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# Conflict and Compromise: The Shipping Act of 1984

by  
Charles L. O. Buderi†

## INTRODUCTION

The new U.S. Shipping Act,<sup>1</sup> signed into law by President Reagan on March 10, 1984, alters several basic features of U.S. regulation of the ocean common carriage of goods in foreign commerce. Although the Act falls far short of promoting the regulatory system sought by U.S. carriers, it is a major achievement representing the largest concession they are likely to receive for some time. Despite the significant changes that have occurred, this Article proposes that the basic thrust of U.S. shipping regulation remains unchanged. In rejecting the protectionist, pro-carrier proposals that would have impaired the competitive environment of the U.S. liner trades, Congress confirmed the basic difference in approach to regulation of liner shipping taken by the United States compared with most other countries. This Article analyzes that difference and the changes brought about by the new Act. It concludes that the Act reaffirms the determination of the U.S. government to maintain a level of competition in the U.S. liner trades not found in the non-U.S. trades nor encouraged by the regulatory policies of most other nations.

## I

### BACKGROUND: THE STRUCTURE OF THE LINER SHIPPING INDUSTRY

The culmination of years of legislative proposals and debate, the Shipping Act of 1984 represents a major effort by Congress.<sup>2</sup> Before examining the provisions of the Act, this Part briefly describes the conditions under which ocean common carriers operate and frames the issues that gave rise to the Act.

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1. Shipping Act of 1984, 46 U.S.C.A. §§ 1701-1720 (West Supp. 1985).

2. S. 1593, 97th Cong., 1st Sess., 127 CONG. REC. 19,362-68 (1981), the most direct precursor of the Shipping Act of 1984, was introduced into Congress on August 3, 1981. However, congressional debate and consideration of the new shipping legislation began nearly six years before the passage and signing of the Act.

### A. *The International Shipping Conference System*

Ocean common carriers, or liner carriers, provide regular service based on posted sailing times and routes, and generally offer service through an organization called a shipping conference. One author describes a shipping conference as:

a group of carriers serving the same trade, and by agreement charging the same tariffs for carriage of the same cargo. The conference may do more. For example, it may agree on a sharing of revenues, or a distribution of cargoes, or an apportionment of sailing dates. It may also offer its customers incentives to patronize only member carriers—for instance, by offering a lower tariff scale for those who promise exclusive patronage; or it may seek to punish shippers who do not patronize conference carriers exclusively, or non-conference carriers who seek to compete for the conference's business.<sup>3</sup>

These anticompetitive practices have been justified on the grounds that free competition in the liner trades would cripple ocean trade.<sup>4</sup> According to advocates of shipping conferences, anticompetitive arrangements in the liner shipping trades are necessary to avoid rate wars which threaten the availability of reliable and efficient liner service.<sup>5</sup> This contention is tied to the concept of market "rationalization".<sup>6</sup>

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3. Lowenfeld, *To Have One's Cake . . . —The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COM. 21, 25 (1969).

4. See, e.g., Agman, *Competition, Rationalization, and United States Shipping Policy*, 8 J. MAR. L. & COM. 1, 9-17 (1976); Bennathan & Walters, *Shipping Conferences: An Economic Analysis*, 4 J. MAR. L. & COM. 93, 95-98 (1972); Ellsworth, *Competition or Rationalization in the Liner Industry*, 10 J. MAR. L. & COM. 497, 503-10 (1979); Hanson, *Regulation of the Shipping Industry: An Economic Analysis of the Need for Reform*, 12 LAW & POL'Y INT'L BUS. 973, 979-82 (1980). See also Editorial, *Liner Shipping in the U.S. Trades*, 5 MAR. POL'Y & MGMT. 141, 143 (1978) (stating that "[i]n liner shipping unfettered competition is unworkable and can lead to instability, inefficiency and high costs").

5. L. JUDA, *THE UNCTAD LINER CODE 5* (1983). See also H. BESS & M. FARRIS, *U.S. MARITIME POLICY, HISTORY AND PROSPECTS* (1981); D. MARX, *INTERNATIONAL SHIPPING CARTELS: A STUDY OF INDUSTRIAL SELF-REGULATION BY SHIPPING CONFERENCES* (1953); Agman, *supra* note 4; Bennathan & Walters, *supra* note 4; Ellsworth, *supra* note 4; Hanson, *supra* note 4; Lowenfeld, *supra* note 3.

However, some government officials have argued that the conference system and its restraint on competition are not necessary for maintaining efficient ocean transportation. See, e.g., U.S. DEP'T OF JUSTICE, *THE REGULATED OCEAN SHIPPING INDUSTRY 216-20* (1977); Report by the Comptroller General of the United States to the Chairman, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, *reprinted in* 130 CONG. REC. S1580-81 (daily ed. Feb. 23, 1984).

6. The term "rationalization" stems from the view that price fixing and other anticompetitive practices engaged in by conferences are logical and necessary because of the market conditions of the liner trades. According to one commentator, conferences restrain competition among the various liner carriers offering cargo space on a particular route so that rates, cargo space, sailing times, and other related services are stable and in conformity with demand. Agman, *supra* note 4, at 3-6. However, the U.S. Supreme Court has ruled that conference agreements which permit such commercial practices are contrary to the public interest and invalid unless shown to be in furtherance of some legitimate purpose. *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

An international conference achieves stable, "rational" markets through a number of long-standing practices, the most important of which is controlling membership. Such conferences are thus referred to as "closed conferences",<sup>7</sup> since existing members determine whether a competitor seeking to join the conference will be admitted. Because competing against conferences can result in retaliatory measures, an independent, or "outsider", may be effectively precluded from entering a trade route served by conferences.<sup>8</sup> Moreover, by controlling membership, closed conferences limit the number of liner vessels, and thus cargo space, available on a particular trade route. In this way, conferences ensure that the amount of cargo space remains at a level commensurate with demand so that conference vessels can run as close to capacity as possible.<sup>9</sup> Thus, the result of closed membership is not only the reduction of competition, but also the realization of a maximum profit.<sup>10</sup>

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7. Hanson, *supra* note 4, at 976.

8. For example, a conference may employ a "fighting ship" to resist the competition created by an independent liner. One commentator describes fighting ships as "conference ships that do not have guns, but that follow independent ships into ports and offer to undercut the independent's prices until he either goes out of business or applies to join the conference." Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe*, 75 AM. J. INT'L L. 629, 630 n.7 (1981). For a general discussion of the anticompetitive activities of closed conferences, see *infra* text accompanying notes 9-16; see also Bennathan & Walters, *supra* note 4, at 94-95.

9. Bennathan and Walters argue that the incentive for vessels to run at full capacity is great because they have large fixed costs and low variable costs, and therefore an "empty hold is an invitation to cut rates and fill up." Bennathan & Walters, *supra* note 4, at 96. Agman describes the pressure to sail at capacity as "intense" because of the large fixed-cost commitment of each voyage:

The pressure of fixed costs and the propensity to indulge in cut-throat pricing tactics when a vessel's cargo carrying capacity is underutilized are not mere abstractions. Whereas a manufacturer of a product has alternatives such as closing down part of his plant to save operational expense, manufacturing to build inventory in anticipation of future demand or producing cut-rate private label merchandise to get some marginal return out of his plant, the vessel owner is more limited in his choice of strategies. He cannot very well lay-up half a vessel and he does not save much operationally when his ship is sailing half empty because the costs of crew, fuel and the like vary little, if at all, as the result of underutilization (he might be able to complete a voyage more quickly as the result of less time required to work cargo in port; however, this is of minimal short-range value to a liner operator who has an entire fleet deployed in a fixed service with regular advertised dates scheduled to meet the requirements of his trade). He cannot inventory his service for future sales as the opportunity to move cargo perishes with non-use and in the short-run he cannot lay-up a vessel when successive sailings are underutilized because he must still contend with keeping his fleet spaced for meeting schedule requirements. A further complication in pursuing the lay-up option should he be able to realign his fleet and future schedule is that weak cargo flows in one direction are frequently offset by stronger demand on the reverse leg of his voyage pattern.

Agman, *supra* note 4, at 13-14.

10. By controlling the availability of cargo space, the conference can fix the prices and conditions of liner service available to the public. Conference members may agree to set common freight rates, regulate sailings and ports of call, pool net earnings or agreed percentages of traffic, or otherwise establish and abide by common policies such that competition among conference carriers is virtually eliminated. See generally Agman, *supra* note 4, at 3-4; Bennathan & Walters, *supra* note 4, at 106-08; Lowenfeld, *supra* note 3, at 25.

Closed conferences maintain control over the cargo market not only by controlling the availability of vessels, but also by negotiating "loyalty contracts" with shippers.<sup>11</sup> Loyalty contracts often provide shippers with year-end deferred rebates<sup>12</sup> of ten to fifteen percent of the cost of all freight rates incurred during the year.<sup>13</sup> However, a shipper is usually eligible for this deferred rebate only if it has transported one hundred percent of its cargo on conference carriers.<sup>14</sup> Thus, loyalty contracts not only attract shippers to the conference by offering a discount, they also ensure their exclusive patronage, even where independent carriers offer lower prices on a spot basis.

Closed conferences also utilize other tactics to preserve their monopoly over trade routes. Where an outsider ventures to sail a conference route, the conference concerned may assign a "fighting ship" to offer substantially lower rates for the same sailing dates and ports of call.<sup>15</sup> Any losses sustained by the fighting ship are absorbed by all the conference members so that each conference carrier loses relatively little. Finally, closed conferences restrain their own members from attempting to compete. Under the terms of most conference agreements, a member carrier who withdraws from or acts independently of the conference is subject to penalties.<sup>16</sup>

### B. Shippers' Councils

In those countries where closed conferences are allowed, "shippers' councils" are also permitted to operate.<sup>17</sup> Shippers' councils act as

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11. The Shipping Act defines "loyalty contract" as "a contract with an ocean common carrier or conference . . . by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference." 46 U.S.C.A. § 1702(14). The Department of Justice has described loyalty contracts as "simply agreements among ocean carrier competitors to charge a certain price to shippers who commit all or a fixed portion of their cargo to those ocean carriers. Such agreements among competitors to fix prices are unambiguous *per se* violations of section 1 of the Sherman Act." Comments of the Department of Justice Before the Federal Maritime Commission Regarding Filing of Tariffs and Dual-rate Contract Systems in the Foreign Commerce of the United States, 12-13, filed July 16, 1984 (available from the International Tax and Business Lawyer) [hereinafter cited as Dep't of Justice Comments].

12. The Shipping Act defines "deferred rebate" as:

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

46 U.S.C.A. § 1702(9).

13. A.E. BRANCH, *THE ELEMENTS OF SHIPPING* 105 (1978).

14. *Id.* See also Agman, *supra* note 4, at 5.

15. See Lowenfeld, *supra* note 8, at 630 n.7. The Shipping Act defines "fighting ship" as "a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade." 46 U.S.C.A. § 1702(10).

16. Bennathan & Walters, *supra* note 4, at 94.

17. For a discussion of shippers' councils, see Agman, *supra* note 4, at 31-32. Agman notes that where closed conferences operate, the "development of councils has been encouraged, if not demanded, by governments[,] and conferences have recognized, if not always welcomed,

counterweights to the conferences by organizing and formulating common policies vis-à-vis the carriers that transport their cargo.<sup>18</sup> The supposed balance thus struck between carriers and shippers, plus the ever present threat of independent carriers entering the trade and undercutting conference prices, are thought to prevent the conferences from exploiting their monopolistic tendencies. Empirical studies have corroborated this theory.<sup>19</sup>

### C. The U.S. Shipping Conference System

Since shipping conferences came into prominence in the late 1800's, their development in the United States has differed quite dramatically from that in most other countries.<sup>20</sup> While the "international" conference system allowed the development of monopolistic characteristics with little regulation by government authorities, the shipping conferences serving the U.S. trade routes were subject to a regulatory regime that prohibited many of the anticompetitive and predatory practices exercised abroad.<sup>21</sup>

Although U.S. law has acknowledged the constructive role of conferences in the liner trades since the Shipping Act of 1916,<sup>22</sup> the American commitment to free trade and competition has led Congress to disallow many features of international conferences. Most importantly, the Shipping Act of 1916 required shipping conferences transporting the foreign commerce of the United States to offer membership to any liner carrier capable of engaging in such service.<sup>23</sup> U.S. conferences are therefore termed "open conferences".

The Shipping Act of 1916 also made all conference agreements subject to approval by the Federal Maritime Commission (hereinafter the FMC).<sup>24</sup> A conference agreement had to meet a strict antitrust standard in order to be approved.<sup>25</sup> Deferred rebates were illegal and the freedom of carriers to tie

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the fact that councils are the mechanism through which the shipper will have a say in matters of concern to him as well as the shipowner." *Id.* at 31.

18. *Id.* at 31-32. The Shipping Act, while it does not provide for shippers' councils, includes provisions that similarly attempt to balance the strength of conferences against that of shippers. See Friedmann & Devierno, *The Shipping Act of 1984: The Shift From Government Regulation to Shipper "Regulation"*, 15 J. MAR. L. & COM. 311, 312 (1984).

19. See, e.g., B.M. DEAKIN & T. STEWARD, SHIPPING CONFERENCES 111-17 (1973).

20. For a general background on U.S. shipping conferences, see *supra* note 4.

21. U.S. shipping regulations were first developed in the Shipping Act of 1916, ch. 451, 39 Stat. 728 (codified as amended at 46 U.S.C. §§ 801-842 (Supp. I 1983)).

22. Shipping Act of 1916 § 15, amended by 46 U.S.C. § 814 (Supp. I 1983).

23. *Id.*

24. *Id.* The original predecessor agency of the FMC was the U.S. Shipping Board.

25. The Shipping Act of 1916 provided that the FMC must cancel, disapprove or modify agreements it found to be:

- (1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports;
- (2) operating to the detriment of the commerce of the United States;
- (3) contrary to the public interest; or,
- (4) contrary to any other section of the Act.

*Id.*

Three decisions rendered in the 1960s dramatically curtailed the freedom of carriers to implement conference agreements: *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213

shippers through other preferential contracts was limited.<sup>26</sup> Although burdensome to carriers, this approval process allowed the FMC to review multi-carrier agreements for possible antitrust violations before their implementation by the conference.

These provisions encouraged competition by restricting U.S. conferences in their ability to control terms and conditions of liner service, fix prices, and limit outside vessels from entering conference routes.<sup>27</sup> With open membership, no penalties for withdrawal, and comparatively few tools to control a trade route, U.S. conferences barely resembled their foreign counterparts.

The relative inability of U.S. shipping conferences to restrain competition reflects the U.S. government's commitment to maintaining a competitive, free-trade system. However, it has also been a source of ongoing controversy, with respect to both the effect of free trade on the financial viability of U.S. shipping companies and the merits of the economic and political arguments regarding competition in the liner trades.<sup>28</sup> This debate served as a focal

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(1966); *Sabre Shipping Corp. v. American President Lines*, 285 F. Supp. 949 (S.D.N.Y. 1968); and *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

The *Carnation* decision held that carriers were entitled to only a "limited antitrust exemption" under the Act and that conference activities undertaken without express approval of the FMC were not immune from prosecution under the antitrust laws. In *Sabre*, the court held that, although an agreement setting conference rates was approved by the FMC, these rates were so unreasonably low that they violated section 18(b)(5) of the Act (*i.e.*, they were detrimental to the commerce of the United States) and thus the conferences implementing these rates were not eligible to receive antitrust immunity for engaging in such activity. In *Svenska*, the most significant of the three decisions, the U.S. Supreme Court held that once the FMC establishes that a conference agreement violates antitrust laws, there is substantial evidence that the agreement is contrary to the "public interest" standard of section 15(3) of the Act. The burden would then shift to the conference to show that the agreement "was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *Svenska*, 390 U.S. at 243.

As has been noted, particularly after the *Svenska* decision, "the FMC forum was used increasingly by carriers to oppose, delay, and in some cases ultimately prevent FMC approval of agreements proposed by their competitors." Friedmann & Divierno, *supra* note 18, at 317-18. The absence of a time limit on the FMC approval process often prevented prompt implementation of conference agreements and "timely carrier response . . . to marketplace conditions." *Id.* at 318.

26. Under the Shipping Act of 1916, deferred rebates were prohibited by § 14, amended by 46 U.S.C. § 812 (Supp. I 1983). Dual-rate discounts were limited to a maximum of fifteen percent below the posted tariff rate by § 14(b), amended by 46 U.S.C. § 813(a) (Supp. I 1983). Discriminatory treatment of shippers was prohibited under § 14, amended by 46 U.S.C. § 812 (Supp. I 1983).

27. L. JUDA, *supra* note 5, at 38-42. For the effects of the U.S. open conference system on liner shipping, see Evans & Davies, *The Liner Conference System, Its Origin, Achievements and Current Difficulties*, 5 MAR. POL'Y & MGMT. ¶ 38, ¶¶ 67-73 (1978) and Gardner, *An Alternative Model of Price Determination in Liner Shipping*, 5 MAR. POL'Y & MGMT. ¶ 183, ¶¶ 215-23 (1978).

28. For a discussion of the effect of the U.S. regulatory system on the U.S. merchant marine, see congressional debate over S. 1593, 127 CONG. REC. 19,362-64 (1981) (statement of Sen. Gorton (R.-Wash.)); Comment, *The Sinking Shipping Industry*, 5 NW. J. INT'L L. & BUS. 99 (1983). For an opposing view, see congressional debate over S. 47, 130 CONG. REC. S1578-80 (daily ed. Feb. 23, 1984) (statement of Sen. Metzenbaum (D.-Ohio)). On the merits of allowing competition in the liner trades, see Agman, *supra* note 4, at 9-17; Bennathan & Walters, *supra*

point during consideration of the new Shipping Act. Carriers vigorously advocated the adoption of a regulatory policy in the United States similar to those in operation abroad,<sup>29</sup> while many officials of Congress and the Executive Branch, and customers of liner shipping services argued that conferences should not be permitted to obstruct the national economic interest in preserving a competitive ocean transportation system.<sup>30</sup>

Although domestic debate over U.S. regulatory policy was pronounced for many years, other events were responsible for finally bringing shipping regulation to the floor of Congress. The deliberations of the United Nations Conference on Trade and Development (UNCTAD),<sup>31</sup> the entry of state-owned fleets of communist countries into the U.S. trades,<sup>32</sup> and the signing of

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note 4, at 95-98; Ellsworth, *supra* note 4, at 503-15; Hanson, *supra* note 4, at 979-82. On the disadvantages of allowing competition, see U.S. DEP'T OF JUSTICE, *supra* note 5, at 55-57.

29. See generally Friedmann & Devierno, *supra* note 18. For the proposals of the liner industry, see *infra* text accompanying notes 38-72.

30. See, e.g., H.R. REP. NO. 2526, 97th Cong., 1st Sess. 241 (1981).

31. UNCTAD, United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, U.N. Doc. TD/CODE/13/Add. I, Vol. II (1975). The UNCTAD Code envisions a basic realignment of world liner shipping by providing that each signatory have a legal interest in carrying a certain percentage of its liner cargo on its own flag vessels. The Code was primarily conceived and pushed forward by the Group of 77 as a means of breaking the near total control of liner shipping held by the industrialized countries and allowing third world countries to enter the liner trades. The United States, along with Switzerland, remains opposed to the UNCTAD Code, primarily because its cargo-sharing provisions and adherence to the closed conference system are at odds with U.S. regulatory law and policy in maintaining competition in liner shipping. On the UNCTAD Code, see L. JUDA, *supra* note 5; SHIPPING NATIONALISM AND THE FUTURE OF THE UNITED STATES LINER INDUSTRY: THE UNCTAD CODE AND BILATERALISM (L. Juda ed. 1984) (Proceedings of a Workshop at the Center for Ocean Management Studies, Univ. of R.I., Nov. 1983); Larsen & Vetterick, *The UNCTAD Code of Conduct for Liner Conferences: Reservations, Reactions and U.S. Alternatives*, 13 LAW & POL'Y INT'L BUS. 223 (1981); Neff, *The UN Code of Conduct for Liner Conferences*, 14 J. WORLD TRADE L. 398 (1980); U.S. DEP'T OF TRANSP., MARITIME ADMIN., *THE IMPLEMENTATION OF THE U.N. CODE OF CONDUCT FOR LINER CONFERENCES: A STUDY OF U.S. OPTIONS* (1981).

32. Concern over the entry of communist country, state-owned fleets ("controlled carriers") into the U.S. trades led to the Ocean Shipping Act of 1978, Pub. L. No. 95-483, 92 Stat. 1607 (1978), *repealed* by Shipping Act of 1984, 46 U.S.C.A. §§ 1701-20 (West Supp. 1985) [hereinafter cited as the Controlled Carrier Act]. According to one commentator:

The Act was passed primarily as an attempt to counter the rate activity of carriers controlled by the Soviet Union engaged in cross-trading to U.S. ports. The theory of the legislation and its implementation is based on a conviction that carriers which are under the control of a foreign government—especially Marxist governments—may not pursue a policy of recovering full costs and maximizing profits in their shipping activities. Accordingly, the legislation is designed to protect the U.S. flag carriers from any such rate cutting activities. This protection is accomplished by allowing suspension of a controlled carrier's cross trade rates, if they are lower than a U.S. flag carrier's rates or lower than other bilateral carriers in that trade.

Address by Stanley H. Barer, Garvey, Schubert, Adams & Barer, at a conference entitled "Sea-trade Conferences, Money and Ships 1981" (April 7, 1981) (available from the International Tax and Business Lawyer).

Concern over controlled carrier activity in the U.S. trades persists today. See, e.g., congressional debate over S. 47, 130 CONG. REC. S1575-76 (daily ed. Feb. 23, 1984) (statements of Sen. Gorton (R.-Wash.) and Sen. Long (D.-La.)).



bilateral maritime agreements with several of our maritime trading partners<sup>33</sup> all heightened the debate over the proper direction of U.S. maritime policy. Those in favor of adopting anticompetitive features of international conferences were concerned over the inability of U.S. liners to capture a larger share of liner cargo in U.S. trade.<sup>34</sup> U.S. shipping rates tended to be higher than those charged by foreign firms, partly due to higher ship-building and labor costs.<sup>35</sup> Others were primarily concerned about national security and the need to preserve the U.S. maritime fleet.<sup>36</sup> Those in favor of continuing prohibitions against monopolistic or cartel-like control of the U.S. liner trade routes responded by arguing that open competition in the liner industry would lead to lower rates and better service.<sup>37</sup>

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33. On the history of bilateralism, see L. JUDA, *supra* note 5, at 93–120. Bilateralism in shipping refers to a bilateral agreement under which two nations agree to share the carriage of cargo moving between their shores. Such agreements may vary as to the percentage of cargo allotted each flag's carriers, the method for allocating the agreed-upon percentage to the carriers, and the type of cargo subject to the sharing arrangement. The United States has signed two types of bilateral agreements. Those agreements, signed with Brazil and Argentina, provide for cargo-sharing through revenue pools in which selected U.S.- and Brazilian- or Argentinian-flag carriers share equally. Shipping: Equal Access to Government Controlled Cargoes, Nov. 17, 1977, 29 U.S.T. 2860, T.I.A.S. No. 8981 (Brazil); Memorandum of Understanding Between the United States and Argentina Regarding Certain Maritime Matters, Jan. 30, 1979, 30 U.S.T. 1055, T.I.A.S. No. 9239 (Argentina). See also L. JUDA, *supra* note 5, at 97, 99. Bilateral agreements signed with the Soviet Union and the People's Republic of China provide for dividing carriage of certain cargoes moving between the two countries, with an agreed percentage reserved for third-flag carriers, without creation of revenue pools. Agreement on Maritime Matters, Oct. 14, 1972, United States-U.S.S.R., 23 U.S.T. 3573, T.I.A.S. No. 7513; Agreement on Maritime Transport, Sept. 17, 1980, United States-People's Republic of China, 19 I.L.M. 1117.

The latter two agreements are no longer in effect; the Soviet agreement was not renewed as a result of the invasion of Afghanistan and the PRC agreement expired and was not successfully renegotiated, due mostly to technical difficulties and dissatisfaction regarding the low percentage of cargo actually carried on U.S.-flag vessels to and from the PRC and the refusal of the United States to grant most-favored-nation status to the PRC fleet despite the agreement. The Brazil and Argentina agreements are still in force but are currently facing serious problems due partly to complaints by shippers regarding rates and quality of service and the objections of the U.S. Government to a bilateral policy because of its promotion of noncompetitive arrangements. The United States has opposed bilateral agreements because they involve anticompetitive cargo-sharing arrangements as a means of transporting ocean-borne cargo, an objection similar to that expressed against the UNCTAD Code.

34. Gonzalez, *Bilateralism: The Solution to an Antiquated International Shipping Policy*, 36 J. INT'L AFF. 329 (1983).

35. For example, recent studies have indicated that foreign crews cost about \$2 million less per ship than U.S. crews and that a vessel constructed in a U.S. shipyard costs three times as much as one constructed in a foreign shipyard. Regarding foreign crew costs, see address by Richard V. Parks, President of Farrell Lines, at conference entitled "The American Merchant Marine: An Industry in Transition" (Mar. 1985), Center for Oceans Law and Policy, Univ. of Va., School of Law (forthcoming) (available from the International Tax and Business Lawyer) [hereinafter cited as the Oceans Law and Policy Conference]. Regarding vessel construction costs, see address by W.H. Williams, Vice President of American President Lines, Ltd., at the Oceans Law and Policy Conference (available from the International Tax and Business Lawyer).

36. See, e.g., Comment, *supra* note 28; Gonzalez, *supra* note 34.

37. See, e.g., 130 CONG. REC. S1578 (daily ed. Feb. 23, 1984) (statement of Sen. Metzenbaum (D-Ohio)). Among other reasons, Senator Metzenbaum opposed the bill because of a "basic feeling" that the conference system leads to "price fixing" and a "dividing of markets" which is "not in the better interests of our country." Describing conferences as "cartels", he

## II PROPOSALS OF THE U.S. LINER INDUSTRY

On August 3, 1981, Senator Gorton (R.-Wash.) introduced a bill (S. 1593)<sup>38</sup> to revise U.S. regulation of international liner shipping. This bill may be said to be the forerunner of the Shipping Act of 1984.<sup>39</sup> As originally introduced, however, the bill largely reflected the extreme position of the liner carrier industry, and many of its provisions resembled only slightly those of the Act. It is nevertheless useful to examine S. 1593 because it clearly demarcates the interests of the carrier industry on the one hand, and those of the government and the private sector on the other. Through reference to S. 1593, the remainder of this Article will examine the nature of the compromise eventually reached in the Shipping Act of 1984.

### A. Provisions of S. 1593

If implemented, S. 1593 would have created a conference system in the United States very similar to the international closed conference system. In this regard, S. 1593 provided for the following:

- (1) Legalization of closed conferences.<sup>40</sup>
- (2) A broad scope of conference activities to enable carriers to discuss and fix prices and conditions of service, pool earnings and traffic, allot ports, regulate sailings, limit the volume and character of cargo carried, engage in exclusive working arrangements, enter into agreements to regulate and prevent competition among themselves, and bring intermodal cargo transportation under the ambit of permissible conference agreements.<sup>41</sup>
- (3) Use of loyalty contracts, except deferred rebates.<sup>42</sup>
- (4) Absolute antitrust immunity for ocean common carriers engaging in any activities described in (1), (2), or (3), above.<sup>43</sup>
- (5) A limited right of independent action by conference carriers.<sup>44</sup>
- (6) Formation of shippers' councils and their immunity from the antitrust laws.<sup>45</sup>
- (7) An expedited approval process for conference agreements submitted to the FMC and a shift in the burden of proof to those opposing a proposed conference agreement.<sup>46</sup>

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stated that these "cartels can raise costs to exporters, drive up retail prices of imported goods, and force consumers to bear increased transportation costs." *Id.*

38. S. 1593, *supra* note 2. The bill was co-sponsored by Senators Stevens (R.-Alaska), Kasten (R.-Wis.), Inouye (D.-Hawaii), and Packwood (R.-Ore.).

39. The Maritime Counsel to the Committee on Commerce, Science, and Transportation, U.S. Senate, who served during the legislative efforts to amend the Shipping Act of 1916, described S. 1593 as the "one legislative development . . . leading directly to enactment of the 1984 Act." Friedmann & Devierno, *supra* note 18, at 319.

40. S. 1593, *supra* note 2, § 4(a)(7), 127 CONG. REC. at 19,364.

41. *Id.* § 4(a)(1)-(6), 4(b), 127 CONG. REC. at 19,364.

42. *Id.* § 7, 127 CONG. REC. at 19,365 (loyalty contracts, generally); *see also id.* § 12(a)(10), 127 CONG. REC. at 19,366 (deferred rebates).

43. *Id.* § 8(a)(1)-(2), 127 CONG. REC. at 19,365.

44. *Id.* § 5(c)(4), 127 CONG. REC. at 19,365.

45. *Id.* § 4(c), 127 CONG. REC. at 19,364-65 and § 8(a)(1), at 19,365.

46. *Id.* § 6, 127 CONG. REC. at 19,365.

S. 1593 thus proposed abandonment of the economic free-trade principles underlying the Shipping Act of 1916 and adoption of many of the features of international conferences which the earlier Act expressly prohibited.<sup>47</sup>

1. *Loyalty Contracts.* S. 1593 contemplated the unrestricted use of loyalty contracts,<sup>48</sup> one of the methods underlying the success of closed membership and rationalization. These contracts tie shippers to conference carriers by providing lower cargo rates in exchange for the shippers' exclusive commitment to the carrier or conference,<sup>49</sup> thus preventing or seriously hindering competition from outside liner carriers. In contrast to international practice, however, the bill did not permit the use of deferred rebates.<sup>50</sup> The deferred rebate is considered more anticompetitive than other types of loyalty contracts because it induces the shippers' continued loyalty to the conference by rebating the discount at year's end and only after a proven record of exclusive conference carriage. Nevertheless, the type of loyalty contract authorized by S. 1593 would have been but one step removed from a deferred rebate contract by virtue of its provision allowing shippers to obtain a lower rate by committing all or a fixed portion of their cargo to the conference.<sup>51</sup>

2. *Antitrust Immunity.* A broadly stated goal of S. 1593 was "to harmonize United States shipping practices with those of its major trading partners."<sup>52</sup> In adopting such a goal, the bill responded to the carrier industry's longstanding claim that a closed conference system would result in more efficient ocean transportation of U.S. foreign trade. Implicit in the transition to a closed conference system was the necessity of granting "complete antitrust immunity to conference activities," a step considered to be at the "bill's core."<sup>53</sup> In congressional debate, Senator Gorton stated that a grant of complete antitrust immunity would solve two problems. First, it would ease tension between the United States and its trading partners over the perennially disputed extraterritorial reach of U.S. shipping regulations, particularly the antitrust laws.<sup>54</sup> Second, it would address the potential problem of "uneven enforcement" brought about by foreign "blocking statutes" that theoretically prevent U.S. authorities from investigating possible antitrust violations by

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47. See *supra* notes 7-16 and accompanying text.

48. S. 1593, *supra* note 2, § 7, 127 CONG. REC. at 19,365.

49. See Friedmann & Devierno, *supra* note 18, at 335.

50. S. 1593, *supra* note 2, § 12(a)(10), 127 CONG. REC. at 19,366.

51. *Id.* § 3(10), 127 CONG. REC. at 19,364.

52. *Id.* § 2(4), 127 CONG. REC. at 19,364.

53. 127 CONG. REC. 19,362 (1981) (statement of Sen. Gorton (R.-Wash.)).

54. *Id.* Senator Gorton stated that U.S. judicial application of the antitrust laws to conference activities "has simply outraged our international trading partners, who do not in any respect agree with either the extraterritorial application of our antitrust laws or with the theory of our antitrust laws as they relate to international commerce." *Id.*

foreign carriers.<sup>55</sup> In addition, the intermodalism provision would have extended antitrust immunity to conferences which arrange for carriage of cargo on inland as well as ocean routes.<sup>56</sup>

3. *Right of Independent Action.* The bill included two provisions intended to preserve some semblance of competition in the liner trades: the limited right of independent action by conference carriers,<sup>57</sup> and the right of a conference member to withdraw from the conference without penalty upon reasonable notice.<sup>58</sup> The right of independent action was confined to agreements between carriers that were not members of the same conference, between conferences serving "different trades that would otherwise be naturally competitive," and to any intermodal agreements.<sup>59</sup> The right of withdrawal without penalty was also limited in that it was not coupled with the right to rejoin.<sup>60</sup>

4. *Shippers' Councils.* Another dramatic departure by the bill from the Shipping Act of 1916 involved its call for the formation of shippers' councils. The councils, like conferences, were granted immunity from the antitrust laws.<sup>61</sup> These provisions contemplated the give-and-take of the international conference system: where conferences are strengthened and the regulatory role of the government is reduced, shippers' councils are intended to serve as a counterweight to the monopolistic and potentially abusive conference powers.

5. *Expedited FMC Approval Process.* The bill also provided various means for expediting approval of conference agreements filed with the FMC.<sup>62</sup> First, time limits were imposed on the Commission's review

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55. *Id.* at 19,362-63.

56. S. 1593, *supra* note 2, § 4(b), 127 CONG. REC. at 19,364-65. For further discussion of intermodalism, see *infra* notes 75-83 and accompanying text.

57. S. 1593, *supra* note 2, § 5(c)(4), 127 CONG. REC. at 19,365.

58. *Id.* § 5(c)(2), 127 CONG. REC. at 19,365.

59. *Id.* § 5(c)(4)(A), (B), 127 CONG. REC. at 19,364-66.

60. *Id.* § 4(a)(7), 127 CONG. REC. at 19,364, which provided that conferences may agree to limit membership.

61. See *id.* § 4(c), 127 CONG. REC. at 19,364-65, which permits the formation of shippers' councils, and § 8(a)(1), 127 CONG. REC. at 19,365, which exempts the activity of shippers' councils from antitrust laws.

62. *Id.* § 6, 127 CONG. REC. at 19,365. In the words of Senator Gorton:

An agreement could be disapproved only if it is: First, unjustly discriminatory or unfair between carriers, shippers, exporters or ports or between exporters from the United States and their foreign competitors, or second, detrimental to the commerce of the United States. Without the vague public interest test, the Svenska standard would have no application, yet the criteria would be relatively clear. The process would be similar to that currently in operation but with time limits to insure that the Federal Maritime Commission consider all agreements expeditiously. The burden of proof would also clearly lie with the person opposing an agreement.

127 CONG. REC. 19,363 (1981) (statement of Sen. Gorton (R.-Wash.)).

process.<sup>63</sup> Second, the public interest test of the *Svenska*<sup>64</sup> case was abandoned so that conference agreements could be disapproved only if they were unfair to carriers, shippers, exporters, or ports, or unjustly discriminatory against foreign competitors, or if they were detrimental to the commerce of the United States.<sup>65</sup> Finally, the burden of proof as to the permissibility of a conference agreement was shifted from the conference to the party opposing the agreement.<sup>66</sup>

### B. Other Policy Goals

Geared as it was toward the concerns of the carrier industry, the bill naturally centered around the fact that the percentage of cargo carried on U.S. vessels in the foreign commerce of the United States had declined in recent years.<sup>67</sup> Its author, Senator Gorton, stated that this "downward trend" could be "arrested" through the regulatory reforms in the bill.<sup>68</sup> He further stated that these reforms would promote the U.S. merchant marine without a direct fiscal impact on the federal government<sup>69</sup> and would benefit foreign-flag carriers plying the U.S. trade routes as well.<sup>70</sup>

Two assumptions underlay the goal of promoting the merchant marine through legalization of closed conferences. First, it was believed that an efficient ocean transportation system would develop only after elimination of government regulation which impedes commercial maritime transactions.<sup>71</sup> Second, in the context of liner shipping, market efficiency would best be achieved through conferences with the ability to rationalize their services by allowing carriers to agree not to compete.<sup>72</sup>

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63. S. 1593, *supra* note 2, § 6(e)-(f), 127 CONG. REC. at 19,365.

64. For a discussion of the *Svenska* decision, see *supra* note 25.

65. S. 1593, *supra* note 2, § 6(b), 127 CONG. REC. at 19,365.

66. *Id.* § 6(c), 127 CONG. REC. at 19,365.

67. In introducing the bill, Senator Gorton stated that "the merchant marine of the United States faces serious problems and is now at one of its historic low points in the percentage of the cargoes that it carries." 127 CONG. REC. 19,362 (1981) (statement of Sen. Gorton (R.-Wash.)).

68. *Id.*

69. *Id.*

70. *Id.* Because the bill applied equally to all ocean common carriers, its promotional sections would have benefitted both U.S. and foreign-flag carriers on a nondiscriminatory basis. *Id.*

71. *Id.* See also the bill's Declaration of Policy which states that an objective of U.S. regulation of international liner shipping is "to develop and maintain an efficient ocean transportation system through commercial means, with a minimum of government involvement, in order to serve the needs of United States foreign commerce." S. 1593, *supra* note 2, § 2(1), 127 CONG. REC. at 19,364.

72. In introducing the bill, Senator Gorton stated:

It is questionable that the FMC's activity to date has contributed significantly to an effective international transportation system. For this reason, and consistent with the President's goal to reduce unnecessary Federal regulation this bill allows commercial standards and practices to govern in many areas where the FMC now has considerable discretion. Fundamental to the policies stated in the bill is the recognition that the conference system is an acceptable method of commercial operation in international shipping.

127 CONG. REC. 19,362 (1981) (statement of Sen. Gorton (R.-Wash.)).

Although these viewpoints carried some weight, the potentially adverse effects of insulating the carrier industry from the antitrust laws raised serious objections from many members of Congress, shipper interests, the Administration, and others who deemed such action as being monopolistic and detrimental to the economic interests of the country.

### III THE SHIPPING ACT OF 1984: MAJOR PRO-CARRIER PROVISIONS

The legislative process of enacting the Shipping Act of 1984 significantly altered the pro-carrier bent of S. 1593. The House Judiciary Committee assumed a central role in injecting antitrust concerns into the proposed legislation and in restricting the strength of conferences.<sup>73</sup> Shipper interests became increasingly involved in the legislative process during the 98th Congress, where the bill assumed its final state.<sup>74</sup> To a significant degree, however, many of the carrier-oriented provisions presented in S. 1593 were retained in the final bill. The following sections review those provisions of the Shipping Act of 1984 which responded to the interests of the carriers.

#### A. *Intermodal Ratemaking Authority*

The Act clarified the authority of the FMC to approve conference agreements that set intermodal "through rates".<sup>75</sup> Because of technological advancements in liner shipping, particularly the increased use of containerized vessels in the U.S. trades in the 1960s and 1970s, intermodal rates have become the most practical and simple means of paying for transportation services.<sup>76</sup> The 1916 Act left unclear the question of whether the FMC had authority to approve intermodal agreements entered into by conferences and marketed to shippers.<sup>77</sup> The Department of Justice had argued that the FMC had no such authority since such power was not specifically granted under the 1916 Shipping Act, and that therefore the conferences could not receive any antitrust immunity for intermodal rate setting.<sup>78</sup> The 1984 Act clarified

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73. Friedmann & Devierno, *supra* note 18, at 321.

74. *Id.*

75. Section 4(a) of the Shipping Act of 1984 provides that "[t]his chapter applies to agreements by or among ocean common carriers to—(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service." 46 U.S.C.A. § 1703(a)(1). The Act defines "through rate" as "the single amount charged by a common carrier in connection with through transportation." 46 U.S.C.A. § 1702(25). "Through transportation" is defined as "continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port." 46 U.S.C.A. § 1702(26). Thus, such rates cover transportation service for inland and ocean carriage rather than simply port-to-port service.

76. Friedmann & Devierno, *supra* note 18, at 318.

77. *Id.* at 319.

78. *Id.* at 318.

any uncertainty by explicitly providing that agreements among carriers setting "through rates" are within the scope of the Act and therefore, if approved by the FMC, are immune from the antitrust laws.<sup>79</sup> This immunity does not extend to agreements between ocean carriers and inland carriers regarding rates charged by the latter,<sup>80</sup> but it does allow discussions and agreements among ocean common carriers regarding the price they will charge a shipper for inland transportation.<sup>81</sup> Although the issue was hotly debated on the Senate floor, carriers and shippers both generally supported this provision.<sup>82</sup> Shippers often prefer such "point-to-point" single rates, and carriers are fully capable of providing this service.<sup>83</sup>

### B. Standard of Review

The 1984 Act changed the FMC's general standard of review of multi-carrier agreements.<sup>84</sup> Once a conference agreement has been submitted for review, the Act directs the FMC to seek injunctive relief against agreements that are likely "by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."<sup>85</sup> The Act itself does not explain how this standard should be applied, but the Conference Report indicates that the section prescribes a more lenient approach to reviewing conference agreements.<sup>86</sup> In pertinent part, the Conference Report states that, contrary to the holding in *Svenska*, the 'public interest' test in the present law is vague and unworkable in its automatic application of certain antitrust principles to ocean shipping. The standard removes any per se condemnation of concerted conduct such as might be applied under the antitrust laws. Consequently, the standard establishes a

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79. This result is achieved by the interplay of sections 5 and 7. Section 5 provides for the filing of carrier agreements, including those concerning proposed intermodal through rates. 46 U.S.C.A. § 1704(a). Section 7 specifies that the antitrust laws do not apply to agreements filed under section 5 which become effective by otherwise complying with the other provisions of the Act. 46 U.S.C.A. § 1706(a)(1).

80. Section 7(b)(2) provides that the Act does not extend antitrust immunity "to any discussion or agreement among common carriers that are subject to this Act regarding the inland divisions (as opposed to the inland portions) of through rates within the United States." 46 U.S.C.A. § 1706(b)(2). The Act defines an "inland division" as "the amount paid by a common carrier to an inland carrier for the inland portion or through transportation offered to the public by the common carrier." 46 U.S.C.A. § 1702(12). "Inland portion" is defined as "the charge to the public by a common carrier for the nonocean portion of through transportation." 46 U.S.C.A. § 1702(13).

81. See, e.g., 130 CONG. REC. S1599 (daily ed. Feb. 23, 1984) (statement by Sen. Metzenbaum (D.-Ohio), decrying the leverage that ocean carriers have under the Act to set inland and ocean rates.)

82. 127 CONG. REC. 19,363 (1981) (statement of Sen. Gorton (R.-Wash.)). See also Friedmann & Devierno, *supra* note 18, at 318.

83. Friedmann & Devierno, *supra* note 18, at 318.

84. 46 U.S.C.A. § 1705(g).

85. *Id.*

86. H.R. REP. NO. 600, 98th Cong., 2d Sess. 1, 31-37, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 283, 287-93 [hereinafter cited as CONFERENCE REPORT].

threshold for prompt approval of *most generally accepted* joint conduct in ocean shipping.<sup>87</sup>

The Conference Report presents a three-part test for review of multicarrier agreements by the FMC and the courts. Under this test, carrier agreements are valid if they do not substantially reduce competition. If they do reduce competition substantially, they must not reduce service or increase costs to shippers in a "material and meaningful way." If there is material and meaningful harm, the harm must not be unreasonable when balanced against other benefits arising from the agreement in question.<sup>88</sup>

The first part of the test, whether an agreement will reduce competition substantially, establishes a threshold and is itself comprised of three elements: the "market share" of the parties participating in the agreement; "the right of independent action and ability to leave and enter the conference freely," which may be considered to offset somewhat any reductions in competition resulting from an agreement; and the availability of means of transportation other than the liner route subject to the agreement, including alternative liner routings and bulk carriers.<sup>89</sup>

If the FMC finds that an agreement does not overcome the threshold and that it substantially reduces competition, it must then inquire whether the agreement will also result in "material and meaningful" harm to shippers in terms of increased costs or reduced frequency or quality of service.<sup>90</sup> Recognizing that some changes in costs or services may be necessary to achieve the benefits of the Act, the Conference Report states that the harm to shippers must be material and meaningful in a "commercial context".<sup>91</sup> The emphasis on showing evidence of harm was intended to preclude "any per se condemnation of concerted activity such as might be applied under the antitrust laws."<sup>92</sup>

The third part of the test provides that an agreement that substantially reduces competition and results in material and meaningful harm to shippers

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87. *Id.* at 32, 1984 U.S. CODE CONG. & AD. NEWS, at 288 (emphasis added).

88. *Id.* at 34-35, 1984 U.S. CODE CONG. & AD. NEWS, at 290-91.

89. *Id.* Regarding the effect of alternative means of transportation that may effect a reduction in competition, the conferees stated:

In applying the general standard, the Commission also must consider whether the relevant competitive market includes more than just ocean common carriers providing direct service in a trade. The conferees intend that the Commission, in carrying its burden under the general standard, consider the impact on shippers of an agreement not only in view of competition between ocean common carriers providing direct service in a trade, but also in view of other competitive means of transport. In some cases, alternative liner routings, bulk carriers, charter operators, or air freight carriers may provide competitive alternatives to the direct service provided by ocean common carriers.

*Id.* at 35, 1984 U.S. CODE CONG. & AD. NEWS, at 291.

90. *Id.*

91. *Id.*

92. *Id.* at 32, 1984 U.S. CODE CONG. & AD. NEWS, at 288. See also Friedmann & Devierno, *supra* note 18, at 328.



may still be approved if its benefits outweigh its negative impact.<sup>93</sup> This “escape clause” could prove to be a watershed for U.S. maritime policy in coming years. It conceivably provides a justification for fashioning agreements that run counter to the competitive spirit of the Act in order for U.S. carriers to respond to events originating abroad. Indeed, the Conference Report notes that increased competition from controlled carriers, cargo reservation schemes imposed by other nations on their ocean trade, and the need to “act with sensitivity to the interests of its trading partners when administering shipping regulation” are all considerations to be given weight when reviewing proposed carrier agreements.<sup>94</sup> The Report also states that important benefits may result from “efficiency-creating aspects of an agreement.”<sup>95</sup> Thus, “[j]oint ventures and other cooperative agreements can enable carriers to raise necessary capital, attain economies of scale, and rationalize their services. Pooling arrangements can also offer significant benefits in reducing excess capacity and promoting efficiency.”<sup>96</sup> As the Conference Report states, “the general rules of operation and approval of agreements have been developed by the Congress with full awareness of the realities of international ocean carriage.”<sup>97</sup>

It is too early to predict what types of agreements will be enjoined under the provisions of the new Act. Although the standard of review has changed, its application is subject to interpretation; only time will tell how energetic the FMC will be in pursuing injunctions against proposed agreements and how the courts will respond. The effect of the new test, however, may be to validate agreements that would have been considered impermissibly anticompetitive under the former standard. The new standard will probably permit conferences to implement rationalization schemes that were disallowed under the 1916 Act.<sup>98</sup> As described by the Conference Report, “[t]his flexible standard permits the Commission to seek an injunction even when an agreement

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93. CONFERENCE REPORT, *supra* note 86, at 35, 1984 U.S. CODE CONG. & AD. NEWS, at 291.

94. *Id.*

95. *Id.* at 36, 1984 U.S. CODE CONG. & AD. NEWS, at 292.

96. *Id.* The Act recognizes that U.S. carriers faced with a unilaterally imposed cargo-sharing scheme from another country may have no alternative but to cooperate in a pooling arrangement or some other bilateral agreement, or face losing the carriage of substantial amounts of cargo. Thus, a policy of flexibility on this issue under these circumstances is prescribed. This allowance for flexibility is a recognition that the “real world of liner shipping” does not correspond to competitive models. L. JUDA, *supra* note 5, at 94. On several occasions in the last ten years, the United States has entered into bilateral agreements in order to avoid harsher measures that might unilaterally be imposed by other countries. *Id.* at 97–101. This provision also provides a legislative response to potential pressures exerted on the United States and its liner fleet by countries wishing to apply the UNCTAD Code in their bilateral liner trade with the United States, a possibility for which U.S. policymakers must be prepared.

97. CONFERENCE REPORT, *supra* note 86, at 37, 1984 U.S. CODE CONG. & AD. NEWS, at 293.

98. Thomas F. Moakley, Commissioner of the Federal Maritime Commission, observed that since the passage of the Act, all but 12 of 200 conference agreements filed with the Commission had been approved in 45 days or less, and the remaining 12 had also been approved after receipt of additional information. He stated that this approval rate reflects the greater flexibility

would not violate any of the prohibited acts set forth elsewhere in the bill.”<sup>99</sup> The new standard, however, “also permits agreements providing for rationalization of services to be reviewed promptly and, except in cases raising substantial issues under the standard, to enter into effect routinely.”<sup>100</sup> The legislative history reflects the intent of Congress to permit the development of stronger conferences that are more able to combat outside competition:

[T]he conferees have approved a bill that, subject to the constraints already mentioned, permits the reasonable use of conferences and other concerted activity to address structural and competitive problems, such as severe rate instability and overcapacity, that have long plagued this industry.<sup>101</sup>

### C. Procedural Reforms

The new Act also revises the procedures for implementing an agreement filed with the FMC.<sup>102</sup> Prior to enactment of the 1984 Act, a proposed conference agreement could not be implemented until it was first approved by the FMC.<sup>103</sup> Upon a showing by the FMC that the agreement violated antitrust principles, the approval process imposed a substantial burden upon the carriers to establish that the agreement was “required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulating purpose of the Shipping Act.”<sup>104</sup> Furthermore, it imposed no time limit within which the FMC had to issue a ruling on the proposed agreement.<sup>105</sup> In effect, the FMC could prevent implementation of conference agreements simply by not ruling on them. In addition, third parties opposed to the proposed agreement could intervene in the approval process<sup>106</sup> and, depending on the validity or extent of their objections, further impede the approval process.

Broadly stated, the new procedures provide that, as long as a conference agreement complies with the technical prerequisites of the Act, it will become effective unless the FMC succeeds in enjoining the agreement by order of the United States District Court for the District of Columbia.<sup>107</sup> Thus, the burden of proving that a proposed agreement violates the general standard has shifted to the FMC. The FMC must affirmatively establish to the district

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conferences now have in fashioning conference agreements. Remarks by Thomas F. Moakley at the Oceans Law and Policy Conferences, *supra* note 35 (available from the International Tax and Business Lawyer).

99. CONFERENCE REPORT, *supra* note 86, at 31, 1984 U.S. CODE CONG. & AD. NEWS, at 287.

100. *Id.* at 34, 1984 U.S. CODE CONG. & AD. NEWS, at 290.

101. *Id.* at 33, 1984 U.S. CODE CONG. & AD. NEWS, at 289.

102. 46 U.S.C.A. § 1705.

103. Shipping Act of 1916, § 15, *amended by* 46 U.S.C. § 814 (Supp. I 1983).

104. Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243 (1968).

105. Friedmann & Devierno, *supra* note 18, at 329.

106. *Id.*

107. 46 U.S.C.A. § 1705. The technical requirements of the Act are prescribed in section 6, which provides in part:

court that an agreement violates the law, instead of the previous procedure whereby the FMC could unilaterally disapprove an agreement. Furthermore,

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**ACTION ON AGREEMENTS.**

(a) **NOTICE.**—Within 7 days after an agreement is filed, the Commission shall transmit a notice of its filing to the Federal Register for publication.

(b) **REVIEW STANDARD.**—The Commission shall reject any agreement filed under section 5(a) of this Act that, after preliminary review, it finds does not meet the requirements of section 5. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement.

(c) **REVIEW AND EFFECTIVE DATE.**—Unless rejected by the Commission under subsection (b), agreements, other than assessment agreements, shall become effective—

(1) on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later; or

(2) if additional information or documentary material is requested under subsection (d), on the 45th day after the Commission receives—

(A) all the additional information and documentary material requested; or

(B) if the request is not fully complied with, the information and documentary material submitted and a statement of the reasons for noncompliance with the request. The period specified in paragraph (2) may be extended only by the United States District Court for the District of Columbia upon an application of the Commission under subsection (i).

(d) **ADDITIONAL INFORMATION.**—Before the expiration of the period specified in subsection (c)(1), the Commission may request from the person filing the agreement any additional information and documentary material it deems necessary to make the determinations required by this section.

(e) **REQUEST FOR EXPEDITED APPROVAL.**—The Commission may, upon request of the filing party, shorten the review period specified in subsection (c), but in no event to a date less than 14 days after notice of the filing of the agreement is published in the Federal Register.

(f) **TERM OF AGREEMENTS.**—The Commission may not limit the effectiveness of an agreement to a fixed term.

(g) **SUBSTANTIALLY ANTICOMPETITIVE AGREEMENTS.**—If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h).

(h) **INJUNCTIVE RELIEF.**—The Commission may, upon making the determination specified in subsection (g), bring suit in the United States District Court for the District of Columbia to enjoin operation of the agreement. The court may issue a temporary restraining order or preliminary injunction and, upon a showing that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, may enter a permanent injunction. In a suit under this subsection, the burden of proof is on the Commission. The court may not allow a third party to intervene with respect to a claim under this subsection.

46 U.S.C.A. § 1705. See also CONFERENCE REPORT, *supra* note 86, at 30, 1984 U.S. CODE CONG. & AD. NEWS, at 286, which states in part: "Agreements are to be reviewed promptly—unless special problems are encountered, the FMC will be allowed only a forty-five day period—and they will take effect automatically unless the Commission takes affirmative action under subsection (b) or (h)."

the new Act specifies time limits for the FMC's review of proposed agreements.<sup>108</sup> Thus, once an agreement is "properly filed" with the FMC, it automatically becomes effective after 45 days unless the FMC brings suit in the district court to enjoin the agreement.<sup>109</sup> Finally, the role of third-party challenges has been reduced by forbidding third parties to initiate or intervene in district court proceedings in which an agreement is challenged on general standard grounds.<sup>110</sup> The Act only permits third parties to submit "information" relevant to the proposed agreement to the FMC.<sup>111</sup> As stated in the Conference Report, "it should be information that is in the party's grasp, relevant to resolving the issue before the Commission, and not unduly burdensome."<sup>112</sup>

#### D. Antitrust Immunity

The new Act broadens the scope of antitrust immunity for conference activities.<sup>113</sup> Most importantly, section 7 extends antitrust immunity to agreements already in effect under the Act and to other activity outside the scope of an approved agreement if there is a "reasonable basis" to conclude that the activity was within the scope of an approved agreement or exempt from filing requirements under section 16.<sup>114</sup> The Act also specifies that the antitrust laws do not apply to "activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States."<sup>115</sup> Other activities relating to the foreign segment of through transportation<sup>116</sup> and terminal facilities<sup>117</sup> are

108. 46 U.S.C.A. § 1705(c), *quoted in supra* note 107.

109. A "properly filed" agreement refers to an agreement that either initially complies with the requirements of section 5 or that complies with section 5 after additional information has been supplied as required by section 6(d). In this light, the Conference Report states:

The conferees anticipate that most agreements filed with the Commission will be routinely approved within 45 days, without requiring submission of additional information. Only in cases in which there is a substantial issue of unreasonable and anticompetitive effects will the Commission need to make use of this authority. Even in such instances, the Conferees agree that the requests for additional information should be scaled to the importance of the issue and the ability of the filing parties to respond within a reasonable period.

CONFERENCE REPORT, *supra* note 86, at 30-31, 1984 U.S. CODE CONG. & AD. NEWS, at 286-87.

110. Friedmann & Devierno, *supra* note 18, at 330-31.

111. *Id.* The Conference Report also states that the Federal Maritime Commission "may, of course, receive information from third parties who believe they will be affected by a particular agreement. (The participation of third parties is, of course, limited to this informal role.)" CONFERENCE REPORT, *supra* note 86, at 31, 1984 U.S. CODE CONG. & AD. NEWS, at 287.

112. CONFERENCE REPORT, *supra* note 86, at 31, 1984 U.S. CODE CONG. & AD. NEWS, at 287.

113. 46 U.S.C.A. § 1706.

114. 46 U.S.C.A. § 1706(a)(2).

115. 46 U.S.C.A. § 1706(a)(3).

116. 46 U.S.C.A. § 1706(a)(4).

117. 46 U.S.C.A. § 1706(a)(5).

also immune from the antitrust laws. Finally, section 7(c)(2) of the Act provides that no person may obtain treble damages or injunctive relief under the antitrust laws "for conduct prohibited by this Act."<sup>118</sup>

The Act did not, however, adopt S. 1593's proposal to grant complete antitrust immunity to all conference activities. Thus, while the 1984 Act provides a measure of relief from the antitrust laws, it does not afford conferences the broad freedom of action contemplated by the closed conference system. Nevertheless, the Act, by virtue of extensions of antitrust immunity and limitation of remedies, in conjunction with the inclusion of intermodal agreements within the scope of antitrust immunity and the more flexible general standard for immunizing a multicarrier agreement from the antitrust laws, has created a tone of greater permissiveness toward conference activities.

### *E. Exercising Muscle Abroad*

The Act attempts to strengthen the international position of U.S. liners by imposing penalties on foreign anticompetitive practices. Section 13(b)(5) provides that if the FMC determines that any foreign carrier alone, or in conjunction with any person or foreign government, has "unduly impaired" the access of a U.S.-registered vessel to foreign-to-foreign trade routes, the FMC may impose penalties on the foreign carrier or carriers involved.<sup>119</sup> Such penalties include suspending the tariffs of the carriers and the right of carriers to use tariffs of conferences of which they are members.<sup>120</sup>

Section 13(b)(5) addresses a problem which currently harms, and another which potentially harms, U.S. carriers. Because foreign-to-foreign

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118. 46 U.S.C.A. § 1706(c)(2).

119. Section 13(b)(5) of the Act provides:

If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has duly [sic] impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including the imposition of any of the penalties authorized under paragraphs (1), (2), and (3) of this subsection.

46 U.S.C.A. § 1712(b)(5).

120. Section 13(b) of the Act provides for the following penalties:

(1) For a violation of section 10(b)(1), (2), (3), (4), or (8) of this Act, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months.

(2) For failure to supply information ordered to be produced or compelled by subpoena under section 12 of this Act, the Commission may, after notice and an opportunity for hearing, suspend any or all tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member.

(3) A common carrier that accepts or handles cargo for carriage under a tariff that has been suspended or after its right to utilize that tariff has been suspended is subject to a civil penalty of not more than \$50,000 for each shipment.

46 U.S.C.A. § 1712(b)(1), (2), (3).

trade routes are dominated by closed conferences,<sup>121</sup> U.S. vessels may have difficulty entering such trades. Section 13(b)(5) allows U.S. authorities to retaliate if U.S. carriers are excluded from these cross trades.<sup>122</sup> The penalty provisions of section 13(b)(5) also combat the potential problem of increased use of cargo-sharing laws by U.S. trading partners. Cargo-sharing laws, as envisioned in the UNCTAD Code and the Brussels Package,<sup>123</sup> may reserve up to eighty percent of conference cargo, or eventually even one hundred percent of all liner cargo moving between two countries. If such bilateral agreements were to become commonplace, the position of U.S. carriers in such cross trades would become even more disadvantaged.<sup>124</sup>

Section 13(b)(5)'s retaliatory power and restriction on cargo-sharing could lead to serious international tension, because the commercial practices of closed conferences abroad are permitted under the laws of most sovereign nations.<sup>125</sup> However, the effect of section 13(b)(5) is somewhat diminished by section 13(b)(6), which states that no penalty order against a foreign carrier may be carried out without approval by the President, who may veto the order "for reasons of the national defense or the foreign policy of the United States."<sup>126</sup> Nevertheless, detractors are quick to point out that section 13(b)(5) imposes U.S. shipping prohibitions worldwide, even where such practices are legal, and requires nations to grant most-favored-nation status to U.S. vessels in all trades, even with regard to countries to which the United States has not granted such status.<sup>127</sup>

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121. See Agman, *supra* note 4, at 5.

122. For the penalty provisions the FMC may invoke when a U.S.-flag carrier is excluded from a cross trade, see 46 U.S.C.A. § 1712(b)(5), *quoted in supra* note 119.

123. On the UNCTAD Code, see *supra* note 31. The "Brussels Package" refers to a compromise reached by the European Community that provided for each member's accession to the UNCTAD Code subject to various amendments. Most fundamental among these amendments was the limitation of cargo-sharing to trade between the developing nations and the European Community, with trade between developed nations to remain open, subject to any existing commercial schemes that control the movement of liner cargo (meaning the activity of conferences). For details of the Brussels Package, see Larsen & Vetterick, *supra* note 31, at 248.

124. The provisions of the UNCTAD Code refer to the figure of forty percent as a desirable percentage of conference cargo for each trading partner to carry on a bilateral trade route. Thus, under such an arrangement, assuming that both partners were able to carry their forty percent, and that the agreement was properly policed, there would remain twenty percent of the conference cargo for which third-party carriers could compete. See Larsen & Vetterick, *supra* note 31, at 236.

Apart from the Administration's general objections to the Code because of its promotion of anticompetitive arrangements, various U.S. officials have also stated that the Code may be interpreted by some nations as allowing them to close their trade routes by routing all cargo through the conferences, thus excluding independents and perhaps, excluding even the twenty percent participation of third flag carriers in the trade routes by maintaining that such carriers are not needed. Levine, Assistant Director, Office of Int'l Transp. and Trade, U.S. Dep't of Transp., *United States—Consultative Shipping Group Discussions on Reciprocal Guarantees of Competitive Access to Maritime Trade*, 1-4 (available from the International Tax and Business Lawyer).

125. See Agman, *supra* note 4, at 5.

126. 46 U.S.C.A. § 1712(b)(6).

127. This would be the result if, for example, U.S. authorities required entry of U.S. carriers into the Japan-PRC trade on terms as favorable as vessels flying the Japanese and PRC flags in exchange for the U.S. tariffs of those countries' carriers not being suspended, as is allowed under

Legislative history reveals that section 13(b)(5) was modified to provide a sharp legislative response to the possible failure of discussions between the United States and the Consultative Shipping Group (hereinafter CSG) countries<sup>128</sup> regarding reciprocal access to liner cargo. These discussions, initiated in August 1983 by the Department of State, seek the opening of the European and Japanese cross trades to U.S. liners on terms comparable to those under which European and Japanese liners have freely operated in U.S. cross trades for many years. Although it encouraged the successful conclusion of these negotiations, the State Department supported insertion of section 13(b)(5) both as an inducement to the CSG countries to allow reciprocal access by U.S. liners to their trades and as a legislative response in the event that U.S. liners were denied such access.

Section 9 of the Act, another provision affecting access to U.S. trades by foreign carriers, substantially retains the terms of the Ocean Shipping Act of 1978 (also referred to as the Controlled Carrier Act).<sup>129</sup> Section 9 subjects fleets of non-market economy countries (hereinafter controlled carriers) plying U.S. cross trades to close scrutiny by U.S. regulatory authorities.<sup>130</sup> If a controlled carrier in such trades charges rates below a "just and reasonable" level, the FMC may reject or suspend that carrier's tariff.<sup>131</sup> Participation of controlled carriers in U.S. cross trades is thus limited and controlled.

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46 C.F.R. 587.2(a) and (d). Although the United States has not granted most-favored-nation status to the PRC, generally or even to the treatment of its vessels, this regulation would technically allow the United States to require the PRC to treat U.S.-flag carriers under most-favored-nation status or face losing its U.S. tariffs.

128. The CSG is an organization which represents the shipping interests of Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, Netherlands, Norway, Spain, Sweden, and the United Kingdom. Although delegates of the CSG are government officials, the organization itself has no authority to conclude binding agreements on behalf of its members and thus its agreements are enforceable only after the member states have entered into such agreements or enacted appropriate legislation.

129. 46 U.S.C.A. § 1708; Controlled Carrier Act, *supra* note 32.

130. Section 9 does not apply to "rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein, and the United States." 46 U.S.C.A. § 1708(f)(4). Section 3(8) of the Act defines "controlled carrier" as:

an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate; ownership or control by a government shall be deemed to exist with respect to any carrier if

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

46 U.S.C.A. § 1702(8).

131. Section 9(b) provides:

For the purpose of this section, in determining whether rates, charges, classifications, rules, or regulations by a controlled carrier are just and reasonable, the

### F. Conclusion

Although the U.S. regulatory regime now takes a more permissive stance toward multicarrier activities, the fundamental anticompetitive changes sought by carriers, as expressed in S. 1593, were not incorporated into the Shipping Act of 1984. As discussed in the next Part, the Act succeeded in preserving an element of competition in the U.S. liner trades which is unmatched by U.S. trading partners.

## IV

### PRESERVING COMPETITION IN THE LINER TRADES

Despite the inclusion of anticompetitive, carrier-oriented provisions in the new Act, the United States remains a shipper-oriented, free-trade country in which the interests of U.S. ocean carriers are dwarfed by the interests of those whose goods are transported. During the legislative process, Congress considered compelling reasons for maintaining competition in the ocean liner trades. That Congress was persuaded that shippers' interests and co-existing free-trade principles should prevail over carrier interests is evidenced by the extent to which the provisions of the new Act preserve a competitive market.

#### A. Pro-competitive Provisions

Section 5 of the Act requires that all conference agreements provide for open membership, withdrawal from conference membership without penalty, and the right of conference members to take independent action with regard to rates and services.<sup>132</sup> These three requirements ensure that competition is retained in the liner trades by curtailing the power of a conference to control

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Commission may take into account appropriate factors including, but not limited to, whether

(1) the rates or charges which have been filed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;

(2) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade;

(3) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or

(4) the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

46 U.S.C.A. § 1706(b).

Furthermore, section 9(a) places the burden of proving that a rate, charge, classification, rule, or regulation maintained by a controlled carrier is just and reasonable upon the controlled carrier. 46 U.S.C.A. § 1706(a). Section 9(d) allows the FMC to suspend all rates, charges, etc., proposed or already maintained by a controlled carrier pending a determination of their lawfulness under section 9. 46 U.S.C.A. § 1706(d).

132. Section 5(b)(2), (3) and (8) provide as follows:

(b) CONFERENCE AGREEMENTS.—Each conference agreement must—



the supply of available tonnage or to bind conference members to established rates.<sup>133</sup> With unrestricted membership and the right of independent action, conference agreements setting rates and terms of service may be broken if a carrier believes such action will attract more cargo and improve business.<sup>134</sup> Competition is thereby increased by eliminating the conferences' exclusivity and control over prices and service, and by allowing carriers to set their own rates and terms of service without jeopardizing their status as conference members.

1. *Independent Action.* While the 1916 Act also required open membership, the new legislation, for the first time, gave a statutory right of independent action to carriers.<sup>135</sup> This right is of considerable significance in that it allows shippers to bargain with a conference carrier for rates that are lower than, or services that are different from, those published by the conference under section 8(a) of the Act.<sup>136</sup> The carrier, in turn, may respond by giving the conference ten days' notice of its intention to take independent action without jeopardizing its membership in the conference.<sup>137</sup> Although conferences sometimes allowed, or were compelled to allow, such action under the 1916 Act,<sup>138</sup> a statutory right of independent action, which virtually mandates competition among conference carriers, was not established until the enactment of the new Act.

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

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

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

46 U.S.C.A. § 1704(b)(2), (3), (8).

133. For a discussion of the methods by which a closed conference controls competition, see *supra* notes 7-16 and accompanying text.

134. One British study advocating closed conferences and rationalization concludes that two of the most serious problems with U.S. open conferences are overtonnaging and instability of rates, the latter problem being a direct result of the first. See Evans & Davies, *supra* note 27, at ¶ 38.

135. 46 U.S.C.A. § 1704(b)(8), *quoted in supra* note 132.

136. *Id.* Friedmann and Devierno note that the "basic objection of conference carriers to a mandatory right of independent action is that it is inconsistent with the concept of liner conferences, since it reduces a conference's ability to stabilize rates." Friedmann & Devierno, *supra* note 18, at 341.

137. 46 U.S.C.A. § 1704(b)(8), *quoted in supra* note 132.

138. Friedmann & Devierno, *supra* note 18, at 341.

2. *Increased Shipper Strength.* The Act provides additional strength to shippers by legalizing service contracts<sup>139</sup> and permitting the formation of "shippers' associations".<sup>140</sup> Service contracts are specifically allowed under section 8(c) of the Act and are mentioned in various other sections as well.<sup>141</sup> While carriers resisted allowing service contracts under the Act,<sup>142</sup> shippers, particularly large shippers, enthusiastically supported their inclusion.<sup>143</sup>

Service contracts are intended to stimulate competition by permitting carriers to offer lower rates and preferential service terms to a shipper in exchange for the shipper's agreement to provide a minimum quantity and type

139. See *infra* notes 141-147 and accompanying text.

140. The Act defines a "shippers' association" as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts." 46 U.S.C.A. § 1702(24).

141. Section 8(c) provides:

**SERVICE CONTRACTS.**—An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any. The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

46 U.S.C.A. § 1707(c).

The Act defines "service contract" as:

a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

46 U.S.C.A. § 1702(21).

See also subsections 10(b)(6), (b)(11) and (c)(6) concerning prohibited acts. 46 U.S.C.A. § 1709(b)(6), (11) and (c)(6).

142. Telephone interview with Peter Friedmann, Maritime Counsel, Committee on Commerce, Science and Transportation, U.S. Senate (Jan. 1985).

143. Friedmann & Devierno, *supra* note 18, at 345.

of cargo over a fixed period of time.<sup>144</sup> The Act does not require that a conference afford its members the right to offer service contracts.<sup>145</sup> However, where the conference prohibits such freedom, a conference carrier can withdraw from the conference and negotiate a service contract if it finds the economic reasons sufficiently compelling. Furthermore, where the conference does not accord a service contract to a shipper that controls enough cargo to be able to demand one, such a shipper is likely to conclude a service contract with independents.<sup>146</sup> The result may be that conferences themselves will begin negotiating service contracts for the benefit of all conference carriers.

Allowing service contracts induces carriers to offer lower rates and thus compete against one another. Negotiated service contracts also disrupt the conference machinery because such contracts greatly reduce the base of available cargo over long periods of time. While service contracts may enable individual carriers to establish a more competitive market, they reduce the power of the conference to control prices and terms of service on a particular trade route.

As a general proposition, large shippers in control of sizable amounts of cargo are best able to negotiate discounts through service contracts. The resulting price disadvantage to smaller shippers is the main reason such contracts were questioned under the 1916 Act.<sup>147</sup> The new Act has partially addressed this problem by authorizing the formation of "shippers' associations".<sup>148</sup> Such associations allow small-volume shippers to group together on a nonprofit basis to obtain discount rates available on large-volume shipments.<sup>149</sup> By negotiating with a carrier as a group, the smaller shippers may be able to obtain the same shipping terms as a large-volume shipper.

The shippers' associations are not, however, granted immunity from antitrust laws. Therefore, the Conference Report urges shippers to obtain advice from the Justice Department as to possible violations of the antitrust laws before they enter into association agreements.<sup>150</sup> Market share and the

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144. The Department of Justice Comments even characterize service contracts as "pro-competitive". See Dep't of Justice Comments, *supra* note 11, at 13; Friedmann & Devierno, *supra* note 18, at 345. Shippers tend to support service contracts because such contracts allow them to bargain with carriers. Shippers also favor service contracts because they may be negotiated only with reference to a particular commodity. Loyalty contracts, on the other hand, usually involve a standard ten to fifteen percent discount, with no room for negotiation, and require the carriage of all the shipper's cargo, as opposed to a contract of carriage for a particular commodity.

145. The right of independent action provided in section 5(b)(8) of the Act, 46 U.S.C.A. § 1704(b)(8), applies only to a rate or service item required to be filed under section 8(a), 46 U.S.C.A. § 1707(a), while a service contract filing is handled under section 8(c), 46 U.S.C.A. § 1707(c).

146. See Friedmann & Devierno, *supra* note 18, at 343 & n.170.

147. *Id.* at 345.

148. For the Shipping Act's definition of "shippers' associations", see 46 U.S.C.A. § 1702(24), *quoted in supra* note 140.

149. In this regard, section 10(b)(13) provides that no common carrier or conference may "refuse to negotiate with a shippers' association." 46 U.S.C.A. § 1709(b)(13).

150. CONFERENCE REPORT, *supra* note 86, at 37-38, 1984 U.S. CODE CONG. & AD. NEWS, at 293-94. The Conference Report also notes that a conference or carrier does not violate the

makeup of the proposed association will be considered in determining compliance with antitrust laws.<sup>151</sup> For example, an association that covers a significant share of the cargo shipped or includes direct competitors will not be permitted.<sup>152</sup> However, the Department of Justice recently indicated that shippers' associations that control up to fifteen percent of the market traffic will be allowed.<sup>153</sup>

### B. Conference-Weakening Provisions

By and large, activities prohibited under the new Act maintain, or in at least one instance strengthen, the competition-oriented prohibitions of the 1916 Act.<sup>154</sup> Among other prohibitions, section 10 of the Act forbids common carriers to use fighting ships,<sup>155</sup> to offer deferred rebates,<sup>156</sup> or to use loyalty contracts which violate the antitrust laws.<sup>157</sup>

1. *Restrictions on Loyalty Contracts.* Loyalty, or dual-rate, contracts were used extensively under the 1916 Act.<sup>158</sup> The Justice Department, however, described such conference contracts as "unambiguous per se violations of section 1 of the Sherman Act" because they are "simply agreements among ocean carrier competitors to charge a certain price to shippers who commit all or a fixed portion of their cargo to those ocean carriers."<sup>159</sup> The Justice

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antitrust laws by negotiating with a shippers' association that is in violation of such laws if the negotiations were "within the scope of an effective agreement." *Id.*

151. *Id.* at 38, 1984 U.S. CODE CONG. & AD. NEWS, at 294.

152. Friedmann & Devierno, *supra* note 18, at 349-50.

153. A favorable business review letter from the Department of Justice concerning Ocean Shippers' Associations would presumably rest on the same analysis used to consider approval of similar associations organized by the National Small Shipments Traffic Conference, Inc., which represents motor carriers. One such proposed organization, which controlled about fifteen percent of the less-than-truckload traffic carried by general freight motor carriers each year nationwide, was not considered to have "market power over freight rates ('monopsony power') in any relevant market" (although the organization was disapproved for other reasons). Letter from William F. Baxter, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Daniel J. Sweeney, Esq. (July 19, 1983) (available from the International Tax and Business Lawyer).

A favorable business review letter issued in response to a proposed ocean shippers' association considered the following factors: the total volume and distribution of traffic to be shipped under the proposed arrangements; the ability of members of the association to individually negotiate rates or contracts; the intention of the association not to provide for any form of collective rate-making or discussions among broker members; and the association's lack of power to depress transportation rates below competitive levels ("monopsony power") in any geographic market. Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Robert J. Gallagher, Esq. (February 8, 1985) (available from the International Tax and Business Lawyer).

154. 46 U.S.C.A. § 1709. While most loyalty contracts are prohibited under the new Act, they held an ambiguous position under the 1916 Act. *See infra* notes 158-164 and accompanying text.

155. 46 U.S.C.A. § 1709(b)(7).

156. 46 U.S.C.A. § 1709(b)(8).

157. 46 U.S.C.A. § 1709(b)(9).

158. Friedmann & Devierno, *supra* note 18, at 335.

159. Dep't of Justice Comments, *supra* note 11, at 12-13.

Department also opposed loyalty contracts because they make it "hard for carriers not party to loyalty contracts to attract shippers tied" to such contracts, thus reducing competition.<sup>160</sup> Because of these objections, loyalty contracts will likely not be approved unless the Justice Department issues a favorable business review letter which states that the proposed contract affects too small a portion of the relevant total trade to enable the carrier to exercise "market power" by affecting price levels independently.<sup>161</sup>

The Comments of the Justice Department indicate that a business review letter is difficult for a conference to obtain.<sup>162</sup> However, the Department also stated that a favorable business review letter is likely to be issued where it is "presented with a unilateral loyalty contract involving but a single carrier that does not possess significant market power."<sup>163</sup> Indeed, the first reported dual-rate system approved by the Department involved a single carrier on a route in which "other carriers serving the same and neighboring ports possess sufficient capacity to restrict" the carrier's ability to affect price levels independently.<sup>164</sup> This provision again indicates a weakening of conference strength because, without the authority to negotiate loyalty contracts, conferences lose much of their power to tie shippers to conference vessels and thereby exclude competing independent vessels from a trade route.

2. *Prohibited Activities.* The Act also prohibits both retaliatory action against shippers for patronizing other carriers or conferences,<sup>165</sup> and, with the exception of service contracts,<sup>166</sup> any discriminatory behavior with regard to rates and conditions of service.<sup>167</sup> Section 10 of the Act is directed at concerted action taken by a conference or a group of two or more common carriers. It specifically prohibits boycotts,<sup>168</sup> unreasonable restrictions on the use of intermodal services,<sup>169</sup> and "any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier."<sup>170</sup> The significance of these prohibitions in the United States is that most other countries allow such activities.

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160. *Id.* at 13 n.\*\*\*.

161. *Id.* at 15.

162. *Id.* at 15-16.

163. *Id.* at 15.

164. The first dual-rate system that received Justice Department approval was proposed by D.B. Turkish Cargo Lines for service between U.S. Atlantic and Gulf ports and Mediterranean and Black Sea Turkish ports. The Justice Department business review letter stated that "other carriers serving the same and neighboring ports possess sufficient capacity to restrict D.B. Cargo's ability to affect price levels independently." *J. of Com.*, Dec. 20, 1984, at 24B.

165. 46 U.S.C.A. § 1709(b)(5).

166. For analysis of "service contracts", see *supra* notes 141-147 and accompanying text.

167. 46 U.S.C.A. § 1709(b)(6).

168. 46 U.S.C.A. § 1709(c)(1).

169. 46 U.S.C.A. § 1709(c)(2).

170. 46 U.S.C.A. § 1709(c)(3).

## V

## WHAT DOES IT ALL MEAN?

It is still too early to tell what effect the Act will have on competition in the liner trades and the economic performance of the U.S. liner shipping industry. Yet several noteworthy points, summarized below, can be drawn from a reading of the Act and its history.

A. *Nature of the Compromise*

In the United States, regulation of the liner shipping industry has historically been shaped by the pull of two opposing forces. One camp has leaned toward free and open competition,<sup>171</sup> the economic philosophy (if not always the practice) by which the nation has prospered. The other camp has leaned strongly toward industry self-regulation and non-competition with little government oversight, an approach taken by most countries of the world.<sup>172</sup> While the extremist "free-traders" would abolish conferences altogether, the extremist "self-regulators" would close conferences and strengthen their power to control the liner trade routes. Since at least 1916, U.S. regulatory policy has hovered somewhere between these two extremes.<sup>173</sup>

This tendency toward the middle ground has been followed in the new Act. The carrier industry now enjoys a new general standard of review,<sup>174</sup> a faster and easier approval process by the FMC,<sup>175</sup> expanded antitrust immunity,<sup>176</sup> freedom to conclude intermodal agreements,<sup>177</sup> retention of the controlled carrier provisions,<sup>178</sup> and an "escape clause" procedure whereby cargo-sharing is given a vague hope of survival in the U.S. trades.<sup>179</sup> These provisions promote rationalization and reduce competition by facilitating the conclusion and implementation of multicarrier agreements.<sup>180</sup>

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171. Agricultural, manufacturing, and shipper interests have a natural desire to preserve competition in transportation so as to lower transportation costs. See *supra* notes 132-153 and accompanying text.

172. See *supra* notes 3-19 and accompanying text.

173. See *supra* notes 22-27 and accompanying text.

174. See *supra* notes 84-101 and accompanying text.

175. See *supra* notes 102-112 and accompanying text.

176. See *supra* notes 113-118 and accompanying text.

177. See *supra* notes 75-83 and accompanying text.

178. See *supra* notes 129-131 and accompanying text.

179. See *supra* notes 93-97 and accompanying text.

180. This point was recently made in an address by Peter G. Sandlund. While stating that the 1984 Act accommodates "reasonable and efficient rationalization" schemes, Sandlund also noted that it will still be:

difficult to achieve effective rationalization in the U.S. trades, simply because under U.S. law, whether it be the 1916 Act or the 1984 Act, any conference has to be open to membership for all common carriers willing to serve the particular trade or route (Section 5(b)(2) of The Shipping Act of 1984). With this requirement, it is never possible to establish agreed market shares, which, in turn, serve as the basis for vessel allocation in the rationalized service.

However, the benefits accruing to the self-regulators must be balanced against what was achieved or retained by the free-traders. The new Act grants the shipping industry a mandatory right of independent action for conference carriers,<sup>181</sup> the right to enter into service contracts,<sup>182</sup> effective abolition of most loyalty contracts,<sup>183</sup> authorization of shippers' associations,<sup>184</sup> and maintenance of open conferences which are prohibited from engaging in discriminatory, retaliatory, or predatory activities.<sup>185</sup> These provisions promote competition by limiting the power of conferences to control trade routes and by inducing and allowing carriers to compete with one another for cargo, regardless of conference membership.

The extent to which the pro-competition provisions will neutralize or overshadow the new conference-strengthening provisions is difficult to assess. Although the overall tone of the Act is pro-competitive, especially when weighed against the operation of closed conferences abroad, the inclusion of significant pro- and anticompetitive features in the Act illustrates that the opposing forces seeking to shape liner shipping regulation policy are not easily reconcilable. The middle ground is achieved not so much through compromise provisions as through the interaction of contradictory provisions in the legislation itself. Yet, while the Act does not represent an unambiguous policy, it unmistakably reflects the goal of the U.S. government to maintain competition in the liner trades, a distinguishing factor from the policies of its trading partners.

### B. Effect of the Compromise

As the nature of the compromise achieved in the Act suggests, full rationalization will not emerge in the U.S. trades, but neither will full competition.<sup>186</sup> Another way of describing the Act's effect on carrier activity is that it does not grant conferences the power required to fully obstruct carriers' natural inclination to compete.<sup>187</sup> Not only does the Act prevent full rationalization by providing carriers with the incentive to compete and subjecting

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Address by Peter G. Sandlund, Washington Representative of the Council of European and Japanese National Shipowners' Associations, at the Oceans Law and Policy Conference, *supra* note 35 (available from the International Tax and Business Lawyer).

181. See *supra* notes 135-138 and accompanying text.

182. See *supra* notes 139-146 and accompanying text.

183. See *supra* notes 158-164 and accompanying text.

184. See *supra* notes 148-153 and accompanying text.

185. See *supra* notes 165-170 and accompanying text.

186. In this respect, the 1984 Act reaffirms the basic policy of the 1916 Act, which recognized and accepted shipping conferences, yet limited their role by subjecting them to antitrust laws and prohibiting various activities considered essential to effectively implement rationalization schemes. See CONFERENCE REPORT, *supra* note 86, at 33, 1984 U.S. CODE CONG. & AD. NEWS, at 289. For an historical discussion of U.S. legislation concerning conferences and their rationalization attempts, see *supra* notes 22-27 and accompanying text.

187. This point is significant when one considers that shipping conferences, which as collective bodies regulate their members' activities, are also a creation of those regulated shipping

conference agreements to governmental review, it also continues to provide for competitive access to cargo in U.S. foreign commerce.<sup>188</sup>

### C. *The United States Is Not A Carrier-Oriented Country*

A significant conclusion to be drawn from the Act is that the United States is not a carrier-oriented country.<sup>189</sup> The effort to create an anticompetitive regulatory policy in the U.S. trades as favorable to the organized liner industry as that in effect in the non-U.S. trades was soundly defeated. The interests of large shippers and the economic arguments presented for justifying open competition in the liner trades were obviously persuasive to Congress and largely responsible for this outcome.

The interests of the U.S. liner industry are at odds with the economic interests of much larger and diverse sectors of the U.S. economy. Shippers, representing exporting industries in the United States and importers of foreign goods, believe they benefit from open competition and non-monopolistic conferences, with which they have more leverage in negotiating cargo carriage agreements.<sup>190</sup> The lower transportation costs they obtain contribute to

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companies and were voluntarily formed by those shipping companies in order to limit competition between themselves. The perceived collective benefit is obtained by granting the collective body broad authority to control each submitting shipping company and thus prevent each member from making unilateral competitive decisions.

188. Open access to the U.S. trades for cross-trading European and Japanese vessels has, however, been the subject of recent discussions between the United States and the Consultative Shipping Group (CSG), representing Western European and Japanese shipping interests. The problem stems from the CSG countries' decision to accede to the UNCTAD Code, under the formula known as the Brussels Package, and the U.S. opposition to the Code and the possibility that it will close the European and Japanese cross trades to U.S. vessels. The CSG-U.S. dialogue is an attempt to establish reciprocal and open access between the parties' vessels moving each other's cargo in cross trades. CSG-U.S. Dialogue, Agreed Working Text At the Conclusion of Phase One, prepared in Washington, D.C. (Jan. 24, 1985) (unpublished government document available from the International Tax and Business Lawyer).

189. Not only is the U.S. liner industry relatively unprofitable in terms of return on equity, it also represents relatively minuscule financial interests when compared with agricultural, chemical, and other large shipper interests. See L. JUDA, *supra* note 5, at 31. Indeed, the national-security role of the U.S. liner fleet serves as the primary justification for government policies and legislation that protect that industry. As one commentator stated: "The U.S.-flag Merchant Marine has long been considered the primary source of ships to meet national defense requirements . . ." Address by Vice Admiral William H. Rowden, U.S. Navy Commander, Military Sealift Command, at the Oceans Law and Policy Conference, *supra* note 35 (available from the International Tax and Business Lawyer). John Breaux, a senior member of the House Merchant Marine and Fisheries Committee, noted at the same conference that the current decline of our merchant marine may lead the United States to "lose virtually any capacity to provide our traditional armed forces with merchant marine sealift capacity, thus endangering our national security." Address by John Breaux at the Ocean Law and Policy Conference, *supra* note 35 (available from the International Tax and Business Lawyer).

190. See 130 CONG. REC. S1579 (daily ed. Feb. 23, 1984) (statement of Sen. Metzenbaum (D.-Ohio)). For a contrary viewpoint, see Evans & Davies, *supra* note 27. Evans and Davies state that "[a]s a result of such widespread and costly inefficiencies, shippers too have voiced their strong opposition to the open conference system. Thus, 'the ESC [European National Shippers' Council] believe [sic] that the possible effect of the FMC's insistence upon open conferences



lower consumer prices as well.<sup>191</sup> Thus, the Act may be said to have responded to the concerns of major sectors of the economy by providing a framework for competition in ocean transportation.

Attempts to promote the U.S. liner industry through protectionist policies that might exclude non-U.S. flag vessels from the U.S. trades or reserve large percentages of cargo for U.S.-flag vessels have also recently been rejected by the Administration, despite the potentially enormous benefits that would accrue to the U.S. liner industry.<sup>192</sup> The Act thus reflects a view similar to that which prompted U.S. rejection of the UNCTAD Code. Although some anticompetitive practices, such as the activity of open conferences, may be thought necessary to maintain an efficient ocean common carriage system, U.S. regulatory policy still places a priority on the free flow of goods in foreign commerce.<sup>193</sup>

It is no coincidence that this market-oriented approach coincides with the views of the Reagan Administration, which has been increasingly active in promoting a pro-competitive maritime policy for the country and the world.<sup>194</sup> In a recent statement, Transportation Secretary Elizabeth Dole wrote that the Reagan Administration is "committed to providing a framework and stimulus for competitiveness" and has "sought to rely to the greatest extent possible on free market forces."<sup>195</sup>

#### D. *International Developments*

The UNCTAD Code, and the wide-ranging effect it may eventually have on international liner shipping, raises a question as to whether the Act provides an adequate framework within which the United States may respond to the Code's implementation. To a degree, the Act provides such a framework. More importantly, however, the Act confirms the U.S. government's pursuit

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in the North Atlantic Trade could easily lead to disastrous consequences for the shippers' interests'. . . ." *Id.* at ¶ 70.

They further state that "[i]n view of such compelling evidence in favour of COAR conferences [co-operatively organized and appropriately rationalized, i.e., closed conferences] one must seriously wonder why it is that the FMC has not proposed appropriate legislative amendments to the Shipping Act but, instead, has to support inefficient open conferences at the considerable and unnecessary expense of the U.S. national shippers and consumers." *Id.* at ¶ 73.

191. 130 CONG. REC. S1579 (daily ed. Feb. 23, 1984) (statement of Sen. Metzenbaum (D.-Ohio)).

192. Rejection of the principle of cargo reservation was expressed most overwhelmingly in U.S. rejection of the UNCTAD Code, which envisions a worldwide network of bilateral cargo-sharing agreements in which each partner in a bilateral trading relationship has a legal interest in carrying up to forty percent of the cargo moving in that bilateral trade. *See supra* note 31.

193. Thus, for example, conferences—which are basically cooperative organizations of competitors—are permitted to operate but are required to be "open" so that their ability to control the availability of shipping services is limited. *See supra* notes 22-27 and accompanying text.

194. These competition-promoting activities include U.S. rejection of the UNCTAD Code and participation in the CSG-U.S. discussions which are attempting to keep trade routes open to foreign vessels rather than closing them through bilateral cargo-sharing arrangements.

195. Dole, "Realism" *Seen Key to Survival*, *J. of Com.*, May 20, 1985, at 1C.

of a competitive ocean liner system and indicates the resolve with which the Administration may attempt to achieve that goal.

The Act's Declaration of Policy states that one of the purposes of the Act is "to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices."<sup>196</sup> Apart from this noncommittal intention to respond to "international shipping practices", the "escape clause" provision developed under section 6(g) of the Act provides a measure of flexibility under U.S. shipping law for responding to actions taken by foreign governments under the Code.<sup>197</sup>

The basic thrust of the UNCTAD Code runs contrary to U.S. law. It authorizes closed conferences, dual-rate loyalty contracts, deferred rebates, and shippers' councils,<sup>198</sup> all of which are in direct conflict with U.S. law. While the "escape clause" provides some legal basis for enacting cargo-sharing arrangements, a primary objective of the Code, the legislative history of the Act suggests that this provision should be invoked only as a last resort.<sup>199</sup> Thus, the tone and actual provisions of U.S. shipping law remain at odds with the regulatory regime contemplated under the Code.

Furthermore, the imposition of penalties against foreign carriers for unduly impairing access to trade routes, as prescribed in section 13(b)(5), indicates an intention to oppose implementation of the Code and other cargo access restrictions in the non-U.S. trades where they damage U.S.-flag liners.<sup>200</sup> Thus, the Act works in opposition to the Code and its anticompetitive policies where they affect the U.S. trades or U.S. liners.

What is noteworthy from a reading of the Act and recent policy decisions made by the Administration is that U.S. law and policy are aimed at advancing the goal of free competition in liner shipping. To this end, the United States has kept the U.S. trades open and provided strong incentives to our major trading partners to do the same. This approach follows from a view that competition is preferable to cooperation and that the strong U.S.-flag liners should fare well in such an environment, especially where they have a fair opportunity to compete in the European and Japanese cross trades. Those countries' liners are, of course, allowed to compete freely in the open U.S. cross trades.<sup>201</sup> In addition, the retaliatory threat provided by the

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196. 46 U.S.C.A. § 1701(2).

197. 46 U.S.C.A. § 1705(g). See *supra* notes 93-97 and accompanying text.

198. See *supra* note 31.

199. The CONFERENCE REPORT provides:

Although the Commission might generally not approve such restrictive arrangements, the Commission, after giving due consideration to the maritime and trade policy views of the United States, may conclude that approval is necessary in order to maintain a viable U.S.-flag service, as it has in the past in similar circumstances.

CONFERENCE REPORT, *supra* note 86, at 36, 1984 U.S. CODE CONG. & AD. NEWS, at 292.

200. See *supra* notes 119-127 and accompanying text.

201. 46 U.S.C.A. § 1704(b)(2),(3),(8), quoted in *supra* note 132.

Act under section 13(b)(5) and the Administration's authority to enact bilateral agreements with the Third World, thus restricting European and Japanese carrier access to such trades, may be exercised in the event that access by U.S. liners to the CSG cross trades is impaired.

Since the conclusion of the Brussels Package and the signing of the UNCTAD Code by various European Community countries, discussions between the United States and the CSG countries have been the centerpiece of efforts to regulate international liner activity. As mentioned above, these discussions are aimed at ensuring that the CSG countries' cross trades are open to U.S. liner competition even where the UNCTAD Code may be implemented. The United States offered a *quid pro quo* of a continued opportunity for CSG-country liners to carry cargo in the U.S. cross trades. Should the CSG countries enter into UNCTAD Code bilateral agreements with the developing world, even under the Brussels Package formula, the Administration has expressed concern that such agreements would leave no room for the entry of U.S. liners into such trades, even as non-conference independents. In response, the United States could retaliate by entering into bilateral agreements with developing countries which, if carried out, would greatly damage European and Japanese liners already participating in U.S. cross trades.

The fact that the United States has something to gain while the CSG countries have something very significant to lose has provided a measure of common ground upon which negotiations have proceeded. Clearly, the United States feels that, because it offers open trades and open conferences, the CSG countries should at least provide concrete assurances that its closed conferences and UNCTAD Code-controlled trades will not result in closure of such trades to U.S. liner vessels. As mentioned earlier, it was with an eye toward the CSG-U.S. dialogue that the State Department supported inclusion of section 13(b)(5) in the new Act. While the Act may indicate some limited acceptance of cargo-sharing arrangements, its thrust is clearly toward maintaining competition in all U.S. trades and those of our major trading partners as well. A legislative response is available if other countries do not, at a minimum, move to open competition by providing significant assurances that U.S. carriers will be allowed to compete in trades where the UNCTAD Code is implemented.

Following a similar strategy, the Administration has taken steps to promote competition by opposing the UNCTAD Code, the Brussels Package and a U.S. bilateral policy outside the framework of the Code, and by initiating discussions with the CSG countries. Should the CSG talks fail to produce some assurances of open access by U.S. liners to CSG cross trades, the Administration has stated that it will fully support any carrier-initiated 13(b)(5) action to combat such trade restrictions.<sup>202</sup> Furthermore, where access by

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202. The Interagency International Shipping Policy Group, also referred to as the Interagency Maritime Policy Group, which is chaired by the Department of Transportation and vice-chaired by the Department of State, purportedly articulated these warnings in a diplomatic note

U.S. vessels to CSG cross trades is impaired, the Administration is prepared to facilitate a carrier-initiated 13(b)(5) action by acting against both the developing country and the CSG liners involved. While the harshness of the 13(b)(5) remedy must create some tension among foreign carriers and governments, it must also give pause to the U.S. Government because it requires imposition of a unilateral sanction in retaliation against a commercial practice accepted under the laws of foreign sovereign states.<sup>203</sup>

#### CONCLUSION

Although it has brought about some significant changes, the 1984 Act continues to distinguish U.S. liner shipping regulation from international liner shipping regulation by virtue of its competition-oriented principles. Although conference power to conclude multicarrier agreements to rationalize services has been enhanced, the carrier industry's goal of reforming the U.S. liner trades into a virtual image of their counterparts in the non-U.S. trades has not materialized. The basic features of the 1916 Act remain intact, including open access for all vessels capable of participating in U.S. liner trade and open conferences regulated by the FMC.

To understand the U.S. stance toward the regulation of liner shipping, it is important to note that a diversity of interests is involved in decisions affecting the liner trades, not simply the interests of the carrier industry. Clearly, the Act demonstrates that Congress and U.S. policymakers are not willing to sacrifice the principle of economic competition in order to boost the fortunes of steamship companies. This result is consistent with the policies of the Administration in seeking to promote a competitive environment in liner trade routes around the world, rather than responding in-kind to the anticompetitive practices allowed by most countries and encouraged by the UNCTAD Code. Furthermore, the Act supports and complements the free trade policies of the Executive Branch and should therefore give U.S. policymakers an even greater hand in achieving their goals within the international arena of the liner shipping industry.

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sent on November 11, 1982 to the CSG. Remarks by Matthew V. Scocozza, Assistant Secretary for Policy and Int'l Affairs, Dep't of Transp., before the Washington, D.C. Propeller Club (Nov. 12, 1985) (transcript of speech available from the International Tax and Business Lawyer).

203. This point is made under the assumption that the strong shipper interests and governmental free-trade views which so dramatically influenced the Shipping Act would also influence future policy decisions made regarding the Code. Indeed, U.S. rejection of the Code due to its anticompetitive features has already established the free-trade approach of the Administration on international liner shipping issues. Negotiations between the United States and the CSG countries which are currently underway constitute another test of the Administration's commitment to maintaining open access to liner cargo and its choice of methods to achieve these goals. See *supra* note 188.