NOTES

TACKING IN STORMY WEATHER: THE SHIPPING ACT OF 1984

I. INTRODUCTION

The United States merchant marine is currently losing a substantial percentage of potential shipping revenues to foreign competitors. Statistics indicate that domestic liners transport only 4.2% of the total United States imports and exports carried by sea.1 More significantly, foreign carriers are receiving approximately seventy percent of all shipping revenues available in United States trade.2 Although awareness of the merchant marine's weakened position is increasing,3 finding an adequate solution is made

1 Gonzalez, Bilateralism: The Solution to an Antiquated International Shipping Policy, 36 J. Int'l Aff. 329, 329 (1983). The statistics were calculated for 1979. In contrast, Japan's merchant marine transported over 40% of total Japanese imports and exports during the same year. Id. Norway, Spain, Great Britain, Greece, West Germany, and France all maintain merchant marines which transport at least 30% of their own foreign trades. CANNON, SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, SHIPPING ACT AMENDMENTS OF 1978, S. REP. No. 966, 95th Cong., 2d Sess. 3 (1978) [hereinafter cited as S. REP. No. 966]. The Soviet Union has a fleet which transports an astounding 50% of its international commerce. Id.

2 Garvey, Regulatory Reform in the Ocean Shipping Industry: An Extraordinary U.S. Commitment to Cartels, 18 Geo. Wash. J. Int'l L. & Econ. 1, 38 (1984). This 70% figure was derived by comparing the percentage of United States trade carried in foreign vessels to the total amount of shipping revenues generated by United States trade. Consequently, the denominator in this ratio included revenues from United States coastal trade and was not restricted to revenues from United States export and import trade. The Jones Act of 1919 requires that United States vessels and crews perform all coastal trade, including the lucrative market of transporting Alaskan oil to the other 49 states. ADEMUNI-ODEKE, PROTECTIONISM AND THE FUTURE OF INTERNATIONAL SHIPPING 11 (1984). If the revenues from the coastal trade were removed from the denominator and the percentage of United States trade carried in foreign vessels was compared only to revenues available to the international market, the 70% figure would be higher. This adjusted figure would more accurately reflect the dominance of foreign carriers.

3 The present share of United States foreign trade transported by the United States merchant marine is down from a 42.3% share in 1950. S. Rep. No. 966, supra note 1, at 3. The decline is pronounced even more by comparison to the mid-nineteenth century when the United States merchant fleet carried approximately 90% of United States imports and exports. C. McDowell & H. Gibbs, OCEAN TRANSPORTATION 21 (1954).

Modern nations recognize the importance to national security, international trade, and overall economic development of maritime transportation. ADEMUNI-ODEKE, supra note 2, at
difficult by the overriding political inclination to preserve traditional antitrust policies. Strict adherence to these historical policies is the primary source of the problems experienced by the United States merchant marine. The Shipping Act of 1984 represents an effort to reverse the merchant marine’s steady decline and to address the realities of an international shipping industry.

This Note examines the nature of the shipping industry, considering the market structure and congressional policies which have contributed to the present problems of the United States merchant marine. Also, this Note reviews the Shipping Act of 1984, passed by Congress to halt the decline of the United States shipping industry and improve the merchant marine’s position among international counterparts. This Note concludes that more extensive legislative reform abandoning the outdated antitrust philosophies

9. In the United States, the monetary value of trade carried by sea is enormous. Figures from 1977 show that $166.5 billion in United States foreign trade or 84% of the total United States foreign trade was moved by ship. S. Rep. No. 966, supra note 1, at 3.


Congress elaborated its goals for the new Act in a declaration of policy which reads as follows:

The purposes of this Act are —

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of governmental intervention and regulatory costs;

(2) 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 practice; and

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs.

Id. § 1701.

* These philosophies include a rigid adherence to promoting free trade and vigorous competition. Note, supra note 4, at 639. Sen. Metzenbaum is a leading advocate of antitrust principles. During debate over the 1984 Shipping Act, Sen. Metzenbaum expressed his views as follows:

I am one of those who believes very strongly in a free enterprise system, in the right to compete and that competition should not be hindered in any way whatsoever, and that when two or more business groups or businesses or people get together to fix prices or to divide up a market, they have not served our Nation’s best purposes.


Recently, legislators began to question whether or not strict antitrust philosophies are appropriate in the shipping industry. In supporting the 1984 Shipping Act, Rep. Rodino
of the past may be necessary if United States liners are to function as viable competitors in this unique world market.

II. The Problem

The seriousness of the merchant marine's present status is reflected in the atypical degree of cooperation shown among both carriers and shippers in supporting legislative reform, including the Shipping Act of 1984. Normally, these two groups have divergent short-term interests which dictate different legislative approaches. Carriers seek income maximization through the maintenance of the highest possible shipping rates, while shippers seek profit maximization through cost reductions in the form of controlled, lower rates. Consequently, shippers seek greater governmental control over carriers and freight charges, while carriers desire less governmental regulation. Both groups, however, recognize that the decline of the merchant marine will continue unless a market equilibrium is established. If left unchecked, the present decline could result in a marketplace without United States carri-

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11 Id.

12 In theory, production at equilibrium is the goal of a competitive market and generates benefits for all participants. See Hanson, Regulation of the Shipping Industry: An Economic Analysis of the Need for Reform, 12 Law & Pol'y In Int'l Bus. 973, 979 (1980). See also note 31 infra.
ers, in which United States shippers would be subject to conditions imposed by foreign carriers, foreign policies, and foreign interests. The present situation requires legislation with a long-term focus. Consequently, both shippers and carriers support the Shipping Act of 1984 as an instrument to improve the deteriorating shipping industry in the United States.

Opponents of the 1984 Shipping Act contend that United States liners are not facing financial disaster. These opponents favor the historical position rooted in the predecessor of the 1984 Act, the Shipping Act of 1916. The 1916 Act provided a regulatory framework emphasizing traditional antitrust principles and a free market concept. Opponents of the new Act explain that the failure of any particular liner and low returns on investments for liners are consequences of business mistakes and not the by-product of United States policy.

Market statistics, however, indicate that something beyond poor

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13 Note, supra note 4, at 639.
14 Comptroller General of the United States, Report to the Chairman, Committee on Merchant Marine and Fisheries, U.S. House of Representatives (1982), reprinted in Cong. Rec. (daily ed. Feb. 23, 1984), supra note 4, at S1580. The Government Accounting Office (GAO) Report found that while the merchant marine was plagued by inefficiencies and high costs, the United States liner fleet was not in the state of decline ascribed to it. Id. In a response to the GAO Report, however, the Department of Transportation took exception to the conclusions that the condition of the United States liner fleet did not justify legislative reform. Id. at S1596.
16 Note, supra note 4, at 644. The 1916 Shipping Act granted only limited antitrust immunity balancing the traditional antitrust goal of unrestricted competition with the recognized need for stability in the shipping industry. Id. The Supreme Court construed the Shipping Act of 1916 “as conferring only a ‘limited antitrust exemption’ in light of the fact that ‘antitrust laws represent a fundamental national economic policy.’” Federal Maritime Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).
17 Between 1976 and 1980, the industry generated a return on assets of between 0.9% and 6.1%. During the same period, long-term debt increased from 0.76 of equity to 3.83 times equity. The ratio of current assets to current liabilities fell from 1:7 to 1:3. The liner industry’s return on equity in 1979 was less than one-fifth the all-industry average. In 1981, it was less than half and over the last five years has never been greater than two-thirds of the all-industry average. 130 Cong. Rec. S1579 (daily ed. Feb. 23, 1984) (statement of Sen. Long).
18 One commentator noted that the economic performance of some liner companies demonstrates that there are efficient, highly profitable firms as well as the highly visible, unsuccessful ones. The commentator thus implies that the failure of any liner is the result of business inefficiency on the part of its officers since other liners survive and are profitable. Garvey, supra note 2, at 21; see also 130 Cong. Rec. S1584-85 (daily ed. Feb. 23, 1984) (Chapter Three of the GAO Report which proposes that the United States liner fleet performs adequately despite the provisions of the 1916 Act).
19 The policy of promoting free trade and vigorous competition through antitrust laws is embodied in the Shipping Act of 1916. Note, supra note 4, at 639, 644.
business judgment is crippling the United States merchant marine. In the aggregate, the United States merchant marine transported 34.6 million tons in 1980, 5.4 million tons less than in 1974.20 While the fleets of other countries were adapting to the changing world market, the United States merchant marine remained stagnant.21 This stagnation was marked by sluggish construction of new vessels and a fleet growing rapidly obsolete,22 problems which threaten the future of shipping in the United States.

The problems associated with a declining United States merchant marine are not confined to the participating shippers and carriers. A weak shipping industry has an impact on the entire economy. A deteriorating merchant marine reduces the United States balance of payments account. This reduction means that United States dollars are diverted away from the domestic market and into foreign markets.23 A weak shipping effort also reduces the level of employment in the shipping services industry, resulting in fewer jobs for United States citizens.24

From a noneconomic standpoint, the former regulatory scheme eroded national security which to a large degree depends upon the existence of a strong merchant marine. Consequently, the current

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20 Gonzalez, supra note 1, at 330. United States vessels carried 6.5% of the total 628.9 million tons of United States foreign trade during 1974. By comparison, United States vessels carried only 4.2% of the total 823.1 million tons of United States foreign trade during 1980. Id.

21 The United States merchant marine ranked eleventh worldwide based on the number of vessels and eighth based on tonnage capacity. By contrast, Japan's fleet ranked fifth and third respectively, while the Soviet fleet ranked second and seventh respectively. The United States fleet included 257 freighters, 285 tankers, 22 bulk carriers, and 6 combination passenger-cargo vessels. By comparison, the Japanese fleet included 756 freighters, 487 tankers, 500 bulk carriers, and 8 combination passenger-cargo vessels, while the Soviet fleet had 1,828 freighters, 470 tankers, 156 bulk carriers, and 58 combination passenger-cargo vessels. Id. at 330-31.

22 An inventory in 1979 showed that of 567 ships, 30% were built prior to 1955. Of the remaining vessels, 20% ranged in age from fifteen to nineteen years. Construction of new vessels in the United States is less than ambitious. By contrast, both Japan and the Soviet Union are experiencing rapid vessel construction programs. Japan announced plans to increase its dry-bulk fleet by an additional 83 dry-bulk tankers. The United States has adopted no measures to stimulate development of a dry-bulk fleet even though the National Coal Association projected that steam coal exports would increase from a level of zero in 1978 to 90 million tons by 1985, and 150 million tons by 1990. Id.

23 Id. at 332. National shipping services earn foreign exchange dollars by providing services abroad and by conserving dollars which would otherwise have to be paid to foreign carriers. Between 1957 and 1966, the United States merchant marine contributed a favorable five billion dollars to the balance of payments account. Id.

24 Id. In 1946, the shipping industry employed nearly 115,000 United States citizens; in 1980, fewer than 21,000 citizens worked in the United States shipping industry. Id.
merchant marine does not adequately meet national security demands. More than half of the seventy commodities listed by the Defense Department as essential to national security are carried on foreign-flag vessels. Such a precarious situation could lead to disastrous consequences during a national emergency. History dem-


26 Gonzalez, supra note 1, at 331. These commodities could be carried by United States owned ships flagged in foreign countries; however, the service of such vessels could not be guaranteed in the event of a national crisis since international law does not grant the United States jurisdiction over foreign vessels. Id. As Captain Jan A.A. Van Lier stated, "[w]here were these ships during the Vietnam War? Was the military sealift command able to call upon American-owned ships? Of course not! Our aging merchant fleet served our supply liner virtually unaided." Id.

27 MARAD Authorization, Fiscal Year 1984, and Oversight—Part 1: Hearings on H.R. 2114 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 4-5 (1983) (report on American Shipping In War) [hereinafter cited as MARAD]. The report concludes that no reliable substitute exists for a strong United States merchant marine. Substitute sources considered included: (1) North Atlantic Treaty Organization (NATO) allies, (2) ships of subsidiaries of United States owners registered under flags of convenience, and (3) the neutral world fleet. Id. at 5.

Resort to these sources was deemed infeasible because:

1. The NATO fleet comprises under 7,000 liner, bulk and tank vessels of all types, ages, sizes and configurations. The fleet suitable for U.S. service consists of about 3,850 units. That 42 percent of these suitable ships are of Greek registry presents in itself a political problem of some complexity in measuring the reliability of resources; in major part, also, Greek ships are manned by non-nationals, and indeed non-Europeans.

The great difficulty with the NATO fleet lies in its manifest insufficiency for the indicated requirements of the European nations themselves, which have been estimated at 6,000 units. This leaves no margin at all for the wastages and inefficiencies of wartime operations. It certainly leaves no room for international cross-trading between the United States and non-European nations. It must therefore be accepted that the NATO members will at once abandon the cross-trades, and will actually attempt to draw in additional tonnage from every source.

The NATO fleets will not therefore cushion our deficiencies of supply, but will on the contrary become a negative factor, opening with our own compelled withdrawal a gap in our trade with non-European countries (based on the depressed year 1981) amounting to 50 percent of the liner movement, 41 percent of the bulk, and 30 percent of the tanker. Mobilization of the American coastwise tank fleet significantly widens the gap.

2. A second presumed source is tonnage under flag of convenience owned by subsidiaries of American nationals, and considered under effective American control. Viewed from the physical point of view, this fleet contains practically no freighters, and the dry-bulk sector would fall far short of requirements created by withdrawal of NATO tonnage from our trades; the tanker sector, which is the largest constituent, is markedly deficient in clean-products carriers, and marginally adequate in crude carriers of various sizes before allowing for wartime casualties. From the political viewpoint, there persists grave doubt whether foreign-flag ships will prove reliable, manned as they are by non-NATO crews employed be-
onstrates that a strong merchant marine is crucial to national security. Recognition by Congress of the seriousness of this problem was the primary impetus for the reforms embodied in the 1984 Shipping Act.

The presently weakened United States merchant marine is the result of two interacting factors. First, international shipping functions within a unique market structure. Second, prior congressional and judicial policies have failed to recognize fully this special structure. The unique market structure interacted with and pronounced the negative effects of poor policy.

A. A Unique Market Structure

The shipping industry is not conducted in a stable and competi-

cause they are cheap, and who are therefore without national loyalty in the great causes that divide the West.

3. The same and similar considerations of a political nature affect the neutral fleets. Moreover, there remains the question whether nations such as Japan, Korea, and others much less economically independent can withstand Soviet pressure to maintain strict neutrality. We rely at present to a very great extent on Japanese production of crucial military components; Japan is also the world's largest shipbuilder. If we should prove unable to guarantee her protection, and she chose to remain neutral, our failure to build equivalent facilities here may prove fatal.

Id.

The Soviet Union has refused to rely upon foreign sources of shipping. The Soviet merchant fleet has grown in proportion as the United States fleet has declined. Id; see also supra notes 1 and 21 (citing figures on the size of the Soviet fleet).

The emergence of the Soviet Union as the owner of one of the newest and fastest-growing commercial liner fleets brings the fear that such state-owned fleets will be conducted in pursuit of national political goals, rather than profits. These state-owned carriers backed by national treasuries could drive private companies out of business through rate-cutting. The state-owned competitor's true aims might be earning hard currencies, projecting economic power or despoiling another nation's business. Agman, Competition, Rationalization, and United States Shipping Policy, 8 J. MAR. L. & COM. 1, 40 (1976).

MARAD, supra note 27, at 4. Ironically, the Shipping Act of 1916 was essentially an emergency measure to counteract a shortage of tonnage and its detrimental impact on United States foreign commerce. Since the Civil War, the United States merchant fleet had steadily declined, and by 1910, its vessels were carrying only 10% of the total volume of United States foreign trade. As the First World War broke out, European nations withdrew their vessels from the United States trade, causing dramatic increases in freight charges. The cost of shipping grain from the United States to Great Britain rose from 5 cents to 50 cents a bushel. Basedow, Common Carriers Continuity and Disintegration in U.S. Transportation Law, 13 TRANSPL. L. J. 1, 31 (1983). More recently, the war in the Falkland Islands demonstrated the importance of a country's maintaining a strong merchant marine for naval planning. Gonzalez, supra note 1, at 331.


tive market.\textsuperscript{30} Since the benefit of a competitive market, production at equilibrium,\textsuperscript{31} is not present, the basic stability and efficiency of the industry are threatened.

Three conditions exist in the shipping industry which combine to create its unique market structure. First, the barriers to entry into the industry are relatively low while the barriers to exit are high.\textsuperscript{32} Second, the industry is capital intensive.\textsuperscript{33} Finally, the demand for shipping is basically price inelastic.\textsuperscript{34}

Low barriers to entry result from the low research and development costs\textsuperscript{35} associated with the liner industry, which is perceived as a technologically conservative industry.\textsuperscript{36} Entry into the liner industry is not predicated upon technological capabilities but instead

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  \item Hanson, \textit{supra} note 12, at 979. The conditions necessary for a stable competitive market include: (1) the presence in the market of many independent producers of relatively equal size; (2) maintenance of production volume initially near the level at which marginal cost equals marginal revenue; (3) ability to shift productive resources freely among alternative uses, even in the short run; and (4) elasticity of supply and demand. \textit{Id.} at 977.
  \item Theoretically, production at equilibrium in a competitive market is both efficient and stable, resulting in probable benefits to both carriers and shippers. First, productive capacity is organized so that prices of products are equal to per-unit costs plus a reasonable return on invested capital, thus benefiting carriers. Second, each firm operates at peak efficiency, producing its output at the least possible cost per-unit, thus benefiting shippers. \textit{Id.} at 979.
  \item Neff, \textit{The UN Code of Conduct For Liner Conferences}, 14 \textit{J. World Trade} L. 398, 399 (1980). Since sophisticated technological abilities are not required to enter this particular industry, the barriers to entry are considered low. A new participant need only to have the monetary capability which is a requisite of entry into any industry and presumably can be obtained through ordinary financing. Thus in comparison to technologically intensive industries, the shipping industry has lower entry requirements. As Neff points out, “the capital required for entry into the shipping business has consisted ‘only’ of money and not of know-how.” \textit{Id.} at 400 (emphasis added). Once the money or financing is secured, however, the shipping industry becomes costly to exit. \textit{Id.}
  \item Id.; Hanson, \textit{supra} note 12, at 980; Note, \textit{supra} note 4, at 640.
  \item Hanson, \textit{supra} note 12, at 980; Neff, \textit{supra} note 32, at 399.
  Elasticity of demand refers to the relationship between proportionate changes in the amount of a good or service that is purchased and proportionate changes in its price or proportionate changes in the buyer’s rate of income. When a change in price produces more than a proportionate change in the quantities bought, the demand is said to be price elastic. Conversely, when a change in price produces a less than a proportionate change in the quantities bought, then demand is called price inelastic.

D. Marx, \textit{International Shipping Cartels} 16 n.9 (1953).
  \item Neff, \textit{supra} note 32, at 399.
  \item Id. at 399-400. Some commentators, however, have noted recent technological advances in liner shipping. Garvey, \textit{supra} note 2, at 22 (noting in particular the development and adoption of container technology); Note, \textit{supra} note 4, at 640 (referring to technological advances in vessels). Nonetheless, the industry has a reputation as being among the most conservative of industries technologically.
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is available to anyone with the monetary capacity.\textsuperscript{37} Moreover, since ships have relatively long useful lives\textsuperscript{38} and the resale market for a ship is limited,\textsuperscript{39} exit from the industry is extremely sluggish even when the market would indicate that such a strategy is preferable.\textsuperscript{40} The result is a constant tendency toward overtonnage,\textsuperscript{41} with the consequence that profits in the industry are quite low.\textsuperscript{42}

The capital-intensive nature\textsuperscript{43} of the industry creates a market structure with a high percentage of fixed costs.\textsuperscript{44} To meet the demands of shippers, carriers must maintain fixed schedules, thereby increasing the high percentage of fixed costs.\textsuperscript{45} After covering these initially high fixed costs, carriers could handle extra cargo at relatively low per-unit costs.\textsuperscript{46} Carriers, however, must first generate enough volume to cover the fixed costs. Thus a carrier finds it economically desirable to utilize the full capacity of the ship since variable costs are low and unused capacity cannot be stored for later use.\textsuperscript{47} Carriers are, therefore, inherently motivated to engage in

\textsuperscript{37} Neff, \textit{supra} note 32, at 400.

\textsuperscript{38} Hanson, \textit{supra} note 12, at 980. Ships have useful lives of up to 25 years. Neff, \textit{supra} note 32, at 400.

\textsuperscript{39} Hanson, \textit{supra} note 12, at 980.

\textsuperscript{40} "[T]he fact that ships last up to twenty-five years means that exit from industry, even in times of low profitability, is extremely sluggish." Neff, \textit{supra} note 32, at 400. Obviously, the limited resale market compounds the lock-in effects of ships' long useful lives. As one commentator noted, "Carriers will try to maintain their level of service even during economic downturns. The relevant decision is whether to maintain the service level or go bankrupt, not whether the level of service should be reduced in small increments." Ellsworth, \textit{Competition or Rationalization in the Liner Industry}, 10 J. MAR. L. & COM. 497, 506 (1979).

\textsuperscript{41} Overtonnaging occurs when there is more than adequate shipping capacity (tonnage) available on a route. Ademun-Iodeke, \textit{supra} note 2, at 344.

\textsuperscript{42} Neff, \textit{supra} note 32, at 400. When the shipping capacity exceeds the demand for shipping services, carriers are likely to engage in competitive bidding to attract the limited number of consumers. \textit{Id.}

\textsuperscript{43} The liner business is labeled as capital intensive because start-up costs for entry into the industry are relatively high as compared to other industries. Fixed costs such as capital costs for construction or payments on long-term charters comprise approximately 80% of the total costs of a liner operator. Moreover, a larger number of fixed expenses exist which do not vary according to the amount of cargo handled. These fixed expenses or constant costs include wages and bunker fuel costs. \textit{Id.} These fixed and constant costs constitute practically all of the expenses incurred by a liner operator. The only truly variable costs are handling costs, brokerage, and wharfage. Ellsworth, \textit{supra} note 40, at 506.

\textsuperscript{44} Note, \textit{supra} note 4, at 640.

\textsuperscript{45} \textit{Id.} Liner shipping is a transportation service which utilizes regularly scheduled ocean carriers sailing on established routes. In contrast, tramp carriers maintain irregular routes and schedule sailings only when sufficient cargo is available. Liner shipping is the prevalent form of shipping in the United States. \textit{Id.} at 640 n.9.

\textsuperscript{46} \textit{Id.} at 640.

\textsuperscript{47} \textit{Id.}; Ellsworth, \textit{supra} note 40, at 506-07.
competitive rate-cutting\textsuperscript{48} to generate the necessary volume to cover fixed costs.

Compounding the inherent tendency to engage in rate wars is the price-inelastic demand for liner services.\textsuperscript{49} Inelasticity of demand means that price reductions or increases do not alter the demand for liner services.\textsuperscript{50} Price cuts, consequently, mean decreased revenues\textsuperscript{51} because demand does not increase in any proportion to the price reduction. An inelastic demand combined with the inherent tendency for rate wars makes destructive pricing a reality.\textsuperscript{52}

These basic characteristics inherent in the shipping industry would create in a competitive market a dramatic economic cycle,\textsuperscript{53} generating excitement and insolvency\textsuperscript{54} for both carriers and shippers alike. During the nineteenth century, a devastating series of rate wars\textsuperscript{55} prompted the survivors to search for an effective mode of addressing the economic realities of the industry.\textsuperscript{56}

B. A Unique Market Response

Liners sensitive to the destructive tendencies of the industry created conferences\textsuperscript{57} which were basically agreements among carriers

\textsuperscript{48} Note, supra note 4, at 640; Neff, supra note 32, at 400.
\textsuperscript{49} Note, supra note 4, at 640.
\textsuperscript{50} See supra note 34.
\textsuperscript{51} Note, supra note 4, at 641.
\textsuperscript{52} Id.

If prices declined in the initial phases of a rate war but the reduction in prices resulted in a surge in demand then the war would be of a short duration. On the other hand, if the reduction in price led to a reduction in revenue because demand was price inelastic then the rate war could become serious.

Ellsworth, supra note 40, at 509.

\textsuperscript{53} Hanson, supra note 12, at 980.
\textsuperscript{54} "Shipping, in short, is a classic boom-and-bust industry, a source of much excitement and insolvency." Neff, supra note 32, at 401. The commentator is referring to a business cycle with short time intervals between the expansion and contraction phases. A business cycle consists of fluctuations in the general level of economic activity as measured by such variables as the rate of unemployment and changes in real Gross National Product (GNP). A boom is the high point of the business cycle as indicated by a low rate of unemployment and rapid growth in real GNP. Booms come at the end of expansion phases. A bust or recession is the low point of the business cycle, characterized by a high rate of unemployment and a slow rate of growth, or even a decline, in real GNP. Recessions come at the end of contraction phases. J. Gwartney & R. Stroup, Economics: Private and Public Choice 138 (2d ed. 1980).

\textsuperscript{55} Neff, supra note 32, at 401; Note, supra note 4, at 641.
\textsuperscript{56} Note, supra note 4, at 641.
\textsuperscript{57} Id. The invention of the liner conference system followed a series of rate wars in the 1870's. Neff, supra note 32, at 401.

In its simplest form, a liner conference is merely a multilateral covenant not to cut rates.
to combat the tendency toward destructive pricing and to prevent wasteful overtonnage resulting in insolvency. Coordination between conference members to reduce costs by minimizing waste and increasing utilization of assets is known as rationalization. Conference systems and rationalization have changed very little since their inception and are the means by which most developed nations achieve stable merchant marines.

The basic tools of the conference system, including joint rate-setting, market division, and discounts for exclusive patronage, are illegal under United States antitrust laws. Consequently, United States liners could not operate in a conference system without a grant of immunity from these antitrust laws. United States policymakers have been reluctant to allow the merchant marine to conform totally to international shipping practices. Instead, prior regulatory schemes have attempted to strike a balance between the traditional antitrust goal of unrestrained competition and the in-

Most conferences, however, are more complicated in form and assume cartel-like roles. Conferences typically allocate sailings among member carriers and negotiate loyalty arrangements with individual shippers, offering either preferential rates or deferred rebates to loyal shippers. Id. Conferences provide a tangible economic benefit in the form of predictability of rates and services. Id. at 403.

Note, supra note 4, at 641.

See Agman, supra note 27, at 2. Rationalization is the organization of a business or industry in an orderly manner to avoid waste through coordination of effort. When utilized by a single enterprise, rationalization is praised as evidence of efficient management. When jointly applied by an entire industry, rationalization is criticized as monopolistic. Under United States law, when an entire industry is allowed to rationalize, as in the case of many utilities, it invariably is regulated. Complete regulation of liner shipping, however, is impracticable because the industry is international and not fully subject to the force of United States law. Id.

Neff, supra note 32, at 401.

Ellsworth, supra note 40, at 498. United States law and policy has regarded conferences as an evil to be endured rather than a constructive force in the international economy. Agman, supra note 27, at 1. By contrast, developing countries recognize the necessity of conference systems as a means to develop third world merchant fleets. Neff, supra note 32, at 403.

Hanson, supra note 12, at 981. The commentator also cites boycotts as a major method used by conferences to maintain rates at a profitable level. Id. Boycotts, however, are an extreme method of conferences. Consequently, boycotts should not be considered as a basic tool of the conference system.

industry need for stability through conferences.\textsuperscript{64}

III. THE SHIPPING ACT OF 1916 AND ITS HISTORY

The Committee on Merchant Marine and Fisheries created the Shipping Act of 1916 after conducting an extensive investigation into the practices of the ocean shipping industry.\textsuperscript{65} The Committee published its findings in the Alexander Report,\textsuperscript{66} which acknowledged the benefits of conference systems but found that conference carriers had to be regulated to prevent any potential abuse of their collective powers.\textsuperscript{67}

The 1916 Shipping Act established a regulatory format requiring open conferences and granting limited antitrust exemptions to those conferences.\textsuperscript{68} The Act, further, established the Federal Maritime Commission (FMC) as the regulatory mechanism for the shipping industry.\textsuperscript{69} Section 15 of the 1916 Shipping Act immu-

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\textsuperscript{64} Note, supra note 4, at 644.
\textsuperscript{65} Garvey, supra note 2, at 6.
\textsuperscript{66} H\underline{O}USE C\underline{O}MM. ON M\underline{E}RCH\underline{A}NT M\underline{A}RINE AND F\underline{I}SH\underline{E}RIES, R\underline{E}PORT ON S\underline{T}EAM\underline{S}\underline{H}IP A\underline{G}REEMENTS AND A\underline{F}FIL\underline{I}ATIONS IN THE A\underline{M}ERICAN FOREIGN AND D\underline{O}MESTIC T\underline{R}ADE, H.R. Doc. No. 805, 63d Cong., 2d Sess. 51 (1914) [hereinafter cited as Alexander Report].
\textsuperscript{67} Garvey, supra note 2, at 6, 11. Because shipowners identified the conference system as necessary within the market structure of international shipping, initial reaction to the Alexander Report was extremely hostile. This negative reaction in 1914 delayed any immediate legislative response to the Report; however, two years later, Congress passed the 1916 Shipping Act embodying the recommendations of the Alexander Committee. Note, supra note 4, at 642-43.

The first investigation of the shipping industry was the United Kingdom’s Royal Commission on Shipping Rings (1906-1909). Agman, supra note 27, at 17. The Royal Commission found the conference system to be beneficial and recommended permitting closed conferences while opposing governmental regulation. The Royal Commission recommended only the reservation of an undefined role for governmental oversight and investigation in the event of complaints that important national interests were being transgressed. The British philosophy was to rely on the countervailing force of collective bargaining between shippers and carriers as the primary market control. By contrast, the Alexander Report recommended denying the use of closed conferences and placing governmental regulation as the primary market control. Id. at 18-19.

\textsuperscript{68} Note, supra note 4, at 644; Hanson, supra note 12, at 982-83.
\textsuperscript{69} Garvey, supra note 2, at 11-12. The United States Shipping Board was established as the original maritime regulatory agency under the 1916 Shipping Act. In 1933, the Shipping Board was succeeded by the United States Shipping Board Bureau; in 1936 by the United States Maritime Commission; in 1950 by the Federal Maritime Board; and in 1961 by the Federal Maritime Commission. In 1961, the Maritime Administration (MARAD) was established as the federal agency responsible for promoting the United States merchant marine. Note, supra note 4, at 645 n.45; see also Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm’n, 650 F.2d 1235, 1240 n.9 (D.C. Cir. 1980), cert. denied, 451 U.S. 984 (1981); Federal Maritime Comm’n v. Seatrian Lines, Inc., 411 U.S. 726, 727 n.1 (1973) (referring to the history of FMC).
\end{footnotesize}
nized conferences of common carriers that engaged in rationalization such as collective rate-setting from antitrust laws.\textsuperscript{70} Under section 15, conferences were required to file agreements with the FMC,\textsuperscript{71} which would then allow or disallow an antitrust exemption for the filing conferences.\textsuperscript{72} The FMC was required to verify that all conference agreements met the general provisions of section 15.\textsuperscript{73} This duty was affirmative and existed even in the absence of complaints as to activities of the conference.\textsuperscript{74} The Act also listed prohibited practices which clearly conflicted with the traditional notions of free enterprise.\textsuperscript{75} Prohibited practices included the use of "fighting ships,"\textsuperscript{76} "deferred rebates,"\textsuperscript{77} and retaliatory or dis-

\textsuperscript{70} Shipping Act of 1916, ch. 451, § 15, 39 Stat. 733 (current version at 46 U.S.C. § 814 (1982)). The immunization was granted provided the ratemaking was authorized by agreements approved by the FMC and provided further that all rates had been properly filed with the FMC. National Ass'n of Recycling Indus. v. American Mail Line, Ltd., 720 F.2d 618, 618 (9th Cir. 1983), cert. denied, 104 S. Ct. 1616, (1984).

\textsuperscript{71} Agreements which must be filed include any agreement:

- fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements.

\textsuperscript{72} The FMC was required to disapprove any agreements found:

- to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter.

\textit{Id.} Any agreement disapproved by the Commission was considered unlawful. \textit{Id.}

\textsuperscript{73} \textit{Id.} The Commission disapproved, cancelled, or modified agreements only after notice and hearing. Before approval or disapproval, the agreement was considered unlawful. \textit{Id.}

\textsuperscript{74} \textit{Id.} The Commission disapproved, cancelled, or modified agreements only after notice and hearing. Before approval or disapproval, the agreement was considered unlawful. \textit{Id.}


\textsuperscript{76} The term "fighting ship" means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade. \textit{Id.} The fighting ship "is one placed on a run to transport merchandise that might form the nucleus of the cargo for a nonconference steamship, and to
criminatory rates or services.\textsuperscript{78}

Whatever workable qualities the original Shipping Act of 1916 may have possessed, the courts and the Department of Justice\textsuperscript{79} effectively removed that potential through narrow judicial interpretations restricting benefits that could have accrued to the United States merchant marine.\textsuperscript{80} For instance, even though a conference was operating pursuant to an FMC-approved agreement, the finding of a Shipping Act "violation" was held to operate retroactively, stripping the conference of its antitrust immunity and subjecting the liners to extremely detrimental treble damages actions.\textsuperscript{81}

The Supreme Court sanctioned the greatest limitation on the

do so at rates that were wholly unremunerative." C. McDowell & H. Griss, \textit{supra} note 3, at 390. The goal is to attract enough consumers away from the competition to cause losses sufficient to make the competition abandon the trade route. The fighting ship can suffer the losses from reduced rates because the carrier or carriers, in effect, subsidize the vessel's operations. \textit{Id}.

\textsuperscript{77} The old Act defined the term "deferred rebate" as:

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

\textsuperscript{78} A practice is retaliatory or discriminatory if used by the carrier to:

\begin{itemize}
\item Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.
\item Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.
\end{itemize}

\textit{Id}. Violation of any prohibition was a misdemeanor punishable by a fine of not more than $25,000 for each offense. \textit{Id}.

\textsuperscript{79} Although Congress granted an antitrust immunity to the shipping industry, the other branches of the government were hostile to the exemption and attacked the immunity at three points: (1) the implementation of unapproved agreements, (2) the scope of the FMC's authority to approve agreements, and (3) the standards used by the FMC to approve or disapprove agreements. Note, \textit{supra} note 4, at 648.

\textsuperscript{80} Gonzalez, \textit{supra} note 1, at 333.

availability of antitrust immunity when it held that the FMC could require liner conferences to prove that the proposed agreement or activity "was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." This refinement of the public interest standard became known as the *Svenska* standard. As a result, the section 15 burden on the FMC to show that an agreement should not receive antitrust immunity was changed to a burden on the conferences to show that a proposed agreement should receive antitrust immunity. This judicial burden-shifting resulted in a long and costly procedure for any conference seeking antitrust immunity. Compounding the problem, administrative hearings on the proposed agreement were considered vital, even though such hearings resulted in lengthy delays.

The Supreme Court also held that any broad use of section 15 to confer antitrust immunity would conflict with the frequently ex-

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Friedmann & Devierno, *supra* note 63, at 317-18. For example, one trade association made an antitrust claim against a conference alleging that the conference rates for shipping wastepaper were unreasonably high even though the rates were otherwise authorized by the conference agreement and properly filed with the FMC. The antitrust claim extended over eleven years of administrative and judicial proceedings before the Ninth Circuit finally resolved the claim. National Ass'n of Recycling Indus., Inc. v. American Mail Line, Ltd., 720 F.2d 618, 619 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984). The FMC forum has been used to oppose, to delay, and in some cases to prevent FMC approval of conference agreements. Friedmann & Devierno, *supra* note 63, at 317-18.

pressed view that exemptions from antitrust laws are strictly construed.\textsuperscript{87} The consequences of that holding were destructive, crushing any viability that the 1916 Shipping Act might otherwise have sustained. Thus, the retroactive application of antitrust penalties, coupled with the shifted burden of proof and general hostility toward antitrust exemptions, rendered the congressional promise of antitrust immunity for conferences a nearly useless declaration.\textsuperscript{88}

Compounding the merchant marine's problems, the United States policy of free trade promotion through antitrust laws was perceived as antagonistic to the shipping policies of other nations.\textsuperscript{89} Responding to the liberal discovery procedures and private treble damages actions characteristic of the United States system, other countries promulgated blocking statutes that prohibited their carriers from disclosing documents under certain circumstances and denied the use of their courts to enforce a foreign civil judgment with a punitive element.\textsuperscript{90} England even enacted a "claw back" statute allowing suits by English citizens to recover the punitive portion of any judgment executed in the United States.\textsuperscript{91} Foreign blocking and claw-back statutes combined with strict domestic enforcement of antitrust policies placed United States liners in the least favorable of positions.\textsuperscript{92} The new Shipping Act of 1984 is an effort to address the realities of the present shipping industry and to remove the restraints upon the United States merchant marine.\textsuperscript{93}

\textsuperscript{87} Seatrain Lines, Inc., 411 U.S. at 733. This case illustrated the Supreme Court's belief that the 1916 Act conferred very limited antitrust immunity. Note, supra note 4, at 652.


\textsuperscript{89} Garvey, supra note 2, at 32.

\textsuperscript{90} Id. at 35.

\textsuperscript{91} Id.

\textsuperscript{92} Oversight Hearings on Maritime Antitrust, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on Judiciary, 97th Cong., 2d Sess. 133-34 (1982) (testimony of Albert E. May, Executive Vice President, Council of American Flag-Ship Operators). United States laws cannot effectively restrict conferences formed under the laws of other countries. United States laws, however, can restrict conferences formed by domestic carriers and thereby place United States carriers at an economic disadvantage relative to foreign competitors in terms of attaining the economies of scale necessary to operate within the market structure of the shipping industry. Agman, supra note 27, at 29.

\textsuperscript{93} Rep. Moorhead found four fundamental flaws in the regulatory scheme of the 1916 Act. First, the standards of approval for an agreement were too unpredictable. Second, the FMC's actual decisionmaking process was too lengthy, accentuating the uncertainty. Third, the antitrust laws were enforced unequally to the detriment of United States carriers. Finally, international relations were strained because trading partners complained that extraterritorial application of United States antitrust laws was an unfair interference with inter-
IV. The 1984 Shipping Act

In congressional hearings prior to the passage of the new Shipping Act, legislators emphasized that the new Act needed to recognize the realities of the shipping industry,\textsuperscript{84} to provide more logical and predictable rules for carriers,\textsuperscript{85} and to allow the United States merchant marine to compete on an international level.\textsuperscript{86} Congress subsequently restated these goals within the context of the Act through an express declaration of policy.\textsuperscript{87} By that declaration, Congress desired to strengthen the merchant marine, thereby improving the economic well-being and security of the United States.\textsuperscript{88} Less than three days after the Shipping Act of 1984 went into effect,\textsuperscript{89} the president of the National Maritime Council\textsuperscript{100} proclaimed that the new legislation would serve as a "blueprint for the U.S.-flag merchant marine to compete on a more equal footing with its foreign counterparts."\textsuperscript{101}

The new Shipping Act attempted to realize these congressional policies and improve the former regulatory scheme by revising the old standards and by responding to antagonistic foreign shipping practices. First, the new Act reevaluated domestic regulation and the role of the FMC. The manner by which the government reviews multicarrier agreements was reformed substantively and procedurally.\textsuperscript{102} Second, a new international approach was undertaken. Specific provisions have enabled the FMC to protect United States carriers from discriminatory and unfair treatment by foreign governments or carriers.\textsuperscript{103}
A. Domestic Focus

As noted earlier, section 15 of the 1916 Act provided the general standard of review for carrier agreements. This standard evolved into a public interest test. As interpreted by the courts and applied by the government, the public interest test presented significant obstacles to the approval of carrier agreements. First, considerable weight was placed on the principles underlying antitrust laws which are generally hostile to conference systems. Second, liners were required to prove that even though an agreement was contrary to traditional antitrust ideals, other factors warranted its approval.

The substantive standard for review of multicarrier agreements is set forth in section 6(g) of the new Act; meanwhile, section 20 clearly provides that the old test under section 15 of the 1916 Act is no longer applicable to international liner shipping. As worded, the new standard allows the FMC or a court to prohibit any agreement that is "likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." From this language one may conclude, however, that the new standard only replaces the public interest standard with an equally general reasonableness standard. Such a reasonableness standard may prove even more elusive than the old public interest standard.

Proponents of the new Act contend that its legislative history explains in some detail what Congress intended the FMC and the courts to consider in measuring an agreement against the new standard. First, the legislative history shows that the new standard gives less weight to antitrust policy and greater deference to carrier agreements. Second, Congress apparently intends that the new standard remove per se condemnation of concerted conduct and instead recognize the historical acceptance of conference

104 See supra notes 70-73 and accompanying text.
105 See supra notes 82-86 and accompanying text. Although the 1916 Act did not expressly prohibit rationalizing steps by carriers, the protracted and arduous procedure required to gain governmental approval of such efforts tended to discourage rationalization. Agman, supra note 27, at 6.
106 Friedmann & Devierno, supra note 63, at 325.
108 Id. § 1719.
109 Id. § 1705(g) (emphasis added).
110 Friedmann & Devierno, supra note 63, at 326.
111 Id.
agreements in international shipping. The conference report on the Shipping Act of 1984 provides a three-part test to be applied in reviewing carrier agreements under the new standard. The test basically focuses upon whether the proposed agreement will result in a substantial reduction of competition which is likely to harm shippers. This harm must be evidenced in a commercial sense, in terms of economically unjustified reductions of service or increases in cost. Furthermore, even if an agreement substantially reduces competition and reduces service or increases costs to shippers, it does not necessarily harm shippers "unreasonably." The harm may be offset by the benefits of an agreement, thus rendering it reasonable.

Seemingly, the new Act replaces the vague section 15 standard of the old Act with a similarly vague commercial standard. Both standards actually resemble a form of cost and benefit analysis. Such standards may benefit the industry. A regulatory standard written by Congress to provide absolute predictability could impair the efficiency of carriers and compromise the interests of their competitors and customers by failing to provide the flexibility necessary to adapt to market conditions or practices. The export trading company industry utilizes similarly vague commercial standards to determine whether certain export trade activities are ex-

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112 Id. The new standard is a direct response to the burdensome Svenska standard or public interest test which was viewed as vague and unworkable in its automatic application of antitrust principles to ocean shipping. Id.


114 Friedmann & DeVierno, supra note 63, at 327. Market share is a factor in assessing reductions in competition. The market, however, is defined in a broad sense to include not only ocean common carriers directly serving a trade, but also alternative ocean common carrier routings, competition from charters, and even competition from air freight carriers. Moreover, reductions in competition are considered to be partially offset by a member's right to independent action and ability to enter and to leave the conference freely. The congressional intention is to make clear that the harm to shippers, in terms of service or cost, resulted from the agreement and not other factors within the larger market of transportation. Id. Consequently, a higher level of reduction is required to constitute a substantial reduction in relation to the larger conception of the market.

115 Id. at 328. This evidentiary requirement eliminates the Svenska standard's presumption that concerted activity is always harmful. Now, a specific evidentiary showing of a "material and meaningful" adverse impact on shippers is necessary before an agreement can be enjoined. Id.

116 Id. at 327.

117 Id. at 328. Benefits offsetting harm include the increased ability of the parties to the agreement to address problems of rate instability or overcapacity, any efficiency creating aspects of the agreement, and any favorable impact on United States foreign policy or international comity. Id. These benefits are given considerable weight. Id. at 329.

118 Garvey, supra note 2, at 24.
empt from antitrust laws.\textsuperscript{119}

In another substantive change related to the revision of the old section 15 standard, Congress expanded the list of prohibited acts under the new statute.\textsuperscript{120} These additional prohibitions, apparently a compromise to antitrust advocates, demonstrate the types of actions which although violative of the old public interest standard, might still satisfy the new section 6 standard.\textsuperscript{121} Since the commercial reasonableness standard of the 1984 Act shows greater deference for multicarrier agreements, these prohibitions are in reality specific limitations upon that deference. Although written in an absolute form, the parameters of these prohibited acts are not clearly defined. As one commentator noted, the prohibition list is replete with activities that are only proscribed if "unjust" or "unreasonable."\textsuperscript{122}

Although members of the maritime industry have praised the new standard as a significant improvement over the old public interest standard,\textsuperscript{123} this praise may be premature. The new deference for conference systems and decreased emphasis on antitrust principles truly benefit industry members. Indeed, this new attitude combined with the express provisions of the Act will provide a psychological stimulus to United States liners.\textsuperscript{124} In reality, however, the actual standard is just as literally vague and imprecise as the old standard. Industry members may believe that the FMC and the courts will interpret this standard with the appropriate deference. The 1916 Act attempted to employ a similarly general standard which was then to be interpreted in the special context of the shipping industry. As noted, antitrust proponents slowly


\textsuperscript{120} Friedmann & Devierno, supra note 63, at 335-38. For instance, no conference or group of two or more carriers may (1) boycott or unreasonably refuse to deal, (2) unreasonably restrict the use of intermodal services, or (3) engage in predatory practices. Shipping Act of 1984, 46 U.S.C. app. §§ 1709(c)(1)-(3).

\textsuperscript{121} See Friedmann & Devierio, supra note 63, at 336-37.

\textsuperscript{122} Garvey, supra note 2, at 26.


\textsuperscript{124} Del Mar, supra note 100, at 17C.
turned the 1916 legislation into powerless promises which burdened carriers more than it benefited them.\textsuperscript{125}

A debate is already stirring over whether the Justice Department or the FMC should approve rules for the use of loyalty contracts.\textsuperscript{126} This seemingly technical dispute is significant because it could denote the very beginning of a gradual erosion of the favorable deference for carriers. Since the Justice Department is an advocate of antitrust principles, carriers contend that requiring approval by the Justice Department would represent a step back to the old antitrust attitudes of the 1916 Act.\textsuperscript{127} This current dispute illustrates the tension between the Justice Department and the FMC which could erode the new Act's favorable standard and deference for multicarrier agreements, as happened with the 1916 Act's standard.

Substantively, the new Act broadens the actual antitrust immunity provided to carriers, reducing the threat of antitrust liabil-

\textsuperscript{125} See supra notes 79-88 and accompanying text.


A loyalty contract allows a shipper signatory to such a contract to obtain a lower rate from the offering carrier or conference in exchange for a promise to ship only with that carrier or conference. Friedmann & Devierno, supra note 63, at 335. The new Act prohibits the use of a loyalty contract unless in conformity with the antitrust laws. Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(9).

The FMC determined that Congress intended that loyalty contracts would be subjected to both the new Act and the antitrust laws. Service Contracts, Loyalty Contracts, and Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States, 49 Fed. Reg. 45,364, 45,374 (1984) [hereinafter cited as Service Contracts]. Initially, the FMC required that a loyalty contract be approved by a Business Review Letter from the Department of Justice indicating that the contract was within the antitrust laws. Id. at 45,373. Due to numerous complaints from carriers and conferences, however, the FMC deleted the mandatory requirement of a Business Review Letter. Id. at 45,373-74. In its final rules for implementation of the new Act, the FMC stated that the filing of a Business Review Letter would create a presumption of legality for the reviewed loyalty contract. Id. at 45,390 (to be codified at 46 C.F.R. § 580.16).

\textsuperscript{127} Morison, Contract Rate Rules Trouble Ocean Carriers, supra note 126, at 12A. The Justice Department denounces the use of conference systems. Ellsworth, supra note 40, at 498.

Arguably, the resolution of this issue is moot because loyalty contracts ultimately will be replaced by service contracts which are approved by the new Act. Morison, Controversy Heats Up Over Dual Rate Systems, supra note 126, at 1B. For an explanation of the difference between a loyalty contract and a service contract, see infra notes 147-50 and accompanying text.
ity.\textsuperscript{128} To qualify for antitrust exemption, a carrier agreement must meet the requirements of section 5,\textsuperscript{129} which include filing provisions and guidelines.\textsuperscript{130} Unlike the prior law,\textsuperscript{131} an activity or agreement, entered into with a "reasonable basis to conclude" that it is pursuant to an agreement on file with the FMC, is immunized from antitrust laws.\textsuperscript{132} This reasonable basis defense applies even where the conference pursuant to an FMC-approved agreement undertakes an activity prohibited under the new Act.\textsuperscript{133}

\textsuperscript{128} Friedmann & Devierno, \textit{supra} note 63, at 332.
\textsuperscript{130} \textit{Id.} § 1704(a). The only agreements exempted from the filing requirements are "agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States." \textit{Id.}

The 1984 Act provides that each conference agreement must:

1. state its purpose;
2. provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;
3. permit any member to withdraw from conference membership upon reasonable notice without penalty;
4. at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;
5. prohibit the conference from engaging in conduct prohibited by Section 10(c)(1) or (3) of this Act [46 U.S.C. app. § 1709(c)(1), (3)];
6. provide for a consultation process designed to promote—
   A) commercial resolution of disputes, and
   B) cooperation with shippers in preventing and eliminating malpractices;
7. establish procedures for promptly and fairly considering shippers' requests and complaints; and
8. provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act [46 U.S.C. app. § 1707(a)] 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.

\textit{Id.} § 1704(b).


\textsuperscript{131} \textit{See supra} note 81 and accompanying text.
\textsuperscript{133} Friedmann & Devierno, \textit{supra} note 63, at 333. The new Act provides: "[a]ny determination by any agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) shall not remove or alter the antitrust immunity for
The mandatory right of independent action is conceptually appealing because it can act as an internal check on conference powers. If conference rates exceed economic justifications, then hypothetically an astute carrier would recognize the potential for an increased market share and profit in a rate reduction. The astute carrier would file for a right of independent action, and the conference member may take independent action on any rate or service item required to be filed in a tariff. Second, service contracts are now permitted. These two new provisions are essentially designed to check the newly established powers of carriers by enhancing shipper negotiating power and stimulating market interaction between carriers and shippers.


Since the Svenska standard is no longer applicable, the burden is once again on the FMC or complainants to prove that agreements violate the new Act. See supra note 112 (noting Congress’ disapproval of the Svenska standard); Friedmann & Devierno, supra note 63, at 332 (noting that the burden of proof has shifted from proponents of an agreement back to the FMC).


For the text of this provision, see supra note 130.

Shipping Act of 1984, 46 U.S.C. app. § 1707(c). The new Act defines a 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.

Id. § 1702(21).

Friedmann & Devierno, supra note 63, at 340.
ence within 10 days of the filing would allow the action.\textsuperscript{140} Hypothetically, the carrier would then attract shippers with the new lower rates and other carriers would be forced to match the price reductions to maintain current levels of activity. The mandatory right of independent action would serve as the market regulator replacing governmental regulation.\textsuperscript{141} The mandatory right, however, weakens the conference by sanctioning the very destructive pricing patterns that governmental regulation attempts to prevent.\textsuperscript{142}

In contrast to the mandatory right of independent action, service contracts are indirect checks on conference powers. They increase the importance of carrier-shipper negotiation and consultation.\textsuperscript{143} Such freedom to negotiate can allow both carriers and shippers to search contractually for a market equilibrium in this unique market structure. Under prior law, such contracts were unlawfully discriminatory and conflicted with antitrust laws.\textsuperscript{144} Section 8(c) of the 1984 Act\textsuperscript{145} authorizes the use of service contracts by an ocean common carrier or conference with a shipper or shippers’ association.\textsuperscript{146} It is difficult to distinguish conceptually a service contract

\textsuperscript{140} The 1984 Act requires that a conference respond to a request for independent action within 10 calendar days after receipt of notice. Shipping Act of 1984, 46 U.S.C. app. § 1704(b)(8).

\textsuperscript{141} See Friedmann & Devierno, supra note 63, at 340, 351.

\textsuperscript{142} Rockwell, Shippers Debate Effect of Act on Conferences, Journal of Commerce, Oct. 16, 1984, at 1A, 3A; see also Ellsworth, supra note 40, at 517 (arguing further that even nonconference carriers should be prevented from disrupting the rationalization program of a conference).

\textsuperscript{143} Cf. Agman, supra note 27, at 34-38 (discussing the use of commercial consultation and negotiation rather than governmental regulation as a means to ensure equitable treatment between shippers and carriers).

\textsuperscript{144} See Friedmann & Devierno, supra note 63, at 345.

\textsuperscript{145} Shipping Act of 1984, 46 U.S.C. app. § 1707(c).

\textsuperscript{146} A concise statement of essential terms of a service contract must be filed with the FMC. Id. The essential terms 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.

Id. The only service contracts exempted from these filing requirements are those contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste.

Id.

There is no substantive difference between a service contract and a time/volume contract. The time/volume contract is simply a sub-category of the service contract. Service Con-
from a loyalty contract, which is prohibited by the new Act unless exercised in conformity with the antitrust laws.\textsuperscript{147} The fear and consequential prohibition of loyalty contracts are probably founded upon the belief that such contracts would be based upon noncommercial criteria and would lack mutuality of contractual commitment between the conference of carriers and individual shippers.\textsuperscript{148} By contrast, service contracts involve mutual exchanges of commitment and are more clearly motivated by justifiable economic considerations.\textsuperscript{149} The distinction is rapidly growing irrelevant as service contracts become a predominant tool for rationalization by conferences.\textsuperscript{150} Carriers support these contracts because they can provide a steady demand for services. Shippers support these contracts because they can produce more favorable rate and service terms.\textsuperscript{151} Already, shippers and carriers are seeking the stability and efficiency of service contracts.\textsuperscript{152} The success of service contracts will depend to a large degree upon the ability of

\textsuperscript{147} The new Act defines a loyalty contract as "a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference." Shipping Act of 1984, 46 U.S.C. app. § 1702(14) (emphasis added). The conceptual difficulty arises because loyalty contracts are defined as "other than" service contracts. Yet, the two types of contracts are not mutually exclusive since both involve tying arrangements. See Agman, supra note 27, at 5 (as evidence that commentators view these types of arrangements similarly, this particular commentator seems to classify all these types of arrangements as loyalty arrangements).

\textsuperscript{148} The new Act allows loyalty contracts if they are in conformity with antitrust laws. Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(9). Obtaining approval under the antitrust laws, however, could prove to be an extremely difficult task. See supra notes 126-27 and accompanying text.

\textsuperscript{149} This mutuality of commitment argument was offered to explain the difference between time/volume contracts and service contracts. The FMC rejected the argument, noting that Congress was silent on the existence of a difference, and consequently, the FMC would assume that Congress did not intend a distinction. Service Contracts, supra note 126, at 45,372. Here, however, Congress was not silent. Clearly, Congress restricted loyalty contracts yet permitted service contracts. Thus, in distinguishing the two types of contract, the mutuality of commitment argument should apply. Moreover, since the loyalty contract lacks mutuality of contractual commitment, it resembles a monopolistic exercise of power. This explains why the loyalty contract is prohibited and the service contract is allowed.

\textsuperscript{150} Morison, Controversy Heats Up Over Dual Rate Systems, supra note 126, at 1B.

\textsuperscript{151} Friedmann & Devierono, supra note 63, at 345.

shippers to gain effective negotiating power.\textsuperscript{153}

Procedurally, the new Act does contain significant improvements over the old Act. Under the old law, carrier agreements were not effective until the FMC approved the agreement; carriers had the burden of proving that approval was warranted under the regulatory standard. Furthermore, no time limits existed for FMC review of proposed agreements.\textsuperscript{154} Consequently, opponents of a carrier agreement had substantial leverage to delay the agreement for years within the FMC or the courts.\textsuperscript{155} A primary goal of the new Act is to remove these delays and provide carriers a real and meaningful immunity.\textsuperscript{156}

Specifically, the new Act places time limitations on the FMC review of an agreement.\textsuperscript{157} When an agreement is properly filed with the FMC, the FMC should submit the agreement for publication in the \textit{Federal Register} within seven days of its FMC filing.\textsuperscript{158} The agreement then automatically becomes effective 45 days after filing,\textsuperscript{159} unless the FMC seeks and obtains a court injunction on the grounds that the agreement does not meet the general standard of review.\textsuperscript{160} Under section 6(h) of the new Act,\textsuperscript{161} the FMC rather than the shipper must prove that an agreement does not meet the standard.\textsuperscript{162} Members of the maritime industry believe that this new procedural approach will greatly benefit carriers in implementing profitable agreements.\textsuperscript{163} Carriers ultimately should be able to respond more quickly to changing market conditions.

\textsuperscript{153} See \textit{infra} text accompanying notes 202-13 (discussing the use of shippers' associations which would have more negotiating power than individual shippers).

\textsuperscript{154} Friedmann & Devierno, \textit{supra} note 63, at 329; \textit{supra} notes 85-86 and accompanying text.

\textsuperscript{155} Dunlap, \textit{supra} note 152, at 12A; Shear, \textit{supra} note 123, at 1C.

\textsuperscript{156} Shear, \textit{supra} note 123, at 1C.

\textsuperscript{157} Friedmann & Devierno, \textit{supra} note 63, at 330.

\textsuperscript{158} Shipping Act of 1984, 46 U.S.C. app. § 1705(a).

\textsuperscript{159} \textit{Id.} § 1705(c)(1). The FMC may request additional information or documentary material it deems necessary to make a proper determination. \textit{Id.} § 1705(d). If additional information is requested, the agreement becomes effective 45 days after the FMC receives the requested material or as much of the requested material as can be supplied. \textit{Id.} § 1705(c).

\textsuperscript{160} \textit{Id.} § 1705(h). The FMC may bring suit in the United States District Court for the District of Columbia to enjoin operation of the agreement. \textit{Id}.

\textsuperscript{161} \textit{Id}.

\textsuperscript{162} "In a suit under this subsection, the burden of proof is on the Commission [FMC]." \textit{Id}; see also Friedmann & Devierno, \textit{supra} note 63, at 330 (discussing this burden).

\textsuperscript{163} See Dunlap, \textit{supra} note 152, at 12A.
B. International Focus

The domestic approach could generally be classified as an effort to reduce governmental regulation. On the other hand, the new international approach clearly represents an increase in governmental regulation. The new Act specifically provides that the FMC should protect United States common carriers from discriminatory and unfair treatment by foreign governments or carriers. By responding to the unfair practices of trading partners, Congress ultimately intends to achieve an open marketplace in international shipping where United States liners can participate equally.

Under section 13(b)(5) of the 1984 Act, the FMC may take retaliatory action in cases where foreign governments or carriers deny a United States carrier access to cross-trade. Under authority of the 1984 Act, the FMC has issued regulations outlining conditions which unduly impair the access of United States vessels to ocean trade between foreign ports and specifying what actions may be taken to address these conditions. The FMC has stated that it will respond with section 13 sanctions only when United States liners are actually harmed. Otherwise, the FMC will not interfere with the normal forces of competition in the marketplace.

The FMC will find a condition of unduly impaired access only where a United States carrier is commercially able to enter a trade but is precluded or reasonably expects preclusion, or where actual participation in a trade is restricted for reasons other than commercial ability or competitiveness. Any vessel documented under

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164 See Friedmann & Devierno, supra note 63, at 338.
165 Shipping Act of 1984, § 1712(b)(5).
166 Friedmann & Devierno, supra note 63, at 338.
167 Shipping Act of 1984, § 1712(b)(5).
168 Friedmann & Devierno, supra note 63, at 339.
171 Impaired Access Regulations, supra note 169, at 45,406 (to be codified at 46 C.F.R. § 587.1(c)). Factors indicating conditions unduly impairing access include, but are not limited to:

(a) Imposition upon U.S.-flag vessels or upon shippers or consignees using such vessels, of fees, charges, requirements, or restrictions different from those imposed on national-flag or other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel.

(b) Reservation of a substantial portion of the total cargo in the trade to na-
the laws of the United States which believes that its access to ocean trade between foreign ports has been, or will be, unduly impaired may file a petition for relief. The FMC may respond with equalization fees, limitation of sailings, or suspension of tariffs.

Section 13(b)(5) is a potentially powerful tool for responding to European closed conferences and the cargo preference statutes of foreign governments. This type of international approach is appealing to the United States businessman who reads that the merchant marine is declining and that only 4.2% of all United States export and import trade is handled by domestic carriers. The potential for escalating international tension, however, is extremely high. Already, European nations and Japan are calling for diplomatic efforts before retaliatory actions are employed by the United States. Recognizing the seriousness of retaliatory actions in an international market, the FMC regulations require notification be given to the Secretary of State when conditions unduly impairing access exist. The FMC may request that the Secretary of

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tional-flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels.

(c) Use of predatory practices, possibly including but not limited to closed conferences employing fighting ships or deferred rebates, which unduly impair access of a U.S.-flag vessel to the trade.

(d) Any government or commercial practice that results in, or may result in, unequal and unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in the trade.

(e) Any other practice which unduly impairs access of a U.S.-flag vessel to trade between foreign ports.

Id. at 45,407 (to be codified at 46 C.F.R. § 587.2).

172 Id. (to be codified at 46 C.F.R. § 587.3(a)(1)).

173 Id. at 45,408 (to be codified at 46 C.F.R. § 587.7(b)). A civil penalty of up to $50,000 may be imposed for every violation of a tariff suspension. Id.

174 Dunlap, supra note 152, at 12A, 24B (opinion of Thomas Moakley of the Federal Maritime Administration).

175 Morison, FMC Urged: Go Slowly On Ship Act — Foreign Flags Want Time To Prevent Retaliatory Action, Journal of Commerce, Aug. 14, 1984, at 1A. Recently, the State Department and the Department of Transportation said that the FMC might have to suspend the tariffs of Philippine-flag operators in response to a proposed cargo-sharing plan of the Philippine government. The cargo-sharing plan divided 80 percent of the market along the United States-Philippine trade route equally between the two countries, with the remaining 20 percent available to cross-traders. The FMC received numerous complaints about the plan from shippers and third-flag carriers. The threatened retaliation represented an effort by the federal government to keep world shipping lanes open to as much competition as possible. Robb, US-Philippine Cargo-Sharing Problem Ends, Journal of Commerce, July 27, 1984, at 1B. This scenario demonstrates that the United States does not plan to use the new Act as protectionist legislation solely for the benefit of United States carriers. Instead, the new Act can serve as a catalyst to development of trade routes.
State seek resolution of the matter through diplomatic channels. \(^{176}\)

As a final check on section 13 sanctions, the FMC must notify the President of the United States of proposed penalties. The President may disapprove the sanctions within 10 days after receiving such notice if necessary for reasons of national defense or foreign policy of the United States. \(^{177}\) Apparently section 13 is a threat intended to stimulate trade partners to include United States liners in cross-trade. Nonetheless, diplomatic consciousness pervades the provision.

C. What is the effect?

Both carriers and shippers have accepted the new focuses and approaches of the 1984 Act and are claiming legislative victory for all parties. \(^{178}\) Carriers are entering and filing many new agreements which would have been prohibited under the old 1916 Act. \(^{179}\) These agreements are attempts at rationalization and implementation of a viable conference system. \(^{180}\) These conferences, however, are still subject to criticism.

Opponents of the 1984 Act contend that the former regulatory scheme of the 1916 Shipping Act conformed with traditional notions of antitrust while providing a framework tailored to the special needs of the shipping industry. \(^{181}\) Indeed, the prior regulatory scheme may have worked well in periods of steady growth. During the 1970's, however, the Arab oil embargo touched off a general recession which ended the steady growth of, and reduced the demand for, shipping and exposed the weaknesses in the former regulatory scheme. \(^{182}\) Suddenly, the supply of liner services greatly ex-

\(^{176}\) Impaired Access Regulations, supra note 169, at 45,408 (to be codified at 46 C.F.R. § 587.6).

\(^{177}\) Id. (to be codified at 46 C.F.R. § 587.8-.9).

\(^{178}\) See, e.g., Dunlap, supra note 152, at 12A; Del Mar, supra note 100, at 17C.

\(^{179}\) As of Oct. 1, 1984, 157 agreements had been filed with the FMC. Of these agreements filed, none have been rejected or enjoined, and 88 agreements were already in effect. Dunlap, supra note 152, at 12A.

\(^{180}\) For an explanation of the benefits from rationalization within a conference system, see supra notes 59-61 and accompanying text.

\(^{181}\) Sen. Metzenbaum vigorously opposed the 1984 Shipping Act claiming that it was contrary to the national commitment to free enterprise. Sen. Metzenbaum relied heavily upon the GAO Report suggesting that legislative reform was unwarranted. 130 Cong. Rec. S1578-600 (daily ed. Feb. 23, 1984) (statement of Sen. Metzenbaum).

\(^{182}\) H.R. Rep. No. 53 (Pt. 1), 98th Cong., 1st Sess. 6 (1983) [hereinafter cited as H.R. Rep. No. 53]. In 1983, the world's oceangoing traffic declined by 2.6%, marking the fourth consecutive annual drop. Cullison, Japanese Ship Lines Urged to Diversify, Journal of Commerce, July 20, 1984, at 24B. There is little evidence to indicate that the decline will cease anytime
ceeded demand for those services, resulting in overtonnaging of United States trades. The primary reason for the overtonnaging was the regulatory system imposed by the Shipping Act of 1916.\footnote{Note, supra note 4, at 653.} United States carriers were prevented from rationalizing effectively in order to operate efficiently within the special market structure of shipping.\footnote{Rationalizing steps were not expressly prohibited under the 1916 Act; however, the framework of the old Act tended to discourage the undertaking. Agman, supra note 27, at 6.} The recessionary world economy triggered and magnified the weaknesses in the former Act.

Heavy criticism of the new Act has also come from trading partners of the United States.\footnote{During deliberations over the new 1984 Act, Rep. Jones blamed the courts, not the regulatory scheme of the old Act, for its failure.} Section 13(b)(5) is a focal point. Foreign countries view that provision as an unjustifiable infringement upon their domestic affairs and sovereignty.\footnote{The 1916 Shipping Act that has regulated international ocean commerce all these years had outlived its original purpose, not because it was basically unsound, but because its broad and general language was gradually interpreted by courts in ways that have burdened that United States steamship industry which it was originally designed to assist.} Congress specifically provided that the new Act would apply only to agreements among ocean common carriers or terminal operators to the extent that the agreements involve ocean transportation in the foreign commerce of the United States.\footnote{See Morison, supra note 175, at 1A.} Thus, a foreign carrier is subject to the regulation only when it functions within the foreign commerce of the United States. Consequently, submission to the regulation may be viewed as voluntary. United States industry members applaud the new Act for its demand of reciprocal treatment among all carriers.\footnote{See id.}

Such foreign criticism is not novel and is not the primary result of any new regulatory provision. Indeed, the new Act moves toward less overall governmental regulation.\footnote{Shipping Act of 1984, 46 U.S.C. app. § 1703.} The foreign carriers, however, want no governmental regulation. European and Japanese carriers claim that the methods of implementing the new Act are uncertain. These carriers fear that the uncertainty will restrict

\footnote{Morison, supra note 100, at 1B. The National Maritime Council contends that the FMC should prevent discriminatory actions against United States carriers operating between foreign ports and respond to the growth of trade and shipping protectionism. Id.}
them from structuring their own affairs and rationalizing. The Japanese specifically cite the mandatory right of independent action as an open inducement to rate-wars. Thus, the new Act is not simply criticized because it has new approaches or provisions. The true criticism of the new Act is a more general denouncement of any regulation which prevents closed conferences or cargo-preference arrangements which foreign concerns have developed to strengthen their own merchant marines.

V. A Proposal

The true test of any legislative reform in the area of shipping is whether it will actually strengthen the United States merchant marine. Proposals for regulatory reform have generally concentrated on extending antitrust immunity for ocean common carriers and diminishing the regulatory role of the FMC. Simply, the goal is to allow United States liners to ship like international liners. Such an approach is necessary. Businessmen face the reality of a unique international shipping market; therefore, Congress should not impose upon them the inconsistent ideology of antitrust philosophies. The real challenge is to determine which market

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190 See Ericson, Conferences Fire Barbs at FMC Pacts Proposal, Journal of Commerce, Oct. 24, 1984, at 12A. The Council of European and Japanese National Shipowners' Association opposed FMC guidelines explaining how antitrust exemption is approved under the 1984 Act. The guidelines provide for rejection of any agreement that is not clear and complete. The conferences complain that "... neither the Ten Commandments, U.S. Constitution nor any other written compact ... would pass full muster under rigid application of such subjective and semantic standards." Id.


192 Garvey, supra note 2, at 2.

193 During debate over the 1984 Act, Sen. Gorton stated:

A primary goal of this bill, of course, is to bring our regulations somewhat more into line with those of our foreign trading partners and competitors and to see to it that our merchant marine spends less of its money defending itself in court and dealing with regulatory agencies and spends more of it in providing competitive services.


194 Gonzalez, supra note 1, at 333. Businessmen understand that Congress cannot impose United States antitrust laws on trading partners through unilateral legislation and then seek to continue trade with those partners. See Presentation by Ralph Rugan, Jr., Developing Trends in Liner Shipping, The Institute on Foreign Transportation and Port Operations, Tulane University, New Orleans (Apr. 30, 1981). Indeed, the United States is the most extensive regulator of carrier conferences. Garvey, supra note 2, at 36. By comparison, Mexico has attempted to strengthen its merchant marine by embarking on an ambitious shipbuilding and ship-purchasing program as well as streamlining registry rules and directing that governmental cargo be carried when possible on Mexican ships. Orme, Latins Urge Liner
structure best allows the merchant marine to function in a real economic sense.

Much of the current deterioration in the merchant marine is attributable to the free market emphasis of antitrust laws. Within a totally free market, United States carriers could not survive. Foreign liners would have the advantage of strong conferences while United States carriers would be burdened by antitrust laws denying the use of conferences in the name of free enterprise. Congress recognized this perilous situation, and sanctioned in the 1984 Shipping Act limited use of the conference system. The conferences are limited in the sense that they must be open to entry and to exit by any carrier.

The flaws in the open conference approach are significant. First, open conferences inherently create overtonnaging and higher rates. Second, the mandatory right of independent action undermines control over rates and tonnage levels. An alternative approach is necessary. Since neither the free market nor the open conference approach is preferable, a closed conference approach may seem a logical alternative.

Arguably, closed conferences lead to monopolistic prices and

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See Hanson, supra note 12, at 993-98 (analyzing the problems associated with a competitive system). The commentator notes that abolition of conferences (a free market) would disadvantage United States carriers and impede realization of a strong and competitive national flag fleet. Id. at 996.

One commentator suggests that a free market approach is not workable because free entry and exit from the shipping industry are not present. Free entry and exit are necessary for the functioning of a competitive market. Ellsworth, supra note 40, at 502. The commentator suggests that free competition would lead to a more oligopolistic industry. Id. at 497. For a discussion of the absence of free entry and exit in the shipping industry, see supra notes 35-42 and accompanying text.

One British commentator concluded that “unbridled competition can be positively detrimental to the interests of shippers and shipowners alike.” Rose, New Lines for Conference Lines, 1982 Lloyd's MAR. & COM. L. Q. 636, 636.

United States carriers would sustain heavy losses during the transition to a nonconference system. Hanson, supra note 12, at 996.

Foreign flag operators would have significant competitive advantages. Id. at 997-98.

Hanson, supra note 12, at 989-90. The commentator concludes that the current open conference system is the worst possible system from an economic standpoint. Id. at 999.

Conference members contend that any strengthening of the conference system by the 1984 Act was offset by the mandatory right of independent rate-setting action. Rockwell, supra note 142, at 1A, 3A. From June 18 to mid-August of 1984, the Pacific Westbound Conference experienced 900 applications for independent action. Id. (statement of Patrick Moffett, Manager of International Traffic and Sales at Autiovox Corporation). See also supra note 142 and accompanying text.
profits. Moreover, a closed conference if legalized could consist entirely of foreign carriers to the exclusion of United States liners. Consequently, the use of closed conferences is a proposal that must be approached with caution.

The best approach appears to be the utilization of semi-closed conferences. Congress could eliminate the mandatory right of independent action and allow conferences to deny re-entry to a carrier which exercises an independent action. The conference would otherwise be open to entry by any carrier with the commercial capability. These changes would allow conferences to exercise more control over their member carriers and to rationalize more effectively. Conferences must have this power to address overtonnaging, to tailor supply to fit demand, and to operate at economically rational levels.200

The fear of monopolistic pricing policies by large conferences is conceptually significant. However, there is no evidence that closed conferences inherently follow monopolistic practices.201 Furthermore, if Congress allowed associations of shippers to form for the purpose of negotiating with conferences, a strong internal market control would exist. These shippers' associations or shippers' councils would have the size to negotiate on equal terms with large carriers and conferences.202 Section 10(b)(13) of the new Act prohibits common carriers from refusing to negotiate with a shippers' association.203 Both Great Britain and Australia have found the use of shippers' councils to be a positive control mechanism replacing extensive governmental regulation.204

Under the 1984 Shipping Act, the role of shippers' associations is uncertain. The Act defines shippers' associations,205 but beyond this definition, there are no specific provisions outlining the rights or functions of such associations. The 1984 Act does not subject

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200 See Hanson, supra note 12, at 991; Note, supra note 4, at 661. Justice Harlan, in a concurrence to the famous Svenska decision, recognized that "both shipping and antitrust factors" must be considered in assessing carriers' conduct. Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 253 (1968).

201 See Hanson, supra note 12, at 987-89. Available data suggest that closed conferences offer lower rates than those posted by open conferences. Id. at 987.


204 Agman, supra note 27, at 20, 22.

205 A shippers' association is 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. Shipping Act of 1984, 46 U.S.C. app. § 1702(24).
shippers' associations to direct, on-going affirmative regulation by the FMC. The Conference Report accompanying the Shipping Act of 1984 indicates that legal issues arising from the formation of shippers' associations are matters falling within the jurisdiction of other federal agencies.206

Currently, shippers are not forming associations because they fear that such associations would be subject to antitrust penalties.207 Cooperative activities of shippers in obtaining reduced rates will not likely violate antitrust laws if the group does not possess "threatening market power."208 In any event, associations can seek Business Review Letters from the Department of Justice and Advisory Opinions from the Federal Trade Commission (FTC) to provide the shippers with advice on whether their contemplated concerted actions comply with antitrust laws.209 The Justice Department and FTC should allow the formation of shippers' associations. Shippers' councils would serve as counterbalances to strong conferences. These groups would occupy a natural regulatory position within the industry itself.210

Conferences and shippers' associations do not present significant barriers to entry or eliminate small and independent business participants.211 There is no evidence that a closed conference prevents entry by liners as either members or independent competitors any more than an open conference.212 Moreover, independent carriers can restrain the rates of closed conferences and pass some savings to shippers.213 Small shippers or shippers with irregular shipping patterns could even possibly sustain a market within the market for independent carriers.

207 Rockwell, supra note 202, at 1A.
208 Shippers' Associations, supra note 206, at 21,799.
210 Shipper regulation would replace governmental regulation. Freidmann & Devierno, supra note 63, at 351.
211 Nonconference competition would function within the "umbrella" of the conference rate structure. Agman, supra note 27, at 5.
212 Note, supra note 4, at 660-61. "Closed conferences, which are somewhat of a misnomer as new members are accepted from time to time, are not permitted under American law but are the rule in most other trades of the world." Agman, supra note 27, at 5.
213 Hanson, supra note 12, at 991.
VI. Conclusion

The 1984 Shipping Act is a beneficial move for both domestic carriers and shippers. The Act lessens regulatory hardships, allowing carriers to utilize the conference system in an effort to operate more efficiently. United States policy must further recognize that the liner shipping industry is not like other strictly domestic industries where the United States is unquestionably sovereign over its activities. United States policy must acknowledge the necessity of stronger conferences and shippers' associations. Such a commitment would allow the United States shipping industry to form a market structure which could address the problems inherent within international shipping. A stronger conference and association approach would also conform more with international practice, thereby eliminating some of the criticism from trading partners. Although Congress cannot legislate economic recovery, Congress can allow the United States shipping industry to settle into a workable market structure geared for economic efficiency.

R. Dale Hughes

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214 See Ellsworth, supra note 40, at 500.

215 Hong Kong shippers praise the 1984 Act, explaining that now they can interact with United States carriers as they do with carriers of other nations. Bangsberg, Hong Kong Shippers Bullish on US Ship Act, Journal of Commerce, July 6, 1984, at 1B.