly a carrier-biased interpretation of the purpose behind the SCEA when she states that, "The idea behind SCEA is to preserve service choice and common carriage, not to create a food chain in which each fish preys on smaller fish as it is being eaten by larger ones. I urge you to carefully consider before taking action on a regulatory system that successfully harnesses market forces to serve the broad public interest of businesses and consumers across Canada."⁴² This conclusion clearly does not express a desire to foster a spirit of free market competition among carriers.

Mr. Albert Pierce, then Chairman of the now defunct CWRA, who now heads the Transpacific Stabilisation Agreement (herein the "TSA")⁴³, testified before the same Standing Senate Committee where he made a rather ominous statement supporting the continued existence of conference agreements,

⁴¹ Supra, Note 8

⁴² Supra, Note 8

⁴³ Lloyds News Release "Liner expert braced for changes in discussion accords" (20 June, 2001) at <http://www.lloydslist.com>

"I fear for the liner industry. I have been in this industry for a quarter of a century. I worked for one of the major carriers for a number of years before I started into conference work about ten years ago. If there is not sufficient return on capital invested, there will be fewer and fewer carriers; there will be fewer choices; Canada, which is actually beholden to foreign carriers to move your commerce, to keep your businesses of export and import going, will find fewer and fewer participants in that service. Our interest is to maintain everyone who is in business today to stay there and to keep stable rates. Our conference is an effective mechanism to protect the exporters and importers in Canada in that regard."⁴⁴

The statements of Ms. Johnston and Mr. Pierce were made before the committee in 1997, as part of a broader inquiry into Canada's trade role with Pacific Rim countries. Senator De Bané, a member of the Committee who appeared to be more inclined to support free market principles, challenged their views regarding the necessity of antitrust exemptions.⁴⁵

⁴⁴ Supra Note 8

⁴⁵ Ibid. This is evidenced by the following exchange:

Mr. Pierce: I thoroughly believe there would be some carriers who did not have a strong financial interest in infrastructure in Canada who would leave tomorrow if the rates dropped. Also, I believe you would be left with so few choices that the rates over an 18-month period would start climbing so precipitously that Canadian products could find themselves priced out of competition from other countries. The cost of doing business has to be reflected in the revenue received, in my estimation.

Senator De Bané: That kind of argument is made by the one made by the regulated industry. Bell Canada used to say they needed a specific return on their investment. Today, it is unregulated and they do not say that anymore. Now they insist they must have their share of the market because they are competing against MCI, AT&T, Sprint and all these American companies. They do not talk about return now; they talk about having their product at the right price in order to sustain market share.

Mr. Pierce: I agree. It must be at the right price but it must produce some net income.

Senator De Bané: You are coming from the most competitive market in the world [The United States]. Surely you understand. If you were the head of an unregulated, capital-intensive industry, you would know that this is usually the way of doing things in the competitive, open-market system.

5.2 The Carriers' position – U.S.

The Carriers in the U.S. paint an equally bleak picture of the economic perils that plague the shipping industry. Testifying before the Committee on the Judiciary in the House of Representatives on May 5, 1999, John Clancey, President and CEO of Sea-Land Service Inc. stated that,

” This is an industry that requires an enormous amount of capital investment. In the longest bull market in the history of this country, where the S&P returns, as you know, exceeded 20 percent, where air carriers' were up 15 percent, and where third-party logistics providers' were up 18 percent, the ocean carriers' returned between 1 percent and 1.5 percent.”⁴⁶

Timothy Rhein, President and CEO of APL Limited (parent company of American President Lines), testified before the same congressional hearing. He refers to the how the OSRA has revolutionized the way the American Carriers do business. He describes a move away from service contracts negotiated through conferences, which were voted on by all members of the conference, to dealing with individual customers on a one to one basis without the need for approval of any contract, rate, or term by the conference. However, he then acknowledged,

“That is not to say that we do not communicate with other carriers. Under the authority of the Transpacific Stabilization Agreement, carriers are authorized to discuss, among themselves, matters of interest in the transpacific trade. The right to do that was specifically preserved in OSRA. We talk about market conditions, trade conditions, and others.” and concluded by stating that, “ We talk about the global economy at if it exists without the ship part of it. It exists because of the ship part of it. Because it is efficient and cheap. It is essential that we as carriers

⁴⁶ Supra, Note 12, (Statement of John Clancey, President and CEO of Sea-Land Service Inc.) 30

maintain our limited antitrust exemption so that we can rationalize some of the more destructive tendencies of this unique business.”⁴⁷

The Committee then heard from the Honorable Harold Creel, chairman of the Federal Maritime Commission. He pointed out that, “virtually all of our major trading partners afford shipping some special treatment in competition rules, allowing competitors to cooperate on pricing. Given this global consensus, maintaining antitrust immunity avoids potentially disruptive and unpredictable consequences, and maintains the comity and international harmony Congress has deemed important.” With respect to the carriers’ changing position under the OSRA he concluded that,

” the various checks and balances provided for in the Shipping Act, combined with effective oversight of the Federal Maritime Commission, serve to maintain equitable trading conditions in our ocean commerce. Clearly, rates and services are being dictated more by market forces than the impact of antitrust immunity. This, I believe, will be even more true under OSRA.”⁴⁸

Congressman Coble testified at the same hearing, having served as Chairman of the Subcommittee on Coast Guard and Maritime Transportation when it first began to discuss ocean-shipping deregulation. The subcommittee conducted extensive hearings on the issue and recognized that the OSRA is a compromise and that it represents, “a delicate balance that had the support of a majority of the major stockholders in the ocean shipping industry.”⁴⁹ He concluded his remarks by stating that, “in an ideal world, we would have a completely deregulated global shipping market with full competition. We all know that this notion is not realistic. Therefore, I maintain that antitrust immunity is, if not essential, certainly desirable to the protection of U.S. carriers, and is in the national security interest of our country.”⁵⁰

⁴⁷ Ibid

⁴⁸ Ibid, (Submission of Harold Creel, Federal Maritime Commissioner)

⁴⁹ Ibid, (Submission of Congressman Coble)

⁵⁰ Ibid

Since OSRA came into force conference agreements from a North American standpoint have lost a great deal of their significance. However, as alluded to earlier, the phenomenon of discussion agreements fills the gap left by the decline of the conferences.

6. The Shippers' position – in General

It is the shippers, the consumers of the carriers' services that hold a different view when it comes to discussing the economic benefits of antitrust immunity for conferences.

In a Transport Canada summary of the position of stakeholders in Canada, the conferences argued that the SCEA in its 1987 format should be retained and not amended, based on evidence that rates have remained low and Canadian shippers have enjoyed a reliable and high quality of service. The carriers also expressed an opinion that the passage of OSRA should not necessitate corresponding changes to the SCEA. Some examples of the carriers' views were that:

- (1) it is not well founded that without SCEA, Canadian exporters could compete more effectively in international markets, and would have wider opportunities at more competitive rates;
- (2) the SCEA benefits Canadian ports, exporters and importers. There is no empirical evidence to support the contention that SCEA has adversely affected Canadian ports, exporters or importers;
- (3) there are no compelling reasons to modify SCEA because of the adoption of OSRA, and certain modifications may adversely affect the interests of many Canadian shippers, particularly small ones.⁵¹

During an OECD workshop at the May 2000 meeting, shipper groups pointed to the OECD Council decisions that recommend the elimination of exemptions from competition laws for all sectors. Shippers posed a similar question to that which was

⁵¹ Supra, Note 1

raised in 1997 by Senator De Bané in Canada, while sitting on the Standing Senate Committee on Foreign Affairs.⁵² They questioned whether the liner industry was so structurally different from other industry sectors that it could not operate effectively in the absence of rate-fixing agreements. Claiming that their needs were not always adequately met, Shippers stated that it was their general preference and the preference of freight forwarders that freight rates and other service conditions are set on free market principles. They also raised serious concerns about the intent and use of the discussion and capacity agreements that have grown in use as conferences have declined. Carriers held that these were nothing more than another form of co-operative agreement, however, “shippers were concerned that they generally covered both conference and non-conference shipping lines, and that they were designed to remove competition on price and capacity without any countervailing measures or efficiencies.”⁵³

There is a strong historical basis for the reliance of conference carriers on a regulated market for their services. For example, underlying the provisions of the US Shipping Act of 1916 was a “consistent theme” among those supporting regulation that carriers were part of an industry that needed to protect its service providers from the perils of too much competition and the resulting lower prices. Again, this was justified on the basis that the nature of the market, with its high capital costs and with its fixed costs as a high percentage of total costs, would ultimately drive inefficient carriers out of the market.⁵⁴

Nannes objected to the carriers’ continued reliance on these arguments noting the implications of such arguments that, “carriers should be exempt from the antitrust laws because, absent the ability to collude, prices would be lower. 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 the *raison d’être* of a cartel. But, simply because competitors desire to collude in order to maximize their joint profits does not mean that it is good public policy to allow them to do so.”⁵⁵

⁵² Supra, Note 37

⁵³ OECD News Release (31 May, 2000) at www.oecd.org

⁵⁴ Supra, Note 26

⁵⁵ Ibid.

6.1 The Shippers' position - Canada

As stated earlier, conferences have existed for some 125 years. One of the problems, however, is that as conferences and their agreements have survived into the 21st century and have faced certain erosion of their antitrust exemption, some believe that the definition of a "conference" has become clouded by the emergence of similar arrangements taking the form of "Rate Agreements", "Discussion Agreements" and "Stabilization Agreements". These agreements often concern rate fixing, cargo space allocation and vessel capacity reduction.⁵⁶

The Canadian Shipping Council (herein "CSC") is composed of leading national and regional trade and industry organizations. These associations, and their member firms, represent shippers of all sizes from coast to coast and account for the majority of Canada's international trade. Under the SCEA the CSC is mandated by the Minister of Transport to serve as the "designated shipper body", to protect shippers' interests and to provide a counter-balance between shippers and shipping conferences.

Walter Mueller, the Secretary of the CSC, referring to the way carriers' currently operate in Canada stated,

"Their membership often consists of regular conference and non-conference carriers. Some have official tariffs and others disguise them under the term "voluntary guidelines". They all, however, seem to have the same common structure which is generally established to find ways around liner conference regulations such as SCEA and this is causing shippers enormous problems. The Canadian legislation does not cover this diversity of cartel operations, yet authorities have silently tolerated it. Neither the Canadian Transportation Agency, the Competition Bureau nor Transport Canada has been able to provide the CSC with a formal ruling

⁵⁶ Ottawa, Canada, Parliament of Canada, House of Commons Standing Committee on Transport and Government Operations – Shipping Conferences Exemption Act 1987 – Review of Bill C-14 part 15, Paper 01-01: submission made by Walter Mueller of the Canadian Shippers' Council (April 5, 2001) referred to in CSC OECD submission at www.oecd.org/dsti/sti/transport/sea/prod/CSC_submission_CompetitionPolicy.pdf

on whether these groups fall under the current “conference” definition of SCEA or not. Yet they all continue to benefit from antitrust protection as true conferences do, even their non-conference carrier members. The CSC request for clarification of this serious issue seems to have been ignored by the authorities and the proposed new SCEA remains in total darkness over the current ambiguities”⁵⁷

It is the view of Canadian shippers’ that the SCEA should be eliminated or, at a bare minimum, should be brought in line with the OSRA 1998. According to a summary by Transport Canada, in general terms Canadian shippers’, “ believe the SCEA serves to increase trading costs and inefficiency, and may be detrimental to Canadian shippers and industry” and that, “ the conference system is considered to be outdated, and... there is a need for it to be subject to the full impact of the Competition Act.”⁵⁸ Transport Canada claims that this opinion manifests itself in three typical comments:

1. This type of legislative protection in the global marketplace clearly advantages foreign flag ocean carriers;
2. It is time that the conference system is subjected to full competition backed up by the Competition Act, and market forces are left to regulate price and service levels;
3. The OSRA is a vital first step in allowing free and competitive ocean liner pricing which must be matched, if not bettered, by Canadian legislative action.

The CSC maintains that the cost of transportation is one of the most important factors in ensuring Canada’s export competitiveness and that Canadian industry must have free competition in marine transportation so that costs are based on the most efficient carrier and shippers having the ability to negotiate with conference lines in the same manner

⁵⁷ Ibid

⁵⁸ Report of Transport Canada, “*Summary of Stakeholder Views on SCEA*” (Backgrounder) by Marine Policy and Programs Branch” (Ottawa: Transport Canada: June 1999) see <http://www.tc.gc.ca/pol/en/scea/SUMMARY%20OF%20VIEWS.htm>

that they currently negotiate with railways and motor carriers.⁵⁹ Mr. Mueller comments that,

“When one Minister says about the new SCEA, ‘It is a prime example of the Government of Canada working in partnership with its stakeholders’, Canadian shippers are sad to see that they and their concerns have again been totally left out of that ‘partnership consideration’. In our mind it is clear that the conference lobby, consisting exclusively of foreign- based ocean carriers, has again succeeded with totally inaccurate information to convince authorities of the continued need of antitrust immunity for them. They continue to claim that it is them who are providing stability in service and freight rates to the trade and that unless Canada retains its antitrust protection for them they would move their operations away from Canadian ports. Why is it then, that it is conference carriers who move in and out of conference arrangements as it suits them and who operate quite successfully as independent carriers in different trades without antitrust immunity. It is also them who are the price leaders on freight rates when major rate restoration programs are implemented, sending rate levels sky high, while independent or non-conference carriers, who have no antitrust immunity, merely follow the trend established by conferences. This makes conference cartels the greatest offenders on rate and service stability, yet they continue to claim such stability as their own invention. The livelihoods and financial success of conference carriers does not depend on their antitrust immunity and on protection from normal Competition Act provisions. We are profoundly disappointed that the Canadian Government succumbed to carrier threats that they would withdraw service if they didn’t like the amendments to SCEA. This is incorrect, as carriers will seek out cargo if it is there to be carried at a profit. The Canadian Government should be asking itself, why carriers are so interested and insistent in maintaining a rate setting mechanism that is out of date, anti-competitive and skewed in favor of the carrier? The answer is that it allows carriers to allocate shippers amongst themselves,

⁵⁹ Supra, Note 56

limit competition and protect an otherwise costly and non-competitive system. In any other industry this would be known as price fixing and collusion.”⁶⁰

In the discharge of its mandate, the CSC has made several recommendations for changes to Canadian law.⁶¹ The recommendations were as follows:

1. Shippers should have the ability to negotiate contracts with individual conference carrier(s) on a confidential basis.

There is no provision in Bill C-14 that prevents carriers from disclosing the contents of and sharing the information contained in these service contracts. It is the view of the CSC that this should have been included in the final version of Bill C-14 when it was presented to the House. In particular, the CSC wanted Canada to follow the lead of the OSRA and incorporate provisions similar to those contained in Sections 10 and 11 of the OSRA:

- Section 10 (b) (13) A, B & C, which prohibits a carrier from disclosing any information in a service contract or the transaction that the contract covers. According to the CSC, this “safeguards confidentiality to the shipper and is considerably more restrictive on carriers than the proposal in SCEA.”⁶²
- Section 10 (c) (7) & (8) also deal extensively with “Concerted Action by conferences”⁶³

⁶⁰ Supra, Note 56

⁶¹ Canadian Shippers’ Council presentation to the OECD Secretariat: Maritime Regulatory Reform (May 17, 2001) p. 12 at www.oecd.org/dsti/sti/transport/sea/prod/CSC_submission_CompetitionPolicy.pdf

⁶² Supra, Note 56, pp.2 & 3

⁶³ Supra, Note 56, p.3

The CSC believes that, a revised SCEA has to clearly address the issues of service contract confidentiality and the safeguarding of shipper's interests, by prohibiting carriers from disclosing to anyone information of a service contract or the transactions that such contract covers.⁶⁴

2. That there be a simple and effective dispute resolution mechanism with real teeth, important penalties, and enforcement powers.⁶⁵

In order for provisions such as the confidentiality of service agreements to lead to the promotion of competition, the CSC argues that there must be well-structured and reliable enforcement provisions which are not unduly cumbersome for those who wish to use them. According to the CSC, "The current Act has no workable provisions for dispute resolution and leaves the shipper without even a minimal balance of power vis a vis the carrier."⁶⁶

- Section 11 (a) provides for, "a simple and effective provision for filing of a shipper complaint and for obtaining remedy for injury caused. SCEA on the other hand contains no such claims provision nor potential relief to shippers.

3. That there be a "sunset" provision

In addition to the ability to enter into confidential contracts, it is arguable from the shippers' perspective that one of the most significant potential reforms to the Act was the inclusion of a sunset provision which would remove anti-trust immunity altogether within five, or possibly, ten years. During a Tripartite meeting in Vancouver in early 1999 Shippers' Councils from around the world made a joint declaration supporting a five-year "sun-setting" provision. The CSC in a letter dated February 17, 1999 to Mr. Andre Pageot Director General, Marine Policy and Programs,

⁶⁴ Supra, Note 56, p.3

⁶⁵ Supra, Note 56, p.3

⁶⁶ Ibid

Transport Canada suggested the incorporation of a “ five year ‘sun-setting’ provision or less, should another country and major trading partner with Canada abolish anti-trust immunity for ocean liner conferences prior to the 5 years.”⁶⁷ In January 2000, it was reported that the federal Transport Department favoured a ten-year sunset clause, to give conference carriers a fairly long period to adjust to totally open competition.⁶⁸ At that time, Mr. Allen, Chairman of the CSC stated that ten years would be far too long, saying that, “no one these days has a ten year planning horizon, five years would be a reasonable compromise.”⁶⁹

The CSC, in submitting its report to the OECD this past May concluded that,

”On closer examination of the Government’s proposed amendments to SCEA 1987 it became quite clear, however, that most of the major recommendations for revision submitted by the CSC had been ignored. The proposed amendments did not meet the established OSRA provisions for individual confidential contracts between a shipper and a conference carrier, again ignoring the necessary safeguard provisions on confidentiality. The CSC has now formally responded to these shortcomings and has since also appeared before the Government’s Transport Committee on the issue. Transport Canada has responded to our concerns about confidentiality and a revision to the amendments has been accepted by the Standing Committee on Transport of our Parliament. Assuming that revision survives and appears in the SCEA amendments as proclaimed, we are hopeful that it will provide Canadian shippers with confidential service contracts on the same basis as U.S.

⁶⁷ Excerpt from letter dated February 17, 1999 from The Canadian Shippers’ Council to Mr. Andre Pageot Director General, Marine Policy and Programs, Transport Canada see copy of letter attached to CSC submission at www.oecd.org/dsti/sti/transport/sea/prod/CSC_submission_CompetitionPolicy.pdf

⁶⁸ Lloyds News Release “International Regulation: Division over Canadian ocean shipping reform” (20 January, 2000) at Lloydslist.com

⁶⁹ Ibid

shippers. We will only be able to assess whether that occurs, however, after the amended SCEA is in force.”⁷⁰

The CSC’s position is consistent with the current trends toward the globalisation of international markets and they have advised Transport Canada that,

“Canadian industry’s competitiveness abroad is of vital importance to Canada’s continued well being and prosperity, a fact clearly recognized by the Canadian Government. It is also a well known fact that the cost of transportation is one of the most important factors in ensuring Canada’s export competitiveness. There is no room for price fixing cartels operating within artificial and outdated infrastructures which add substantially to industry’s trading costs. Canadian industry must have free competition in marine transportation and costs based on the most efficient carrier. To maximize Canada’s international competitiveness, shippers must have the freedom to negotiate rates and service with the carrier of their choice who best fills their needs. Shippers must be able to deal in a transportation environment which ensures price and service competition, with the ability to exchange information freely, confidentially and on an individual basis with all service suppliers. Market forces set prices for Canadian goods and it is therefore essential that cost components including freight are also set entirely by the same market forces. The CSC members across the country believe that OSRA is a vital first step in allowing free and competitive ocean liner pricing which must be matched, if not bettered, by Canadian legislative action. The exact overall cost of the conference system to Canadian shippers is difficult to accurately assess, but we know it is an unwarranted and extraordinary burden. The CSC believes that without it, freight rates in an open market environment would be more competitive and would quickly settle at non-conference levels, or less, for all shippers. Independent carriers have traditionally priced their services 5 - 10% below those of competing conferences.”⁷¹

⁷⁰ Supra, Note 61

⁷¹ Supra, Note 67

“The results show that regardless of the shipper size or industry sector, rate volatility from the conferences is very high, particularly in the two major Canadian trades, namely the North Atlantic and the Far East. In our view it is clear that conferences have not provided rate stability.

Conferences are rather the price leaders and non-conference carriers merely follow the conference’s rate actions. As perhaps best illustrated in the Far East area, conference’s rate restoration programs have had drastic impacts on transportation costs for export and import shippers alike. This is also the trade where the Canada Westbound Transpacific Stabilization Agreement (herein “CWTSAs”) controls about 90% of the container volume shipped from Canada and continues to maintain that they do not operate as a monopoly.”⁷²

6.2 The Shippers’ position – U.S.

As referred to earlier, on May 5th 1999, 4 days after the OSRA took effect in the U.S., a hearing was convened under the direction of Congressman Hyde examining the position of Shippers under the new Act. Mr. Hyde is a vocal opponent of the retention of any form of antitrust immunity for carriers and sees such immunity as a violation of the principles of free competition and a mechanism that drives up transportation costs for shippers and ultimately consumers. Mr. Hyde states, “As those who follow this issue well know, I’ve long questioned the justification for the antitrust immunity provided in the Shipping Act. At the most visceral level, the industry has evolved to the point that the immunity largely benefits foreign-owned carriers, at the expense of American shippers, and non-vessel owning common carriers or NVOs.”⁷³

During the same hearing the Honorable Delmond Won, a Commissioner of the Federal Maritime Commission was called upon to testify concerning his report and

⁷² Supra, Note 67, p.6

⁷³ Supra, Note 12

recommendations to the Federal Maritime Commission in Fact Finding Investigation Number 23, entitled Ocean Common Carrier Practices in the Transpacific Trades.

Mr. Won concluded as follows:

“The documents and testimony gathered during the investigation generally supported the allegations which caused this initiation and revealed that

- (1) ocean common carriers took advantage of an unusual supply-demand imbalance to turn away cargo which was less profitable and demand voluntary rate increases in return for vessel space, regardless of obligations in existing service contracts,
- (2) ocean common carriers engaged in various other practices to take advantage of the excess cargo demand, such as refusals to honor service contract commitments to shippers' associations, which created pressure upon members to seek space on their own at higher rates,
- (3) ocean common carriers participated in conference service contracts while opting out of negotiated contract rates, enabling the opting out carrier to charge tariff rates, and
- (4) conference lines may have failed to file minutes as required of certain meetings at which there were discussions relating to allocation of space.”

He said that, “collectively, these activities resulted in an environment, best described by one carrier's statement, that “the box goes to the highest bidder.”⁷⁴

Mr. Won prefaced his remarks with a brief analysis of the “Asian Crisis” which was in full swing by the second half of 1997, a critical time period covered by the report. He describes how US export trade with several Asian countries from Thailand to Korea fell dramatically in 1998 while imports from those countries during that year increased by as much twenty percent. It was as a result of this trade imbalance that a serious shortage of vessel space and containers emerged on US inbound Pacific trade routes.

⁷⁴ Supra, Note 12 (Submission of Hon. Delmond Won, Commissioner of the Federal Maritime Commission)

In mid -1997, the Transpacific Stabilization Agreement (herein the "TSA"), a "discussion agreement" effectively took over the inbound US trade with a market share on those routes approaching 86%.⁷⁵ This discussion agreement was able to halt competitive discounting among its members by utilizing a comprehensive email communication system whereby all members could notify one another of proposed rate changes and service contract discussions.

According to Mr. Won the result of this dominant, well organized discussion agreement coupled with a severe trade imbalance was a situation where large champion accounts were generally unaffected, while middlemen that are referred to as non-vessel operating common carriers, or NVOCCs, were the first to be told that their cargo would not move unless they agreed to increase the rates they had negotiated just a few months earlier in their annual service contracts. As a result, most NVOCCs capitulated to the carriers' demands.

Is the above summary a concrete example of blatant price fixing by carriers who found themselves in a dominant position or is it simply the natural result of a short-term shortage of supply and excess demand brought about by the "Asian Crisis"? The Report concludes that,

"the regulatory concern raised during the course of the investigation is not that the carriers' took advantage of a very tight market to increase rates, that was to be expected, rather, the problem is that the carriers' targeted their increases and allocated their space in a manner that appears to be discriminatory and otherwise inconsistent with their obligations under the 1984 act, and that TSA's centralized information exchange system provides a forum in which all of its members could take advantage of the unusual market conditions in a coordinated manner."⁷⁶

The TSA has admitted that the discussion agreement allows carriers to operate in a coordinated manner much in the same way as they did under the conference system.

⁷⁵ Joseph Francois and Ian Wooten *Trade in International Transport Services: The Role of Competition* (Amsterdam-Rotterdam: Tinbergen Institute June 2000) at p. 3 see <http://www.tinbergen.nl>

⁷⁶ Supra, Note 73

Albert Pierce, President of the TSA stated this past June that, "Admittedly, some of our activities, and the way we do them, date to predecessor rate conferences, but we're continuing a top to bottom review, to ensure that our actions are consistent with carrier and customer goals under OSRA and to see how members might jointly deploy new technologies within the agreements to improve the way they do business."⁷⁷

Andrew Danas, assistant general counsel for the American Institute for Shippers' Associations, Inc.⁷⁸, appearing before the same committee stated,

"Up until enactment of the Ocean Shipping Reform Act of 1998, we supported the antitrust exemption for the ocean carrier industry. As a matter of fact, we joined with the Ocean Common Carrier Coalition back in 1995 to oppose the changes that ultimately led to OSRA, and I could recite chapter and verse all of the reasons why the antitrust exemption should stay on the books. We have now changed our position, and we believe there should be a repeal of the antitrust exemption, or at least some of the provisions of the Ocean Shipping Reform Act should be reconsidered. The reason for that is very simple. In the international shipping industry, there has always been a quid pro quo as far as having an antitrust exemption. The reason for that is that ocean shipping is the gateway to international trade. It is a derived demand. Nobody buys ocean-shipping services simply to go and say, "I want to ship a box somewhere because it is fun to ship the box." They do it because they have markets overseas, or they are trying to import goods into the United States. So, for the ocean carrier industry to have an antitrust exemption it is because it is looking for stability of service, stability of rates, and to provide a common carrier service. As long as the antitrust exemption provides that, we support it, and we support it if it is done in a non-discriminatory manner. That means that common carriage principles

⁷⁷ Lloyds New Release "Europe/ Liner expert braced for changes in discussion accords" (20 June, 2001) at <http://www.lloydslist.com>

⁷⁸ The Shippers' Association industry consists of small to medium sized shippers that join or form shippers' associations in order to achieve economies of scale to get volume discount rates on service contracts.

apply, and that all shippers have equal opportunity based on objective transportation factors, economic factors, to get competitive access to ocean transportation; and to make sure that a large shipper and a small shipper are not having their competition in foreign markets or U.S. markets distorted by the fact that the ocean carrier industry itself has an antitrust exemption.”⁷⁹

Referring to the principle set forth in an advertisement placed in the Washington Post by American President Lines on May 5 1999, the day of the hearing, which stated that, “APL’s business is to develop global transportation solutions for customers, the details of which are nobody else’s business”⁸⁰, Mr. Danas stated,

“The Ocean Shipping Reform Act works on this principle, and we are all for that. But if you’re going to have that, then you can’t have voluntary guidelines that the ocean carrier industry is operating under with a 90 percent market share, pursuant to confidential, voluntary guidelines that the shipping portion of the industry doesn’t know about, that the carriers’ are acting collectively together with, and that they are allowed to engage in individual discrimination against smaller shippers because the large shippers will have the power to break those guidelines. You can’t have that and then go and say that this is a competitive statute, or that the antitrust exemption should be kept. You either have to go and say that we are going to have confidential contracts, have a level marketplace for everybody and make it fair, in which case we are going in the direction this APL ad says we’re going, or, alternatively, you have to have oversight and safeguards.”⁸¹

Ronald Jacobson, vice president of Northstar Drawback Consultants, Ltd. appearing before the committee on behalf of the Customs Brokers and Foreign Freight Forwarders

⁷⁹ Supra, Note 12 (Submission of Andrew Danas, Assistant General Counsel for the American Institute for Shippers’ Associations, Inc.)

⁸⁰ The advertisement stated, ‘at APL, it is our business to develop global transportation and logistic solutions for our customers, the details of which are nobody else’s business. Customized, confidential, and competitive. Just as it should be.’

⁸¹ Supra, Note 12

Association of Chicago was critical of “discussion agreements” and provided examples which he felt reflected carrier price discrimination. He pointed to the following examples which he claimed occurred during the 1998 -1999 Pacific shipping season:

- (1) Blatant discrimination against non-vessel operating common carriers (herein, “NVOCCs”) and smaller shippers whereby he claims that during the peak of the 1998-1999 shipping season collective action was taken under TSA-issued directives and so-called “Voluntary Guidelines and NVOCC cargo was singled out for rejection, reduction, and/or increases by most carriers. He refers to an excerpt from the Won Report Summary wherein the Commissioner states,” that NVOCCs “were also subjected to space discrimination . . . [s] ample excerpts from carrier documents included: ‘Currently only service contract accounts are getting space . . . and all tariff and NVOCCs bookings are being rejected.’; ‘All existing NVOCC [contracts] will be fully implemented [at] the US \$300 Peak Season Surcharge . . . such that those unwilling to accept or a little hesitant will definitely not be able to get any space for the rest of the next two months.’; ‘And because of the tight space problem, NVO shipments is (sic) always the first once (sic) to go.’”⁸²; and
- (2) Voiding of Service Contracts where TSA members told NVOCCs that their contracts were no longer valid because the minimum amount of cargo as agreed to be shipped had been completed. According to Mr. Jacobson, “Traditionally, carriers and shippers, including NVOCCs, have continued to utilize a service contract for their transportation needs throughout the entire duration of a contract, regardless of the volume shipped at any given time during the year.”⁸³ He claims that the carriers’ actions, “ resulted in termination of valid contracts in the middle of the peak shipping season and forced NVOCCs to take the higher rates imposed on them by the shipping lines without any true alternatives.”⁸⁴

⁸² Supra, Note 12

⁸³ Ibid

⁸⁴ Ibid

Negotiations were taking place at the time of the hearing to establish carriage contracts for the 1999-2000 Pacific shipping season and Jacobson contends that the TSA "voluntary guidelines" contributed to significant increases in rates that were being negotiated. He concluded that,

"The TSA appear once more to be restricting true competition in the trades. NVOCCs have found that all contract offers from the TSA steamship lines, now including China Ocean Shipping Company ("COSCO"), a traditional independent carrier, are almost identical, from rates to surcharges, to even the language of the new "confidentiality clauses" which the Reform Act makes a reality. In effect, TSA has unilaterally raised rates for the current shipping season by 50% over last season. The impact of this is severe since the TSA is comprised of 95% of the carriers in that trade lane."⁸⁵

There is also criticism by Mr. Jacobson that the TSA abused its position with respect to the confidentiality measures incorporated in the OSRA. He stated that, "The option many lines "give" to shippers is: use the language offered for confidentiality of the contract or the contract will be "public", thus defeating the very benefit of the Reform Act [OSRA] for NVOCCs and smaller shippers." and he further claims that,

"The TSA is building a commodity/shipper specific data base which will then be used by the TSA as internal guidelines so that members cannot underbid each other. They are collectively sharing vital commercial information in such a pervasive way as to completely remove competition. This is in an era of so-called confidential service contracts. But the most egregious aspect of this practice is that service contract information is available to 95% of the carriers by virtue of the antitrust immunity on the books."⁸⁶

Finally, Jacobson claims that favourable treatment is often given to large accounts. He states that, "As the FMC stated in its Report Summary on the Won Investigation, some carriers afforded special treatment to so-called "VIP" accounts last year. The FMC found

⁸⁵ Ibid

⁸⁶ Ibid

that documents obtained during the investigation indicate that certain large, "reliable" contract shippers generally received preferential space allocation. Documents indicate that, in September 1998, NVOCCs, as a class, were forced to accept increases of at least \$300 from several carriers—which was on top of the initial \$300 increase which was imposed in May 1998. The FMC found that no such wholesale attempt was made to increase the rates for certain proprietary shippers."⁸⁷

Jacobson then put the following recommendations forward on behalf of the Customs Brokers and Foreign Freight Forwarders Association of Chicago:

- As OSRA now stands, Section 10(b)(16) of the Shipping Act of 1984 does not appear to prohibit "discussion agreements" from collecting and exchanging information on shippers, including NVOCCs; as noted above, it is clear that the TSA is building a commodity/shipper specific data base which will then be used by 95% of the carriers in the Far East to set price and service benchmarks, completely undermining competitive forces; this must be prevented by legislation prohibiting such sharing of commercial information among carriers through "discussion agreements";
- Require the Federal Maritime Commission ("FMC") to exercise Section 15 authority on anti-competitive activities in all agreements of any kind where the composition of the membership of the agreement is comprised of more than 60% of the total vessel capacity in a trade lane;
- Permit private parties to seek enforcement of the shipping laws under Section 6(g) of the 1984 Act, and allow double or treble attorney's fees;
- Permit the US Department of Justice, and/or the FMC, without limitations, and with the full right of intervention to shippers, to challenge implementation of agreements which are anti-competitive under Section 6(g);

⁸⁷ Ibid

- Allow NVOCCs to enter confidential service contracts with shippers so as to allow them the same advantages of OSRA as steamship companies enjoy; and
- Short of passage of all of the above legislative remedies, and in view of the abuses inherent in discussion agreements, we strongly encourage the complete repeal of carriers' antitrust immunity, especially since they do not benefit in any significant manner any United States interests."⁸⁸

7. The Economic Arguments

The first thing one notices when reviewing articles written on the economic benefits and detriments of conferences is that there is little consensus. Ocean shipping cartels have employed exclusive contracts for more than 125 years. More recently, with the decline of conferences, carriers are taking advantage of the same antitrust immunity with respect to discussion and similar agreements. Non-cartel carriers and customers alike have often complained about their usage to regulatory authorities and the courts. As stated above, cartel (conference) member firms have long defended the use exclusive contracts as necessary to prevent destructive competition and allow shipping firms to make a profit in what they claim is a unique marketplace. There is, however, some historical precedent concerning the prohibition of conferences and their cartelistic behavior. In the U.S., conflict within the shipping industry came to a head in the 1950s. In a decision that led to an outcry by the shipping industry, the U.S. Supreme Court, in 1958, ruled that exclusive contracts that reduced or eliminated competition in ocean shipping were illegal.⁸⁹ This was relatively short lived, however, and only after an extended political struggle was the matter resolved in 1961 with the passage of amendments to the Shipping Act that overruled the court's decision.⁹⁰

⁸⁸ Ibid

⁸⁹ Federal Maritime Board v. Isbrandtsen Co., Inc., et al., 356 U.S. 481 (1958).

⁹⁰ Pedro L Marin & Richard Sicotte, *Exclusive Contracts and Market Power: The Case of Ocean Shipping* (1999) Pedro L. Marín Department of Economics Universidad Carlos III de Madrid and Richard Sicotte Department of Economics University of Calgary October 1999 p. 3 see <http://econ.ucalgary.ca/fac-files/rs/s5.PDF>

We have seen that the extent and degree of influence that these cartels have maintained has diminished recently. However, the collusive activities of carriers cooperating under discussion agreements and similar documents in an antitrust environment keep the attention of economists focused on the debate. This is fueled by a relatively recent trend in many countries to deregulate transport services such as airlines and railroads and other services such as telecommunications.

Before turning to the specific economic arguments it is useful to examine some of the cartelistic practices that conferences have participated in over the years. The primary tools of the conference were loyalty contracts that were offered to its customers.

The first of these to gain wide use was known as the deferred rebate. This instrument is still used by conferences that operate in non-U.S. trades. The deferred rebate worked by giving loyal customers a rebate if they patronized conference members exclusively for six months. The rebate is usually equal to 10% of the freight rate paid and is paid in two parts. The first half is paid after an additional six months of exclusive patronage and the second half is paid after a further six-month period of loyalty. In the U.S., after several antitrust challenges and a congressional investigation, a clause prohibiting deferred rebates was included in the U.S. Shipping Act of 1916.

After World War I, many conferences began to use dual rate contracts in order to cultivate loyalty among their customers. Dual rate contracts involved a conference offering a contract to its customers that allowed the conference to charge a customer one of two different rates depending on decisions that customer made regarding the transport of its goods. The customer would pay either contract or non-contract rates depending on its decision. Those customers who signed dual rate contracts with the conference would typically pay the lower contract rate. However, if a customer who signed a dual rate contract violated the terms of that contract by shipping cargo on a non-conference vessel, it would be bound to pay liquidated damages, the most common of which were damages equal to the charges that would have been paid had the client shipped at contract rates with the conference. It was also not unusual that the penalty amounted to a multiple of this contract rate.⁹¹

⁹¹ *Supra*, Note 90, pp 6-9

One of the problems with studying the pros and cons of conferences and similar arrangements from an economic perspective is that the availability of financial information can be scarce and is generally closely guarded by carriers. There is also the problem that one cannot examine economic data in a vacuum but must consider the effect of a range of other factors including market forces and industry specific idiosyncrasies all of which may contribute to a firms profitability or lack thereof.

It has been noted that there is "substantial anecdotal evidence" suggesting that conferences used the dual-rate contracts to drive out competition or stop new entrants from competing on a particular route. It has also been argued that dual-rate contracts and other forms of loyalty contracts were necessary to prevent destructive competition. This is a very similar argument to the one that is traditionally advanced by carriers in an attempt to distinguish the shipping industry from other industries. Some maintain that an "empty core" -- the absence of a competitive equilibrium, characterizes the liner shipping industry and without the availability of cartels and other types of collusive measures the shipping industry would be in jeopardy. Sjostrom suggests that these shipping conferences may exist, not as monopolizing cartels, but to ensure that shipping services are provided in a market in which there is no competitive equilibrium. In a market with unavoidable fixed costs, the core may be empty and he argues that collusion imposes equilibrium where otherwise none would exist. He tests this hypothesis against that of the conference being a cartel and finds some support for the theory of the core.⁹² Under this argument, loyalty contracts are desirable to the extent that they are required to sustain a stable conference system.

Marin and Sicotte conducted a study based on the question of whether loyalty contracts are capable of enhancing conference firms' performance by acting as a barrier to entry.⁹³ They contend that several theoretical contributions have shown that the practice of using loyalty contracts in fact has potentially strong anti-competitive effects on the shipping industry. The study was focused on the evolution of firm's returns during the 1950s and the authors focus on this period because there was a period of regulatory instability in the industry at that time. The authors contend that the main advantage of using this time period is that shipping companies were not diversified at the time and their returns

⁹² Supra, Note 90, pp 6-9 referring to the work of Pirrong and Sjostrom

⁹³ Supra, Note 90, pp 6-9

depended only on their shipping activity. The main disadvantage however was the difficulty in testing the effects of the use of loyalty contracts by conferences on independent companies that were not using loyalty contracts. This is due to the inability to collect financial information on these firms because they were not publicly listed at the time.

The results provided by Marin and Sicotte suggest that loyalty (dual-rate) contracts affect positively firms' performance. However, they caution that these results should be interpreted prudently because not all the events considered in their study seem to have affected firms' returns and results differ across firms. They contend however, that this could be consistent with the fact that some of the events that they studied were anticipated by the firms and that the various firms studied may have had differing degree of dependence on the existence of dual-rate contracts because of their size, product mix or technological characteristics. They note that further research is required on this last point in order to better interpret their results.⁹⁴

Clyde and Reitzes conducted a study whereby they examined shipping rates filed by ocean liner conferences with the FMC between 1985 and 1988. In the study they look for evidence as to whether the rate structure in ocean shipping markets is based on costs, the exercise of market power by conferences, or the exercise of market power by firms in a manner unrelated to the conference system. They conclude, "some aspects of the conference system may contribute to higher shipping rates, particularly when the conference has a sizable market share." They also find that "conferences do not act as perfect cartels maximizing the joint profits of their members."⁹⁵

8. The Role of the OECD and the United Nations

The OECD has been actively involved in examining the effect of liner conferences on world trade for a number of years. With respect to matters concerning the shipping industry the OECD, of which Canada and the U.S. are members, is guided by a "Code of Liberalization of Current Invisible Operations"(herein the "CLIO") originally adopted in

⁹⁴ Supra, Note 90, p 23

⁹⁵ Supra, Note 75, p 5

1961. Under the Code, governments are required to refrain from taking action that would be contrary to the principle of free circulation of shipping in international trade and free and fair competition. In 1987 as an extension to the CLIO, the Council of the OECD endorsed a set of "Common Principles of Shipping Policy for Member Countries". These Principles promote among OECD member governments the ideal of safeguarding and promoting open and fair competition and preventing the abuse of a dominant position by any commercial party. However, in Annex II of the Common Principles there is a statement that recognizes that liner-shipping conferences may be advantageous when basic guidelines and rules for them have been established and followed.

In 1998, the Maritime Transport Committee of the OECD published its "Conclusions on Promotion of Compatibility of Competition Policy Applied to International Liner Shipping". The report concluded that there is a need to encourage uniformity of competition policies between Member countries and that where incompatibility existed, Member countries should seek practical solutions to overcome their differences. In particular, when implementing competition policy involving the liner sector, key objectives such as free and fair competition, maintenance of open trades, market access, economic efficiency, and transparency of laws, regulations and rulemaking processes, are to be pursued.⁹⁶

Developing countries have for some time been exposed to but have not successfully participated in the ongoing debate regarding carriers and antitrust exemption. They have had little chance of putting forth their views or having their concerns addressed.

On April 6, 1974, the United Nations Convention on a Code of Conduct for Liner Conferences (herein the "UN Code"), developed by the United Nations Conference on Trade and Development (herein "UNCTAD"), was adopted. It came into force in 1983 with ratification by the requisite number of countries representing 25% of the total volume of world trade. It effectively allows the lines of the countries at each end of the conference trade to enter into commercial sharing agreements that allocate equal shares of the cargo between their ships. Third country shipping lines have the right to acquire a significant part of the conference trade. This provision for discrimination in favour of national flags is considered by many to be inconsistent with the principle of free and fair

⁹⁶ Supra, Note 1

competition. This is cited as the main reason why Canada is not a party to the UN Code for Liner Conferences.⁹⁷

In particular the specific form of cargo reservation scheme in the UN code is known as the 40- 40-20 rule. Governments applying the UN code require conferences to divide the cargo transported according to the following formula: 40% for ships belonging to the exporting country, 40% for ships belonging to the importing country, and 20% for ships belonging to other countries. These restrictions were designed to encourage the development of the shipping industry of developing countries.⁹⁸

According to Tetley and Peippo, the UN Code was a compromise between two basic principles, "the advancement of the merchant fleets of less developed nations and the controlling of the monopolistic practices of liner conferences in order to reduce the cost of ocean transport to shippers and consignees." They claim that the two principles, which are quite contradictory, do not represent a conflict between developing nations and nations with large merchant fleets but instead, represent a conflict found in the "bosom" of developing countries who wanted favoured treatment for their local industries as well as favoured treatment for their own national fleets. They also allege that while developing countries condemned the monopolistic practices of liner conferences they had no "compunction about supporting monopolistic proposals which would favour their own national carrier interests."⁹⁹

It is also interesting to note that when the UN Code was being developed in the early 1970's developing countries were split between two main purposes. When countries met at Unctad III in 1973, the Latin American countries developed a draft text that favoured their own national fleets over the conference lines while the African and Asian countries prepared a draft text that favoured their domestic shippers.¹⁰⁰

⁹⁷ William Tetley and David J. Peippo, *"Liner Conferences in Canada under Canadian Law and the U.N. Code of Conduct for Liner Conferences"* (1982), at II-1

⁹⁸ *Supra*, Note 11

⁹⁹ *Supra*, Note 97 at II-1

¹⁰⁰ *Ibid*, at II-1

Tetley and Pieppo sum up the UN code as, "an international convention which, in theory, promotes open conferences and open competition to benefit shippers but which also permits national protection and promotion of national fleets" and they conclude that the UN code, "has been compromised by these two contradictory themes, and lastly by the reservations of its signatories"¹⁰¹ Perhaps this is the downfall of the UN code which some 18 years after it finally came into force is still largely ignored being applied mostly on routes between West Africa and Europe."¹⁰²

9. The WTO and Trade Liberalisation

Through the WTO, the current trend in world trade is towards promoting an international trading environment of global liberalisation with the dominant trend tending towards multilateralism and the distant and perhaps unrealistic goal of international free trade. Is it possible for developing countries to utilize their position in the WTO to influence the policies of developed countries regarding matters related to shipping services? It has been suggested that a fundamental feature of the WTO, and indeed the very character of the WTO, is that it is a political construct, a negotiating arena, and not some supra-political legal body. Its *raison d'être* is as an instrument with which the most powerful governments (and their global corporations) are re-shaping international economic rules and regulations to promote the emerging liberalised global economy. The WTO is a political platform upon which the most powerful states act to promote their respective interests in relation to each other and the rest of the world. As such, WTO 'multilateral' negotiations are characterised by constant political battles, overt and covert, but also by complex backstage manoeuvres and tactical alliances between the strongest economies. However, developing countries are gradually formulating their own counter-strategies and building alliances in the WTO against the 'majors' or the 'quad' (the EU, the US, Canada and Japan). The WTO is increasingly understood to be a site of political struggle. WTO terms have to be understood to be accessible to alteration if appropriate alliances are created and effective interventions are pursued and reinforced by wider governmental and non-governmental campaigns, and pressures from outside

¹⁰¹ Ibid, II-2

¹⁰² Supra, Note 11

the WTO. This is the context and the spirit in which the WTO and its role *vis-à-vis* the LC and the interests of ACP countries have to be viewed.¹⁰³

The conclusion of the Uruguay Round in 1993 and the subsequent emergence of the World Trade Organization marked an important new era in world trade. The General Agreement on Tariffs and Trade (GATT) began in 1947, with twenty-three (23) signatories. It was part of a global approach aimed at restructuring international economic relations after the end of World War II. The impetus for the establishment of GATT came from the chaos generated by the pervasive protectionism of the 1930's which had resulted in a significant reduction of trade between nations and had impacted negatively on world economic growth.

Until the most recent round of negotiations and despite several "rounds"¹⁰⁴ leading up to Uruguay Round, GATT 1947 remained a set of rules governing trade between primarily developed industrial countries. There were, however, certain provisions that emerged through negotiations of GATT over the years that permitted concessions to be granted to developing countries to assist them in participating in trade with developed countries. However, until the Uruguay round there were no provisions that dealt with trade in services. The WTO system includes a revised GATT (1994) and also includes a parallel institutional framework devoted to services trade-the General Agreement on Trade in Services (GATS). GATT 1994 also involves a deeper commitment by the developing countries to participate in the multilateral trading system with a clear shift towards globalisation of trade through trade liberalization.

Unfortunately, the Uruguay Round negotiations on market access in several service sectors were wrought with difficulties and proved problematic, even by Uruguay Round standards. The fact that service sectors had been singled out for separate negotiations seemed to create new obstacles to forming a consensus on issues and many of the

¹⁰³ D Keet, Booklet *"Integrating the World Community: Political Challenges and Opportunities for Developing Countries"*, (1998) Southern African Perspectives No 70, Centre for Southern African Studies, School of Government, University of the Western Cape, South Africa

¹⁰⁴ The better known of these "rounds" being The Kennedy Round (1964-67) and The Tokyo Round (1973-79)

service sectors failed to reach an agreement.¹⁰⁵ One of the sectors where negotiations were extremely problematic was maritime services.

Points of contention in the maritime negotiations included cabotage restrictions and national preference schemes. According to Francois and Wooten, "In retrospect, given that the industry is largely protected from competition on domestic routes (cabotage) and exempted from antitrust rules for international routes, it is not surprising that the industry and its negotiating representatives resisted liberalization. The U.S. delegation, for example, was backed by a very vocal domestic industry, and stood strongly opposed to making market access commitments in the sector, especially with regard to cabotage."¹⁰⁶ There have been additional reasons suggested for the failure to obtain specific commitments in maritime transport services despite the general progress made and the continuous pressure for liberalisation globally. One source has identified reluctance on the part of the United States to give up its unilateral measures to counter its perception [on] protectionism, and inadequate commitment to liberalism by large countries in the negotiations, for instance, Brazil and India.¹⁰⁷ Private interests affected by the new system, national perception of carrier interests, and the extent to which gains are likely under bilateralism, constraints imposed by accepting the roles of existing institutional structures, and unwillingness to permit foreign establishment or firms in the domestic market or routes are the other reasons that have been suggested as an impediment to negotiations in this area.¹⁰⁸ The U.S. also wanted multimodal transport to be included in any discussions that took place with respect to liberalisation of ocean transport services but developing countries are unwilling to include these services in the discussion, as they fear encroachment on their economic interests in this branch of the transport sector.¹⁰⁹

¹⁰⁵ In the end, some of these negotiations did conclude successfully (i.e. financial services).

¹⁰⁶ Supra. Note 75, pp 1-2

¹⁰⁷ Chia Lin Sien, Lloyd C. Onyirimba and George S. Akpan, "*Liberalisation of Maritime Transport Services: Directions and Options for Asia*" National University of Singapore <http://www1.worldbank.org/wbiep/trade/manila/maritime.pdf> p. 20

¹⁰⁸ Ibid p.20

¹⁰⁹ Ibid p.19

While the extended negotiations on maritime services lasted two years beyond the end of the Uruguay Round, WTO members finally suspended negotiations in June of 1996 and deferred them to the next round of comprehensive service negotiations which were scheduled to begin in the year 2000 but have yet to take place.¹¹⁰

In a recent report commissioned by The World Bank, the authors conducted a study of maritime transport costs and the factors behind the same and conclude that these costs, "significantly impede international trade, and influence geographical patterns of production and income."¹¹¹ They see WTO negotiations on maritime transport, under the General Agreement on Trade in Services (GATS), as an opportunity not only to reduce and eventually eliminate trade restrictions, but also to develop pro-competitive rules. They propose that, "the weak GATS provision dealing with business practices be strengthened through the creation of two obligations. The first would require an end to the exemption of collusive agreements in the maritime sector from national competition law. The second would create a right for foreign consumers to challenge anti-competitive practices by shipping lines in the national courts of countries whose citizens own or control these shipping lines. The second obligation is necessary to deal with the possibility of inadequate enforcement by public agencies, and already has a precedent in the WTO rules on intellectual property and government procurement."¹¹² It may not be easy to create such rules. The authors are highly critical of the previous GATS negotiations and put the blame for failed negotiations clearly with the countries that currently exempt maritime conferences from their antitrust laws. They claim that the failure of these countries to make commitments with respect to liberalisation the GATS weakened the negotiating momentum and suggest that, "One way forward in the current round of services negotiations is for a coalition of countries to offer substantial trade liberalization conditional on the strengthening of competition rules. By targeting the twin maladies of maritime trade, this strategy could deliver considerable global benefits."¹¹³

¹¹⁰ Supra, Note 75, pp 1-2

¹¹¹ Supra, Note 11

¹¹² Supra, Note 11

¹¹³ Supra, Note 11

The authors of the World Bank study then tackle economic arguments based on a new database, created as part of the World Bank's Trade in Services Project, which contains information on both policy and private rate-fixing arrangements affecting maritime trade with the United States. The data is drawn from US Department of Transportation recently published data on waterborne transport charges, broken down for the first time by type of service—liner, bulk and tanker.

They focus on a contention that even though improvements in technology (notably containerization) have led to a significant decline in unit costs for carriers, there has not been a commensurate decline in maritime transport costs and they conclude that this is the result of:

- restrictive trade policies of governments which include a variety of cargo reservation schemes as well as the monopoly rights granted to providers of port and auxiliary services, such as cargo handling and
- private anti-competitive practices including primarily, but not exclusively, the rate fixing practices of maritime conferences, which enjoy an exemption from competition rules in major traders, like the United States and European Union.

With respect to their economic analysis of the effect of the foregoing policies and practices the authors conclude both public policy and private practices exercise a significant influence on maritime transport prices. With respect to government policy the conclusion is made that the cargo reservation policies, which proliferated in the 1970s and 1980s, were largely ineffectual while the restrictions on the provision of port services significantly raise prices. The most significant factor in keeping transport prices high however were private anti-competitive practices. The authors claim that, " while trade liberalization would lead to an average reduction in transport prices by 9 percent and cost savings of up to \$850 million, the breakup of private carrier agreements would cause prices to decline further by 25 percent and additional cost savings of up to \$2 billion on goods carried to the US alone."¹¹⁴

¹¹⁴ Supra, Note 11

The authors suggest that an international initiative is required to address these matters as anti-competitive practices since they have not been addressed by national governments that have promoted anticompetitive devices such as antitrust exemption for conferences, and arguably carriers in general, who are willing to participate in discussion and similar agreements. They see the WTO negotiations as a forum to develop this international initiative by allowing developing countries to use their membership in the WTO as a tool to develop their position. One possible method is to strengthen the provision of the GATS, dealing with anticompetitive business practices to ensure that the gains from liberalization are not eroded by collusive pricing.¹¹⁵

They suggest two possible obligations that might be imposed on maritime states to improve the plight of developing nations. First, they call for an end to the exemption of collusive agreements in the maritime sector from national competition law and second, they advocate the creation of a right of foreign consumers to challenge anti-competitive practices by shipping lines in the national courts of countries whose citizens own or control these shipping lines. The purpose of this second obligation is to deal with a possible failure to enforce, which they claim has already been a problem with the WTO rules on intellectual property and government procurement.

The authors do admit however that, "history does not provide cause for optimism". They give the example of the pro-competitive WTO rules that were negotiated with respect to basic telecommunications. These rules had the support of "conventional political economy forces". They admit that, "to put in place rules that enable small countries to protect their consumers from foreign oligopolies will be far more difficult." ¹¹⁶

It is not surprising that carrier representatives have criticized this World Bank report. The WSC, which represents most of the leading container shipping lines has described the report as "less than credible" and claims that in light of the study's absence of direct freight rate or cost data, or discussion of the actual competitive conditions, the policy

¹¹⁵ Supra, Note 11

¹¹⁶ Supra, Note 11

recommendations contained in the report “are unfounded and unreasonable”. Referring to the report, they further contend that,

”even if the TIMS paper has been based on plausible assumptions, accurate data, a well-specified model and a sound understanding of liner shipping [which it was not], the implementation of the Ocean Shipping Reform Act of 1998, which significantly altered the industry’s pricing practices in the U.S. trades, render[s] its findings and recommendations irrelevant.”

The WSC concludes its remarks by claiming that the authors were unfamiliar with the industry they were analyzing and with existing data sources on liner activities, available maritime press sources and past studies of the role of liner shipping and accordingly, “the TIMS authors began their efforts under a self-imposed handicap that they never overcame”¹¹⁷

10. Conclusion

It is quite remarkable that the debate over conferences has continued into the 21st century and is raging as fiercely now as it has at any time since conferences first appeared some 125 years ago. Lloyds recently reported under a heading “Liner body in anti-trust backlash that, “The latest defence of the conference system and the exemption from ant-trust laws granted in the US, European Union and many other parts of the world, comes at a time when this benefit is being increasingly questioned. The Paris-based OECD is carrying out a review of the international regulatory regime for the maritime industry and has invited submissions, while many shippers continue to press for complete deregulation of liner shipping”¹¹⁸ The debate is truly alive and well.

It is true that recent legislation in the Canada and the U.S. together with similar legislation in the EU and most major maritime nations around the world has retained antitrust exemption for conferences. There are claims by carriers that the “new way of

¹¹⁷ Lloyds News Release “Liner body in anti-trust backlash” (5 May, 2001) at <http://www.lloydslist.com>

¹¹⁸ Ibid

doing business" through confidential service contracts has all but decimated the conference system, at least on routes to and from Canada and the U.S. Still, among carriers, or at least those that participate in discussion agreements, there is a strong lobby to maintain antitrust exemption which some argue allows discussion agreements to function. There are continuing complaints from shippers' that prices are too high and that removal of antitrust exemption at a minimum and complete deregulation at a maximum would both assist in their plight.

There are studies by economists which draw valuable conclusions but are prefaced with the caveat that sufficient data to complete a comprehensive study of the shipping industry is hard to obtain and accordingly, the economic studies of conferences and whether antitrust exemption is a benefit or a detriment to the affected parties are generally inconclusive. Even where a report such as the World Bank study, referred to herein, attempts to formulate conclusive results, it is heavily criticized by carrier groups.

The debate over conferences, related arrangements and the continuation of antitrust immunity is unlikely to fall by the wayside anytime soon. While the governments of maritime nations seem very reluctant to abolish antitrust immunity lest they incur the wrath of their trading partners and compromise their domestic export industry, these same governments promote policies and enter into agreements that seek to liberalise trade.

The fact that antitrust immunity is so engrained in the legislation of so many maritime different maritime states means that a true assessment of the system will have to be conducted by a multinational organization. The work of the OECD, and their recent call for submissions regarding this issue, is an important first step in this assessment. Less certain is the role of the WTO and the GATS agreement in resolving the conflict between interested parties. It is one thing for the OECD to attempt an assessment of the conflicting positions of carrier and shipper groups. It is a very different, and much more complicated exercise, when the interests of developing countries are brought into the debate.

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