



# WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-RL34663>

February 2, 2009

Congressional Research Service

Report RL34663

*Reauthorization of the Federal Maritime Commission  
(FMC): Opportunity to Reexamine the Congressionally  
Mandated Antitrust Exemption for Ocean Liner Carriers?*

John Frittelli, Resources, Science, and Industry Division

September 18, 2008

**Abstract.** This report provides some historical and commercial context for evaluating these questions. After describing the types of agreements liner carriers have made with one another, the report discusses the historical rationale for providing liner carriers with antitrust immunity and how U.S. law has changed over time. Next, it describes Europe's and Asia's approach to liner conferences. The report then profiles U.S. overseas container trade, describing its importance to the U.S. economy, its underlying economics, and the reasons for the recent export container shortage. The report concludes by discussing stakeholder views and issues for Congress. The focus of this report is on the commercial aspects of the U.S. liner trade. It does not provide a legal analysis of antitrust immunity as it applies to liner carriers.



WikiLeaks

# CRS Report for Congress

## Reauthorization of the Federal Maritime Commission (FMC): Opportunity to Reexamine the Congressionally Mandated Antitrust Exemption for Ocean Liner Carriers?

Updated September 18, 2008

John Frittelli  
Specialist in Transportation Policy  
Resources, Science, and Industry Division

<http://wikileaks.org/wiki/CRS-RL34663>



Prepared for Members and  
Committees of Congress

# Reauthorization of the Federal Maritime Commission (FMC): Opportunity to Reexamine the Congressionally Mandated Antitrust Exemption for Ocean Liner Carriers?

## Summary

Authorization for the Federal Maritime Commission (FMC), the regulatory agency with jurisdiction over ocean liner carriers, expires at the end of FY2008, pursuant to P.L. 108-293. Although the FMC does not itself grant the antitrust exemption that Congress has provided to certain ocean liners in a series of shipping acts, the agency's reauthorization might provide an opportunity for Congress to reconsider the current viability of that exemption, which dates back to the early 1900s. The European Union (EU), for example, recently decided to outlaw collective rate-setting among container carriers engaged in EU trade lanes.

Shipping lines contend such arrangements are still necessary to stabilize rates and service in liner shipping. Shippers argue that this exemption is no longer necessary and allows container carriers to charge more than they would otherwise. U.S. exporters contend that this exemption is a contributing factor in their inability to obtain enough containers and vessel space to meet surging demand for their goods. After years of large U.S. trade imbalances in which imported containers outnumbered exported containers by more than two to one, the decline in the U.S. dollar and rising incomes abroad have led to a dramatic rise in demand for U.S. goods. While the United States is no longer a provider of ocean container services, it is a large user of them. The persistent U.S. merchandise trade deficit manifests itself in the container trade. Over three times more containers are imported from Asia than are exported to that region, while nearly two times more containers are imported from Europe than are exported to Europe. As a result of this imbalance, outbound shipping rates to Asia and Europe have been about half as much as inbound rates. While recent market changes have started a possible revival of the U.S. outbound trade that has long been non-remunerative, the import market still dominates shipowner decisions about where to deploy vessel space. The persistent merchandise trade deficit is thus a double-edged sword for U.S. exporters. Because of it, they ship at below cost, yet it also means that they are dependent on import market conditions for the supply of shipping space.

Inasmuch as a desire for international comity is one factor that has shaped U.S. shipping policy, Congress could decide to follow the EU's lead and repeal antitrust immunity, or it could take a "wait-and-see" approach to observe any positive or negative effects that the repeal may have on European trade. Repealing antitrust immunity may lead to lower freight rates but also greater price volatility and some amount of turmoil in the liner market. The historical development of U.S. shipping law has reflected a balance between maintaining a viable U.S.-owned liner fleet for national security purposes and consideration of the interests of U.S. importers and exporters for reliable shipping at competitive rates. Now that the U.S. liner fleet in foreign commerce has almost disappeared, policymakers may wish to reevaluate that balance. The focus of this report is on the commercial aspects of the U.S. liner trade. It does not provide a legal analysis of antitrust immunity as it applies to liner carriers.

## Contents

|  |    |
|--|----|
| Introduction .....                                       | 1  |
| Pricing Agreements .....                                 | 3  |
| Asset Sharing Agreements .....                           | 3  |
| Historical Rationale for Shipping Conferences .....      | 4  |
| Legislative History of U.S. Shipping Law .....           | 6  |
| The Shipping Act of 1916 .....                           | 6  |
| The 1961 Amendments .....                                | 7  |
| The Shipping Act of 1984 .....                           | 7  |
| The Ocean Shipping Reform Act of 1998 .....              | 8  |
| Legislative Activity Since OSRA .....                    | 9  |
| Asian and European Approaches to Liner Conferences ..... | 10 |
| Europe .....   | 10 |
| Asia .....   | 10 |
| China .....  | 10 |
| India .....  | 11 |
| Japan .....  | 11 |
| Singapore and Hong Kong .....                            | 11 |
| Profile of U.S. Overseas Container Trade .....           | 12 |
| Directional Imbalances .....                             | 15 |
| Recent Shift in Trade Flows .....                        | 16 |
| Stakeholder Views .....                                  | 19 |
| Liner Carriers .....                                     | 19 |
| Ports .....  | 19 |
| Shippers .....   | 20 |
| Port Truckers .....                                      | 20 |
| Issues for Congress .....                                | 20 |

## List of Figures

|   |    |
|---|----|
| Figure 1. U.S. Waterborne Foreign Container Trade,<br>Top 10 Trading Partners in 2007 ..... | 14 |
| Figure 2. Container Ship Freight Rates .....  | 16 |

## List of Tables

|  |    |
|--|----|
| Table 1. The Top 15 Container Lines by Size of Fleet ..... | 13 |
| Table 2. U.S. Containerized Trade Imbalance .....          | 15 |

# Reauthorization of the Federal Maritime Commission (FMC): Opportunity to Reexamine the Congressionally Mandated Antitrust Exemption for Ocean Liner Carriers?

## Introduction

Unlike most other industries, which are, generally, fully subject to U.S. antitrust laws,<sup>1</sup> ocean container lines (“liner” carriers) have limited exemption from these laws and are, therefore, permitted to discuss and set freight rates among themselves. This exemption dates back to the early 1900s, beginning with the Shipping Act of 1916,<sup>2</sup> and has been continued through the present in the 1961 amendments to that act,<sup>3</sup> the Shipping Act of 1984,<sup>4</sup> and the Ocean Shipping Reform Act of 1998 (OSRA).<sup>5</sup> Permission to engage in joint pricing activity was thought necessary to stabilize rates and service in liner shipping. Liner carriers argue that this immunity is still needed due to chronic overcapacity in liner services caused by government programs to promote national-flag fleets and domestic shipbuilding.

Shippers, the businesses that own the cargo and hire the ocean carriers to transport it, argue that this exemption is no longer necessary and allows container carriers to charge more than they would otherwise. U.S. exporters in particular contend that this exemption is a contributing factor in their inability to obtain enough containers and vessel space to meet surging demand for their goods. After years of large U.S. trade imbalances in which imported containers outnumbered exported containers by more than two to one, the decline in the U.S. dollar and rising incomes abroad have led to a dramatic rise in demand for U.S.-produced goods. For instance, in the first five months of 2008, containerized grain exports to Asia were 64% higher than for the same period last year.<sup>6</sup> Yet U.S. agricultural exporters estimate that the

---

<sup>1</sup> These laws include the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), and the Federal Trade Commission Act (15 U.S.C. §§ 41 *et seq.*). See CRS Report RL31026, *General Overview of United States Antitrust Law*, by Janice E. Rubin.

<sup>2</sup> Public No. 260 (64<sup>th</sup> Congress), 39 Stat. 728, 46 U.S.C. App. §§ 801 *et seq.*

<sup>3</sup> P.L. 87-346.

<sup>4</sup> P.L. 98-237, 98 Stat. 67.

<sup>5</sup> P.L. 105-258, 112 Stat. 1902.

<sup>6</sup> U.S. Department of Agriculture, *Grain Transportation Report*, August 7, 2008, p. 3.

shortage of containers and vessel space in recent months has held back their export volume by 20% to 30%.<sup>7</sup>

A desire for international comity is one factor that has shaped U.S. shipping policy in the past. Although the European Union (EU) recently decided to repeal antitrust immunity for container carriers engaged in EU trade lanes, effective this fall,<sup>8</sup> the rest of the world has generally not placed any restrictions on liner collective-rate setting and therefore traditional shipping conferences (cartel-like organizations) continue to exist on trade routes not involving the United States or Europe. Accordingly, Congress may wish to evaluate the need for continued U.S. liner antitrust immunity as it proceeds to reauthorize the Federal Maritime Commission (FMC), whose authorization expires at the end of FY2008.<sup>9</sup> The FMC is the agency that exercises jurisdiction over the liner carriers and oversees the conditions Congress has placed on their rate-setting activities (discussed further below), including their antitrust exemption. The policy issues Congress might consider include:

- Should the United States follow Europe's lead and repeal antitrust immunity, or should it take a "wait-and-see" approach to observe any positive or negative effects that the repeal may have on European trade?
- If repeal were to result in lower ocean freight rates but also greater price volatility with higher peaks and lower troughs, would this development be a net benefit to the U.S. economy?
- In the past, U.S. shipping policy was shaped by a desire to retain a U.S.-owned liner fleet engaged in foreign commerce. Now that this fleet has almost disappeared, should U.S. policy be shaped more by the interests of U.S. shippers?
- Given the tremendous disparity in total volume and dollar value of U.S. containerized imports versus exports, should the stated purpose of U.S. liner shipping policy be expanded to include the interests of importers in addition to exporters?

This report provides some historical and commercial context for evaluating these questions. After describing the types of agreements liner carriers have made with one another, the report discusses the historical rationale for providing liner carriers with antitrust immunity and how U.S. law has changed over time. Next, it describes Europe's and Asia's approach to liner conferences. The report then profiles U.S. overseas container trade, describing its importance to the U.S. economy, its underlying economics, and the reasons for the recent export container shortage. The report concludes by discussing stakeholder views and issues for Congress. The focus of this report is on the commercial aspects of the U.S. liner trade. It does not provide a legal analysis of antitrust immunity as it applies to liner carriers.

---

<sup>7</sup> "Container Shortage Frustrates U.S. Exporters," *Wall Street Journal*, May 9, 2008, p. A4.

<sup>8</sup> Press Release IP/06/1249, European Commission - Competition: Commission welcomes Council Agreement to end exemption for liner shipping conferences, 25 September 2006. Available at [<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>].

<sup>9</sup> P.L. 108-293.

## Types of Agreements Among Liner Carriers

### Pricing Agreements

Rate discussions among container carriers often focus on “General Rate Increases” (GRIs) or ancillary surcharges that are added to the base, ocean freight rate (the port-to-port rate). These GRIs and surcharges have raised the ire of shippers because they are substantial (in combination they can exceed the base freight rate) and are typically charged uniformly by the carriers. The surcharges are intended to recover variable costs or shore-side related costs in ocean shipping, such as fluctuations in fuel prices and currency values, peak season-related congestion, repositioning of empty containers, terminal handling charges, and others. The carriers argue that these charges are properly separated from the base ocean rate because they are costs out of the carriers’ control and itemizing them on the freight invoice provides transparency in shipping charges. Of the 219 liner carrier agreements that were on file with the FMC in 2006, 47 of these agreements related to pricing of liner services.<sup>10</sup> Of the 47, 29 were “discussion” agreements, 8 were “conference” agreements, and 10 were other types of agreements.

### Asset Sharing Agreements

Liner ocean carriers also make agreements with each other to share vessel space, called vessel sharing agreements (VSAs), or to share chassis<sup>11</sup> (chassis pools) at a given port or rail terminal. VSAs are typically made among two to four ocean carriers whereby they agree to provide container slots on each other’s vessels in a given trade route. Sharing chassis among carriers allows them to reduce their inventory of this equipment and saves valuable space in ports or rail yards. VSAs and chassis pools are not opposed by shippers as they recognize that pooling resources among carriers allows for more efficient asset utilization, lowering the overall price of shipping.<sup>12</sup> Of the 219 liner carrier agreements on file with the FMC in 2006, 172 did not include pricing authority and of these, 139 were VSAs.<sup>13</sup>

---

<sup>10</sup> Statement of Steven Blust, Chairman of the FMC, before the Antitrust Modernization Commission, October 18, 2006. Available at [<http://govinfo.library.unt.edu/amc/index.html>].

<sup>11</sup> Chassis are the wheeled frame necessary to haul containers by truck.

<sup>12</sup> However, there appears to be a difference of opinion between carriers and shippers over these so-called “efficiency-enhancing” agreements that involves a legal question: whether specific antitrust immunity is necessary for carriers to continue to engage in these types of agreements.

<sup>13</sup> Statement of Steven Blust, Chairman of the FMC, before the Antitrust Modernization Commission, October 18, 2006. Available at [<http://govinfo.library.unt.edu/amc/index.html>].

## Historical Rationale for Shipping Conferences

Shipping conferences first appeared in the latter half of the 19<sup>th</sup> century as traditional sailing ships attempted to safeguard their business from the emergence of faster steamships.<sup>14</sup> In the post-World War II era, shipping lines have formed conferences as a means of counteracting the effects of government support for merchant fleets. Many governments promote the development of their shipping industry. Some governments do this because of national pride. Shipbuilding is viewed by some nations as a sign of industrialization and a fleet of ships is viewed as a sign of international presence. Some governments support their shipping industry for national and economic security reasons. The bulk of overseas trade as well as military supplies (in wartime) is carried by ships. Governments may not want to be dependent on foreign carriers if overseas trade is vital to their economic welfare. Governments may want access to a commercial fleet they can control if a military need arises. For these reasons, many nations provide subsidies and other preferential treatment to domestic shipyards and shipowners. In a few cases, the shipyards and ships are owned and controlled directly or indirectly by the governments themselves.<sup>15</sup> This includes two Chinese container lines, China Shipping and China Ocean Shipping (COSCO), and one from Singapore, APL, that are major players in the U.S. market.

One of the effects of government intervention in the shipping industry is oversupply of shipping space. While there are periods of tight supply in a given trade lane and in a particular direction, more often ocean shipping is plagued by overcapacity. There are generally more ships available than there is cargo to fill them. Conference agreements were made among carriers in a particular trade route in order to limit the supply of shipping space, establish common tariffs (rates) among themselves, and keep rates from falling to unprofitable levels.

---

<sup>14</sup> The first successful conference appeared in 1875 in the trade between England and Calcutta.

<sup>15</sup> As required by law (46 U.S.C. App. Sec. 1702(3)), the FMC publishes annually a list of government controlled carriers.



### **Promotion of the U.S. Merchant Fleet**

The United States promotes its maritime industry by providing government-backed loans for the purchase of U.S.-built ships, prohibiting foreign-built and operated ships from engaging in U.S. coastal trade, and reserving a significant portion of “government impelled” cargoes, like food aid, for U.S.-flag carriers. The U.S. Navy keeps a fleet of cargo ships on standby in case of war or national emergency. It has also made agreements with privately owned and operated liner carriers to turn over their ships for the U.S. military’s use when needed. These ships receive an operating subsidy to partially offset the additional cost of sailing under the U.S.-flag. Forty out of the 47 U.S.-flag container ships currently engaged in foreign commerce are parties to this agreement. The forty ships are owned by Maersk, APL, and Hapag-Lloyd.<sup>16</sup> Like some other industrialized nations seeking to retain a merchant fleet, the United States recently changed its tax structure to allow U.S.-flag carriers engaged in foreign trades to pay a flat tax based on the size of their fleet rather than paying tax based on their earnings.<sup>17</sup> The prior tax system, based on income earned from shipping, is blamed by some for the sale of U.S.-based carriers like Sea-Land and APL to foreign buyers.

Shipowners assert that the economic structure of liner shipping is another cause for persistent overcapacity. In the near term, the supply of shipping space is fixed as carriers must adhere to their advertised sailing schedules. Moreover, the supply of shipping space is “lumpy” compared with its demand. A new container ship can cost about \$60 to \$70 million, require one to three years to plan and construct, and has a service-life of about 25 years. While demand in a particular trade route may increase or decrease incrementally (measurable in container units or container “slots” on a ship), supply can only adjust by adding or withdrawing an entire ship. Also, if demand falls, ships cannot be easily converted to some other use, so they tend to remain in service, exacerbating overcapacity. Once a ship is in service in a given trade lane, the cost of carrying an additional container on that ship is almost nothing. In a perfectly competitive market, price tends to approach marginal cost. Driven by the desire to fill their ships, carriers frequently find themselves carrying cargo at rates that are, at best, marginally profitable.

For the above reasons, a persistent “boom and bust” cycle characterizes the liner shipping market. The current market is a case in point. While U.S. exporters are frustrated by a shortage of vessel space to Asia and Europe, vessel owners fear pending global overcapacity. Carriers ordered new ships in recent years because of steady, yearly increases in cargo volumes. However, these new ships are being delivered just in time for a significant slowdown in global trade. Forecasters predict that there will now be an increase in scrapping of older vessels and a lay up of some additional vessels.<sup>18</sup>

---

<sup>16</sup> U.S. Maritime Administration, “U.S. Fleet, Year-End 2007,” Excel file.

<sup>17</sup> P.L. 108-357, § 248 (26 U.S.C. § 1352).

<sup>18</sup> Global Insight, “Trends in World Economics and Trade,” vol. 2, June 2008, p. 2.

## Legislative History of U.S. Shipping Law

During the initial era of conferences, some conferences began using “fighting ships” and “deferred rebates” to limit competition from non-conference carriers. A conference would deploy a fighting ship that would underprice the non-conference carrier. The conference carriers would share in the losses of the fighting ship until the new entrant was forced out of the trade or agreed to join the conference. Another controversial practice was the “deferred rebate system” in which carriers would return a portion of their freight earnings to the shipper but only after two subsequent periods in which the shipper demonstrated exclusive loyalty to the conference. Thus, a shipper would suffer a substantial monetary penalty if it shipped with a non-conference carrier. This practice was meant to “tie” the shipper to the conference and keep their business away from competing carriers.

The anti-competitive practices described above led shippers to complain and prompted governments to scrutinize the shipping market more closely. In the United States, this scrutiny has resulted in a series of regulatory acts that endorsed conferences but also included provisions eroding their influence over time. The historical development of U.S. shipping law reflects a struggle between the national interest in a viable U.S.-owned liner fleet and the interests of U.S. importers and exporters for reliable shipping at competitive rates. While U.S. law reflects a recognition of the potential benefits of conferences it also established a regulatory regime to curb their abusive practices.

### The Shipping Act of 1916<sup>19</sup>

Congress began investigating shipping conferences in the early 1900s. Congress concluded that the conferences were used to restrict competition but that overall, they were beneficial for international commerce because they provided price and service stability in ocean shipping. They also were seen as a necessary device to protect small shippers against large shippers who could extract rate discounts from carriers. The Shipping Act of 1916 legitimized conferences, exempting them from U.S. antitrust laws. However, the act also established ground rules for conference activities in U.S. trade lanes. The act created the U.S. Shipping Board, a predecessor to today’s FMC, to regulate the activities of the conferences. The act required that conferences serving the U.S. trade be “open,” meaning that they could not restrict new carriers from joining as “closed” conferences did. The act also required that conference rate agreements be approved by the Shipping Board. “Fighting ships” and “deferred rebates” were outlawed. The sanctioning of liner conferences in the context of government control has become the foundation of present-day regulation. The Shipping Act of 1916 represented a compromise between the United States’ general desire for free enterprise and a recognition that the rest of the world generally condoned shipping conferences.

Much of the 1916 Act pertained to promoting a national merchant fleet rather than for regulating the foreign trades. At the time of its passage, it was the provisions providing promotional authority to enlarge a U.S.-owned liner fleet that were

---

<sup>19</sup> Public No. 260 (64<sup>th</sup> Congress), 39 Stat. 728, 46 U.S.C. App. §§ 801 *et seq.*

considered the most important provisions in the act. The Shipping Board was given promotional duties in addition to regulatory powers. Later, in 1961, these functions were divided between the present day Maritime Administration (promotional duties) and the FMC (regulatory duties).

## The 1961 Amendments<sup>20</sup>

After the 1916 Act, conferences began the practice of offering “dual-rate contracts” which offered discounts (usually 15 %) to shippers that promised to ship a certain amount of their cargo with them. Unlike the outlawed “deferred rebates” described above, this discount was made available at the time the shipper paid the freight bill. Non-conference carriers objected to these contracts and the U.S. Supreme Court outlawed them in 1958, finding that their purpose was to stifle competition.<sup>21</sup> In 1961, Congress legislatively reversed the Supreme Court’s decision with passage of what are commonly known as the 1961 Amendments. They required that all ocean carriers file their tariffs with the FMC. While the 1961 Amendments recognized the need for conferences and reaffirmed their immunity from U.S. antitrust laws, it also streamlined the FMC and gave it more power to scrutinize liner conferences.

## The Shipping Act of 1984<sup>22</sup>

Congress overhauled the 1916 Act with the Shipping Act of 1984. The Shipping Act of 1984 was passed in the context of a move towards deregulation that occurred in other modes of transportation in the late 1970s and early 1980s. The Staggers Rail Act of 1980<sup>23</sup> and the Motor Carrier Act of 1980<sup>24</sup> helped to streamline inland transport of shipping containers by allowing for through bills of lading and cooperative agreements among intermodal carriers. The 1984 Shipping Act further strengthened and clarified carriers’ antitrust immunity by providing that shippers could not seek antitrust relief under the Clayton Antitrust Act for practices that violated the Shipping Act. The 1984 Act was a response to court decisions that reinterpreted the antitrust immunity provisions in the 1916 Act and actions by the Department of Justice which resulted in significant fines against ocean carriers. However, the 1984 Act weakened the cohesiveness of shipping conferences because it allowed individual carriers within a conference to enter into individual service contracts with shippers at lower rates than the conference rate. In exchange for the lower rate, the shipper agreed to ship a certain amount of cargo during the life of the contract (usually a year). These contracts had to be made public and the carrier had to give the same offer to similarly situated shippers (i.e., “common carriage”). The conference could not interfere with the independent actions taken by their member carriers.

---

<sup>20</sup> P.L. 87-346.

<sup>21</sup> See *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

<sup>22</sup> P.L. 98-237, 98 Stat. 67, 46 U.S.C. App. §§ 1701 *et seq.*

<sup>23</sup> P.L. 96-448, 94 Stat. 1895.

<sup>24</sup> P.L. 96-296, 94 Stat. 793.

In addition to allowing independent action by conference members, the 1984 Act included other provisions that gave carriers the flexibility to respond more quickly to market changes. The act extended antitrust immunity to cover intermodal through rates. Intermodal through rates include the price of inland carriage by truck, rail, or a combination thereof for overland connections to and from final destinations and origins. This feature expanded the carriers' ability to offer "one-stop shopping" to those customers seeking door-to-door (as opposed to merely port-to-port) service. The 1984 Act also expedited the process for approving new or modified conference agreements. It required that they become effective 45 days after being submitted unless the FMC filed suit with the federal courts against the proposed agreement. Previously, a conference filing did not become effective until the FMC approved it, a process that could take years.

## The Ocean Shipping Reform Act of 1998<sup>25</sup>

The 1984 Act set up an Advisory Committee to study the effects of the act, beginning five and one-half years after its enactment. The Advisory Committee reported its findings to Congress in 1992,<sup>26</sup> stimulating further legislative debate and ultimately leading to the Ocean Shipping Reform Act of 1998 (OSRA).<sup>27</sup> The intent of OSRA was to expand the flexibility of carriers and shippers to tailor their contractual relationships in a manner that best meets their needs. In contrast to the 1984 Act, a significant provision in the 1998 Act stated that contracts no longer had to be made public and carriers did not have to offer the same rates to similarly situated shippers. Thus, conferences lost the ability to enforce agreed-upon terms among their members. Shippers were dissatisfied with the 1984 Act because requiring service contracts to be made public had enabled the conference to police its members. The act essentially represented a move away from "common carriage" to one of "contract carriage."<sup>28</sup> About 95% of liner cargo now moves under a confidential service contract, according to the container line shipping association.<sup>29</sup>

The 1984 and 1998 Acts undermined the influence of conferences. Since then, conferences have become less relevant and to a large extent have been replaced with more loosely structured "discussion groups" or "stabilization agreements." These discussion groups may include conference and non-conference carriers and are supposed to be voluntary agreements on prices rather than binding arrangements. Also undermining the influence of conferences has been the improved service

---

<sup>25</sup> P.L. 105-258, 112 Stat. 1902.

<sup>26</sup> U.S. Advisory Commission on Conferences in Ocean Shipping, *Report to the President and Congress of the Advisory Commission on Conferences in Ocean Shipping*, Washington, D.C., April 10, 1992.

<sup>27</sup> For further information, see Ira Lewis and David B. Vellenga, "The Ocean Shipping Reform Act of 1998," *Transportation Journal*, Summer 2000, p. 27.

<sup>28</sup> Drew H.M. Stapleton and Soumen N. Ghosh, "The Ocean Shipping Reform Act: Practical Implications for Both Buyers and Sellers," *67 Journal of Transportation Law, Logistics, and Policy* 53 (Fall 1999).

<sup>29</sup> Statement of Stanley Sher, World Shipping Council, before the Antitrust Modernization Commission, October 18, 2006, p. 2.

performance of independent (non-conference) carriers. Historically, independents competed with conference carriers by offering lower rates, but it was recognized that their service may not be as reliable. More recently, that perception of lower service quality has been erased.

The focus of rate discussions may be the “base rate” for ocean transport, but more often, as mentioned earlier, the focus is on ancillary surcharges such as “container repositioning charge,” “peak-season surcharge,” or “general rate increases” (GRI), among others. These surcharges are resented by shipper groups and are usually the focus of their opposition to antitrust immunity because they are generally not included in the fixed terms of a contract. Whether or not member carriers of a discussion agreement actually charge their customers these surcharges is highly dependent on market conditions and the potential volume of cargo a given shipper has to offer a carrier. The rate established by the discussion agreement typically serves as a benchmark from which a discount is negotiated between carrier and shipper.

## Legislative Activity Since OSRA

In the 106<sup>th</sup> Congress, Representative Henry J. Hyde, then Chairman of the House Judiciary Committee, introduced the Free Market Antitrust Immunity Reform Act of 1999 (FAIR Act, H.R. 3138). The FAIR Act was reintroduced in the 107<sup>th</sup> Congress (H.R. 1253) by Hyde’s successor as Chairman of the Judiciary Committee, Representative F. James Sensenbrenner, Jr. and the committee held a hearing on June 5, 2002. These bills were not acted upon by their respective committees and no bills regarding liner shipping antitrust immunity were introduced in the 108<sup>th</sup> and 109<sup>th</sup> Congresses, nor as of yet, the 110<sup>th</sup> Congress. The last reauthorization of the FMC (P.L. 108-293, §§ 501-502, which authorizes the FMC through the end of FY2008) does not address the issue of antitrust immunity.

The House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation held a hearing on May 3, 2000 to review the effect of OSRA on ocean shipping. In the 110<sup>th</sup> Congress, the same committee held a hearing on the FMC and the regulation of international liner shipping on June 19, 2008.

Liner shipping antitrust immunity was one of the subjects studied by the Antitrust Modernization Commission (AMC) which was established by Congress in P.L. 107-273. The AMC held a hearing on ocean antitrust immunity in October 2006. While its final report to Congress does not make any specific recommendation to repeal ocean antitrust immunity, it does appear highly skeptical of the need for the continued existence of such immunity. Some of the commissioners, in separate statements, called for a repeal.<sup>30</sup> The FMC also testified before the AMC, with the Chairman testifying in support of continued antitrust immunity and describing current shipper — carrier relations as “relatively harmonious.” One FMC

---

<sup>30</sup> Reports, transcripts, and testimonies of the AMC are available on its website at [<http://www.amc.gov>].

Commissioner submitted a separate statement calling for repeal of antitrust immunity.

## Asian and European Approaches to Liner Conferences

Relative to the United States, most countries have taken a *laissez faire* approach to liner conferences — that is, they have allowed them to exist without much government intervention. However, Europe’s recent change in course on this issue has spurred debate among Asian nations about the merits of shipping conferences. A 2002 OECD report calling for the repeal of antitrust immunity has also stimulated debate on this issue.<sup>31</sup>

### Europe

The European Commission’s Regulation 4056/86, enacted in 1986, had granted liner carriers a block exemption from Europe’s competition laws allowing shipping conferences to continue on trade routes to and from Europe. Unlike the United States, however, the exemption did not include inland transportation. The EU repealed the exemption from competition law in September 2006 (EC Regulation 1419/2006) and this repeal will come into effect on October 18, 2008. The coming repeal of the antitrust exemption will prohibit carriers from engaging in collective rate setting and discussing capacity utilization in detail, but carriers will be allowed to continue vessel-sharing agreements and other “efficiency-enhancing” operational agreements.<sup>32</sup> Shippers do not oppose vessel-sharing agreements.

### Asia

The Asian Shippers Council (ASC) has been pushing for repeal of antitrust immunity among Asian nations but with mixed success. The chairman of this council notes that different Asian countries have different dominant roles in liner service, which partly explains the respective position of these countries with respect to liner conferences.<sup>33</sup> China and India are net users of liner services, Japan is a net provider of liner services, and Hong Kong and Singapore are primarily facilitators of liner services. The focal point over rate-setting practices in Asia has been the assessment of terminal handling charges that were instituted by the liner carriers starting in 2001.

**China.** Chinese maritime regulations are under the jurisdiction of the Ministry of Commerce which allows collective agreements among shipping lines. However,

---

<sup>31</sup> OECD, *Competition Policy in Liner Shipping*, April 16, 2002.

<sup>32</sup> “Antitrust: Commission Adopts Guidelines on Application of Competition Rules to Maritime Transport Services,” IP/08/1063, July 1, 2008. The guidelines are available at [<http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/>].

<sup>33</sup> “Final Front is Asia,” *American Shipper*, November 2007, pp. 6-10.

in March 2007, China's Ministry of Communication issued a requirement that shipping lines first discuss any proposed rate increases with their customers and that they file their conference and discussion agreements with the Ministry fifteen days before they become effective, raising speculation that the government will be scrutinizing the liner conferences more closely.<sup>34</sup> Moreover, China passed a competition law in August 2007 that came into force in August 2008. The new law does not exempt liner conferences from the law's antitrust provisions.<sup>35</sup> According to one report, the ASC is ready to go to court if this new law does not take precedence over Chinese maritime regulations.<sup>36</sup> Thus, Chinese policy appears to be in flux, but it is not clear as of yet what the exact implications will be for liner carriers calling at Chinese ports.

**India.** India is also purportedly moving in the direction of outlawing collective rate-setting. The Competition Commission of India (CCI), created by a law passed in 2002 but whose actions have been delayed by litigation, appears to be in favor of banning collective-rate setting and has advised India's Ministry of Shipping to curb the practice. However, India's Ministry of Shipping appears to favor further oversight of current shipping practices rather than an outright ban on conferences.<sup>37</sup> The apparent conflict of interest has prompted a liner conference operating in this trade route to request clarification.

**Japan.** Japan appears to favor the status quo — that is, allowing the conference system to continue. Japan may prove to be a holdout for the conference system due to the fact that large shippers are linked to large ocean carriers in Japan through the *keiretsu* or “group system” of business organization.<sup>38</sup> Also, Japan may favor the carrier's perspective because Japanese ocean carriers rely more on trade outside Japan than they do on trade to or from Japan. As the ASC chairman stated, “Japan will not want to let go of the maritime exemption. Why should it? The liners get money substantially into the country.”<sup>39</sup>

**Singapore and Hong Kong.** Singapore and Hong Kong, like Japan, are also home to major ocean carriers and are world rivals as container transfer hubs, but neither are home to large producers or importers of liner cargo. Understandably, a concern of the Hong Kong and Singapore governments is that they not be too far out of step with the maritime regulatory regimes of the major trading nations using their transport services. Hong Kong's strong tradition for *laissez faire* policies may explain its lack of a competition law, but it appears to be evaluating the need for a

---

<sup>34</sup> “China's Own FMC?” *American Shipper*, May 2007, p. 46.

<sup>35</sup> “China's Anti-trust Act to Outlaw Liner Conferences,” *Lloyd's List*, September 18, 2007, p. 1.

<sup>36</sup> “Asian Shippers Ready To Go To Court Over Price-Fixing, ASC Says China's Antitrust Law Must Be Obeyed,” *Lloyd's List*, August 20, 2008, p. 1.

<sup>37</sup> “Asia's Antitrust Revolution,” *American Shipper*, November 2007, pp. 10-12.

<sup>38</sup> “Internal Struggle,” *American Shipper*, June 2007, pp. 50-55.

<sup>39</sup> “Asia Confident of Liner-block Move; Region Expected to Follow in Footsteps of European Repeal,” *Lloyd's List*, September 20, 2007, p. 7.

competition policy in the liner sector. Hong Kong has lost some of its market share to mainland Chinese ports, partly because of higher terminal handling charges that are applied across the board by the shipping lines calling at Hong Kong. Singapore granted a five year exemption for liner carriers from its new competition law that came into effect on January 1, 2006. The Singapore Competition Commission stated that “it was seeking to create a regulatory environment for shipping lines operating through Singapore that was broadly aligned with that in other major jurisdictions.”<sup>40</sup>

## Profile of U.S. Overseas Container Trade

Liner carriers sail on a defined trade route with regularly scheduled arrivals and departures at designated ports. Today, liner carriers predominantly operate container ships but car carriers (roll-on/roll-off vessels) also fall under this category. A marine container is a large steel box that is used to consolidate cargo into a standardized unit.<sup>41</sup> Liner carriers load and unload containers at each scheduled port somewhat like a city bus picking up and dropping off passengers at scheduled bus stops. Because container ships typically call at three or four ports along a coast, ports with a short access channel from the ocean are preferred over ports requiring a long transit up a bay or river. Liner ships are distinguished from “tramp” vessels which typically carry bulk commodities, such as grain, iron ore, or coal, sail wherever demand dictates, and contract with the shipper on a per-voyage basis.

Although it was an American company that started the “container revolution” in liner shipping, today almost all of U.S. foreign liner trade is carried by foreign-owned carriers. Two large U.S.-based container lines were sold to foreign interests in the late 1990s. In 1999, Sea-Land Service, the U.S. company that pioneered container shipping in the late 1950s was sold to Maersk Lines, a Danish carrier. As the name “Sea-Land” suggests, this company’s business model was capitalizing on the easy transferability of containers from ships to trucks and railroads. The container has now become synonymous with the term “intermodal” transportation. In 1997, American President Lines (APL), a pioneer in the development of double-stack container rail service in the mid-1980s, greatly improving the efficiency of inland container transport, was sold to Neptune Orient Lines, a carrier controlled by the Government of Singapore. In 2003, a new U.S.-based company tried to establish a foothold in the trans-Pacific trade, reviving the name of a venerable predecessor, United States Lines, but it was acquired by a French carrier in 2007. **Table 1** lists the top fifteen container carriers based on the TEU capacity of their fleet and the location of their world headquarters.<sup>42</sup> The virtual disappearance of the U.S. liner fleet raises

---

<sup>40</sup> “Singapore Antitrust Immunity Stays for Liner Groupings,” *The Business Times Singapore*, October 5, 2006.

<sup>41</sup> Standard sizes are 8x8x20 feet and 8x8x40 feet, but the 40-foot container, which is roughly equivalent to a truck load, is the most commonly used. Containers are measured in 20-foot equivalent units, or TEUs. A 40-foot container is equal to two TEUs.

<sup>42</sup> *Journal of Commerce*, July 23, 2007, p. 27, based on data as of July 12, 2007, from AXS-Alphaliner.



the issue of whether the Shipping Act of 1984, which has a stated purpose of promoting the U.S.-liner fleet, needs to be revisited.

**Table 1. The Top 15 Container Lines by Size of Fleet**

| Ship Operator             | Home Base           | Market Share |
|---------------------------|---------------------|--------------|
| 1) A.P. Moller-Maersk     | Copenhagen, Denmark | 16.2%        |
| 2) Mediterranean Shipping | Geneva, Switzerland | 10.5%        |
| 3) CMA CGM Group          | Marseilles, France  | 7.6%         |
| 4) Evergreen Line         | Taipei, Taiwan      | 5.1%         |
| 5) Hapag-Lloyd            | Hamburg, Germany    | 4.0%         |
| 6) COSCO                  | Shanghai, China     | 3.8%         |
| 7) APL                    | Singapore           | 3.6%         |
| 8) China Shipping         | Shanghai, China     | 3.4%         |
| 9) NYK Line               | Tokyo, Japan        | 3.3%         |
| 10) Hanjin/Senator        | Seoul, South Korea  | 3.0%         |
| 11) MOL                   | Tokyo, Japan        | 2.9%         |
| 12) OOCL                  | Hong Kong           | 2.8%         |
| 13) "K" Line              | Tokyo, Japan        | 2.4%         |
| 14) Zim                   | Haifa, Israel       | 2.4%         |
| 15) Yang Ming             | Keelung, Taiwan     | 2.3%         |

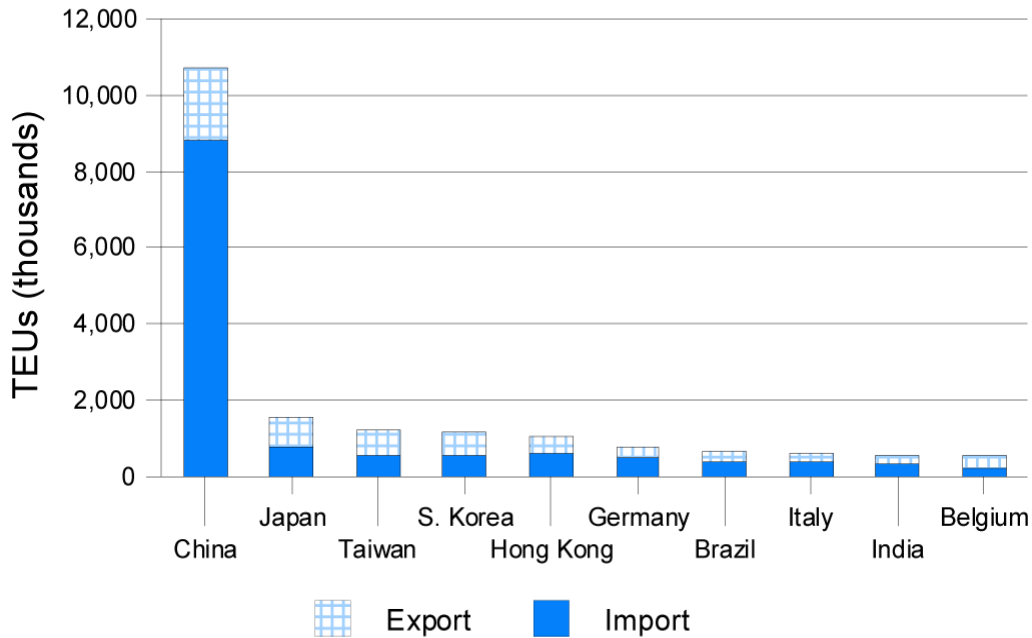
**Source:** *Journal of Commerce*, July 21, 2008, p. 15, based on data as of July 12, 2008, from AXS-Alphaliner.

While the United States is no longer a provider of ocean container services, it is a large user of them. The United States is the second-largest maritime container trading nation (after China), accounting for 11% of worldwide container traffic.<sup>43</sup> This means that about one in every nine containers moving globally is bound to or from the United States. U.S. container traffic nearly doubled over the past decade.<sup>44</sup> The top five U.S. trading partners in maritime container trade are all Asian nations: China, Japan, Taiwan, South Korea, and Hong Kong. China's role in the U.S. container trade is hard to overstate, as shown in **Figure 1**, which lists the top 10 U.S. containerized cargo trading partners in 2007.

<sup>43</sup> U.S. DOT, Bureau of Transportation Statistics, *America's Container Ports, Delivering the Goods*, March 2007.

<sup>44</sup> *Ibid.*

**Figure 1. U.S. Waterborne Foreign Container Trade, Top 10 Trading Partners in 2007**



**Source:** U.S. Maritime Administration, based on PIERS database.

Compared to other types of waterborne cargo, such as bulk or break-bulk cargo, containerized cargo has a higher value-to-weight ratio. While containerized cargo accounts for only 20% of U.S. overseas waterborne tonnage, it accounts for about 55% of the total dollar value of U.S. overseas waterborne trade.<sup>45</sup> Imports of containerized cargo are dominated by consumer goods. The “box” ship has been instrumental in the success of “big box” retailers such as Wal-Mart, Target, Home Depot, Lowe’s, Costco, and Ikea which are among the top importers of containerized cargo. Other leading importers include consumer goods producers such as Dole Foods, Philips Electronics, Heineken, Canon, and Nike. Exports of containerized cargo are dominated by wastepaper, forest products, chemicals, plastics, rubber, agricultural commodities, and machinery. America Chung Nam (a wastepaper exporter), Weyerhaeuser, DuPont, Cargill, Procter and Gamble, General Electric and the competitors of these companies are the largest U.S. exporters of containerized cargo.<sup>46</sup> Automobile manufacturers are significant exporters and importers of containerized cargo. Because U.S. containerized imports tend to be higher value finished goods while U.S. containerized exports tend to be lower value primary or intermediate goods, and because the United States imports about twice as many containers as it exports, the dollar value of containerized imports is nearly three times

<sup>45</sup> Calculation from Global Trade Information Services, Inc., World Trade Atlas, using 2007 trade data.

<sup>46</sup> For a list of the top 100 importers and exporters of containerized cargo, see *Journal of Commerce*, vol. 2, issue 21, May 28, 2007, pp. 16A-24A and 40A-48A.

greater than that of exports while the tonnage of imports exceeds exports by over one and one-half times.<sup>47</sup>

## Directional Imbalances

The persistent U.S. merchandise trade deficit manifests itself in the container trade. Over three times more containers are imported from Asia than are exported to that region, while nearly two times more containers are imported from Europe than are exported (see **Table 2**). Container trade with South America is more balanced but it is of much smaller scale than trade with Asia and Europe.

**Table 2. U.S. Containerized Trade Imbalance**  
(millions of TEUs)

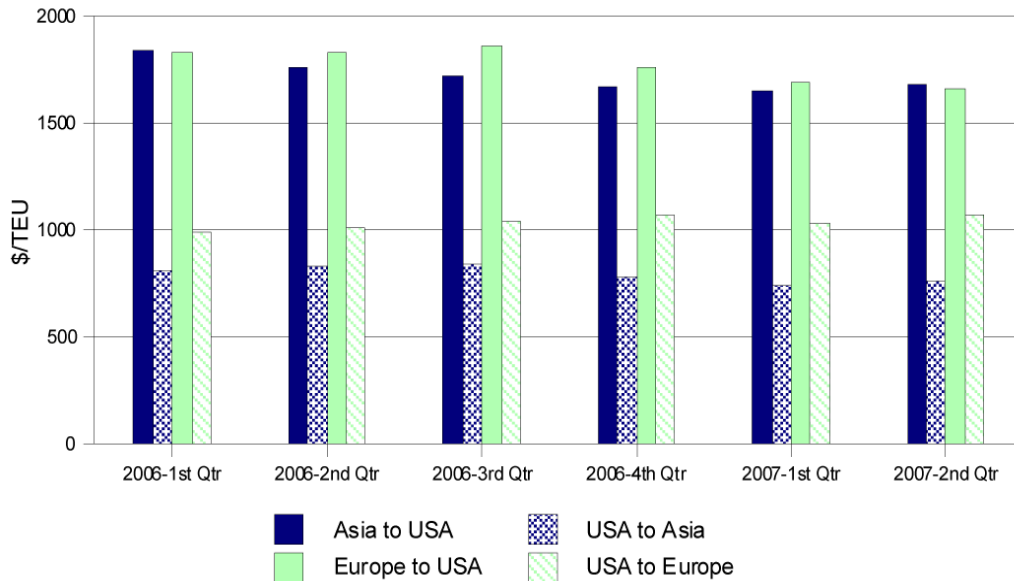
| Year           | Asia to USA | USA to Asia | Europe to USA | USA to Europe |
|----------------|-------------|-------------|---------------|---------------|
| 2005           | 12.4        | 4.4         | 3.8           | 2.1           |
| 2006           | 13.9        | 4.6         | 3.9           | 2.3           |
| 2007(forecast) | 14.8        | 5.0         | 3.9           | 2.4           |

**Source:** UNCTAD, *Review of Maritime Transport*, 2007, p. 74.

As a result of the imbalance, outbound rates to Asia and Europe have been consistently much lower than inbound rates. Outbound rates for “dry” containers (non-refrigerated) may merely reflect the variable costs of moving a container back to Asia or Europe, since the container would otherwise be returned empty. **Figure 2** shows the market average freight rate for 2006 and the first two quarters of 2007 for trade routes to and from Asia and Europe.

---

<sup>47</sup> Calculation from Global Trade Information Services, Inc., World Trade Atlas, using 2007 trade data.

**Figure 2. Container Ship Freight Rates**

Source: UNCTAD, *Review of Maritime Transport*, 2007, p. 73.

## Recent Shift in Trade Flows

The recent decline of the U.S. dollar has significantly dampened the once burgeoning Asia to North America liner trade. In this trade lane, trade volume increased by 10% in 2006, 2.2% in 2007, but is expected to *decrease* 7.1% in 2008.<sup>48</sup> As a result of the slowdown in 2007, shipowners shifted vessels from this trade lane to the more robust Asia to Europe trade, which grew 19.9% in 2007. But a softening in this trade lane is also now occurring and is forecasted to increase by 9.9% in 2008.<sup>49</sup> On the outbound side, North America to Asia container trade grew by 5.3% in 2006, 12.7% in 2007, and is forecast to increase 21.6% in 2008.<sup>50</sup> In addition to the decline of the dollar, rising standards of living in China and India are believed to be fueling U.S. export growth to Asia. Despite this shift in trade growth from inbound to outbound, export volumes to Asia are still only about a third of import volumes from Asia.<sup>51</sup>

While the U.S. dollar's decline has started a possible revival of the long-time, non-remunerative U.S. outbound trade, the import market still dominates shipowner decisions about where to deploy vessel space. Even though the current demand for outbound vessel space is raising outbound rates, they must increase substantially to

<sup>48</sup> Global Insight, "Trends in World Economics and Trade," vol. 2, June 2008, pp. 2 and 26.

<sup>49</sup> *Ibid.* p. 25, and "Slo-Mo in Europe; Special Report: Asia - Europe Shipping," *Journal of Commerce*, August 11, 2008, pp. 13-16.

<sup>50</sup> *Ibid.* p. 26.

<sup>51</sup> UNCTAD, *Review of Maritime Transport*, 2007, p. 74.

approach inbound rates and attract vessels to the trade. As one shipping line executive stated,<sup>52</sup>

The problem isn't boxes. If I suddenly got 10 times more equipment in North America, exporters might get boxes, but they're not going to get more space on ships. The problem is vessel capacity, and the capacity is what it is because the inbound market has turned negative in terms of growth.

In other words, carrier capacity is driven by the more lucrative import market, and export volume alone does not presently justify investment in new services.

In the smaller trans-Atlantic market, however, the eastbound market (U.S. to Europe) is expected to be larger than the westbound market (Europe to the U.S.) In 2008 for the first time since 1996.<sup>53</sup> In 2008, North America to Europe container volume is expected to increase 11.1% while trade going the other way is expected to decrease 3.7%.<sup>54</sup> If current trends continue, the traditional back-haul to Europe could become what carriers call the "head-haul," or the route that drives the business, and carriers would begin to design their services around the eastbound leg rather than the westbound leg. However, at least one carrier executive does not think this will happen in the near term, stating "The true definition of a head-haul is the leg that pays the underlying cost of the trade, and we're not there yet. We still need a significant increase in eastbound rates or a significant decrease in westbound rates to get there."<sup>55</sup>

From a liner carrier's perspective, a number of factors limit the profitability of U.S. export cargo. U.S. export cargo generally is of lower value than import cargo because export cargo tends to be primary or intermediate goods while import cargo tends to be finished, consumer goods. Higher value cargo can bear a higher transport rate. During periods of peak demand on the import leg, carriers may even consider returning some containers empty, even if payloads are available, because empty containers can be turned around faster overseas than loaded containers.

Because current export cargoes are generally heavier than import cargoes, an outbound container ship cannot carry as many loaded containers as an inbound ship. An outbound vessel may reach its load line with only 70% of its container slots filled. Draft limitations in the Panama Canal further restrict the load capacity of certain classes of ships bound to Asia from U.S. east coast ports.<sup>56</sup> The reduced capacity of outbound ships reduces the revenue generated by these voyages. Another inhibitor in the profitability of U.S. export cargo is empty container repositioning costs. In the

---

<sup>52</sup> Ron Widdows, CEO of APL, as quoted in *Journal of Commerce*, "Searching for Solutions," pp. 11-13.

<sup>53</sup> "Too Much, Too Soon," *Journal of Commerce*, July 30, 2008.

<sup>54</sup> Global Insight, "Trends in World Economics and Trade," vol. 2, June 2008, p. 27.

<sup>55</sup> "Going With The Flow: Surging Exports Bring Trans-Atlantic Trade Into Balance — Almost," *Journal of Commerce*, August 18, 2008, p. 27.

<sup>56</sup> "Unchartered Waters; Costs, Strong Exports Complicate This Year's Trans-Pacific Peak Season," *Journal of Commerce*, June 30, 2008, p. 14.

United States, import containers are primarily destined for cities while exports tend to originate in agricultural production areas. The cost of repositioning containers from import unloading centers to export loading centers is generally covered in the import rate since this has traditionally been the “head-haul” leg. In Asia, empty containers are repositioned on feeder vessels from Southeast Asia to China. This is because while China is the dominant point of origin of U.S. imports from Asia, U.S. exports to Asia are slightly more dispersed, and include exports to India, Indonesia, and Southeast Asia.

The persistent merchandise trade imbalance is a double-edged sword for U.S. exporters. Because of it, they ship at below cost, yet it also means that they are dependent on the import market for the supply of shipping space. Exporters are facing an empty container shortage because there is a shortage of import shipments to subsidize container repositioning costs.

Two developments could increase the revenue generated by U.S. export cargo for container carriers. With rising standards of living in China and India, meat products could become an increasingly important revenue source for liner carriers. Frozen or chilled meat products are a higher margin cargo for container carriers. Secondly, if the relative weakness in the value of the U.S. dollar were to persist over the long term, higher value manufactured goods, like machinery parts, could become a more significant part of the export mix.

Rising fuel costs have led to speculation as to how the current geography of trade might change. Containerization, by lowering transport costs, is credited as being as influential as free trade agreements in spurring overseas trade growth in recent decades. For instance, it is estimated that the cost of shipping a pair of sneakers from Asia amounts to as little as 26 cents in a \$50 pair of shoes.<sup>57</sup> Reportedly, fuel now accounts for about 50% to 60% of the total cost of operating a vessel.<sup>58</sup> To save on fuel, container ships have begun “slow steaming,” reducing cruising speed from 24 to 25 knots to 19 or 20 knots. However, because of “soaring oil costs,” according to one trade observer, “the explosion in global transport costs has effectively offset all the trade liberalization efforts of the last three decades,” and current “transport costs are equivalent to an average tariff rate of more than 9%.”<sup>59</sup> While labor cost differentials are still a significant factor in U.S. trade with China and Southeast Asia, there is some speculation that some production for the U.S. market could shift from there to Mexico to save on transport costs.<sup>60</sup> A similar development could occur with respect to Europe, China, and eastern Europe.<sup>61</sup> Asia to North

---

<sup>57</sup> “Opposing Views Emerge on Liner Shipping,” *The Business Times Singapore*, June 11, 2008.

<sup>58</sup> “Uncharted Waters; Costs, Strong Exports Complicate This Year’s Trans-Pacific Peak Season,” *Journal of Commerce*, June 30, 2008, p. 14.

<sup>59</sup> Jeff Rubin and Benjamin Tal, CIBC World Markets, Inc. “Will Soaring Transport Costs Reverse Globalization?” May 27, 2008.

<sup>60</sup> *Ibid.*

<sup>61</sup> “Slo-Mo in Europe; Special Report: Asia - Europe Shipping,” *Journal of Commerce*, (continued...)

America and Asia to Europe are the two largest container trade routes, by far. The effect of higher fuel costs on trade will depend on the value of the goods being traded. Containerized cargoes exhibit a wide range of cargo values.

## Stakeholder Views

Some impartial observers argue that the issue of antitrust immunity is somewhat moot because the rise of independent (non-conference) carriers and the advent of confidential contracts has significantly diminished the pricing power carriers once enjoyed. Some believe that since OSRA, market forces, not carriers, essentially dictate freight rates. Other observers, while acknowledging that the influence of conferences has certainly declined, contend that the emergence of discussion groups, which include rate discussions between conference *and* independent carriers, means that price collusion has extended to a larger group of carriers, giving carriers more market power.

**Liner Carriers.** Shipowners and other defenders of antitrust immunity argue that immunity is needed to keep rates from falling so low that carriers are forced into bankruptcy, leaving cargo stranded at docks, and creating an uncertain and chaotic environment for ocean-borne commerce. They believe repealing antitrust immunity would result in greater potential for monopolistic behavior because the number of carriers would dwindle due to bankruptcies. Currently, in terms of container ship capacity, the top five container lines have a combined market share of 43%, the top ten have a market share of 61%, and the top twenty have a market share of 83%.<sup>62</sup> They believe the carriers most likely to prevail would not necessarily be the most efficient ones but the ones that receive the most government support. They argue that price collusion acts as an artificial stabilizer, ensuring a reliable and predictable market for ocean shipping services. They view antitrust immunity as a necessary price for maintaining scheduled services.

Moreover, carriers argue that their “efficiency-enhancing agreements” allow them to pass on operational cost savings to the shippers in the form of lower rates. They argue that these arrangements have increased competition in the market because they make it easier for carriers to enter into additional trade lanes. By allowing carriers to share ship space rather than independently deploying their own ships, the cost of entering into new markets is lower. They argue that a repeal of the exemption could encourage shipowners to return to the use of smaller vessels as VSAs decline, thus losing the economies of scale that larger vessels allow. These types of agreements are not contested by shippers and their supporters.

**Ports.** Marine terminal operators are also exempted from antitrust immunity. They argue that they must be able to discuss rate and service issues in order to assess surcharges to finance security related improvements in ports, allocate labor among

---

<sup>61</sup> (...continued)

August 11, 2008, pp. 13-16.

<sup>62</sup> “Special Report: Container Shipping,” *Journal of Commerce*, July 21, 2008, p. 15.

the various terminals in a port, implement clean air initiatives, and reduce truck congestion at ports.

**Shippers.** Some shippers and other opponents of antitrust immunity argue that immunity allows carriers to charge higher rates, especially when supply is tight, than shippers would otherwise have to pay. They contend that price fixing arrangements protect the least efficient members of carrier conferences or discussion groups because prices are set so that all members will achieve some level of profitability. For this reason, they argue, antitrust immunity is a contributing factor to the chronic oversupply problems. By keeping prices artificially high, carriers are driven to over-invest in capacity and have less incentive to innovate and operate more efficiently. While they acknowledge that repealing antitrust exemption may cause some short-term instability, over the long-term, they believe the most efficient carriers will survive, resulting in lower rates. Rather than having carriers fix prices among themselves, shippers argue that the solution to rate volatility is for carriers to fix prices with their customers by means of time-volume service contracts.

Shippers also contend that the claim by shipowners that their protection from antitrust laws is warranted because of the unique characteristics of their industry is not a valid argument. Shippers contend that railroads, air carriers, and pipeline carriers also have high fixed costs, provide regularly scheduled service, and experience seasonal and directional imbalances in cargo flow, but do not require collective price setting in order to prosper.

**Port Truckers.** Drayage carriers (truckers that “dray” shipping containers between the port and shipper or between the port and rail terminus) also oppose ocean antitrust immunity because they believe it gives ocean carriers an unfair advantage in negotiating rates and service parameters.

## Issues for Congress

Congress could decide to follow the EU’s lead and repeal antitrust immunity or it could take a “wait-and-see” approach to observe any positive or negative effects that the repeal may have on the European liner trade. Both shippers and carriers generally believe that a repeal would likely result in lower freight rates, but also greater rate volatility with higher peaks and lower troughs.<sup>63</sup> In addition to the lowest possible transport cost, importers and exporters seek some amount of rate stability for the same reason they seek stable exchange rates. Traders seek some assurance as to future market conditions in order to guide investment decisions.

If antitrust immunity were to be repealed, in the short run, one could expect rate wars to ensue, with some carriers unable to survive. Over the long term, carrier consolidation could reduce their costs and shippers believe that service quality will improve. Deregulation of the airline, railroad, and trucking industries may provide, more or less, some insights into a further deregulated liner industry. According to

---

<sup>63</sup> “Continental Drift: End of Conferences in Europe May Produce More Volatility in Rates and Surcharges,” *Journal of Commerce*, July 14, 2008, pp. 10-13.



most observers, some market turmoil in the short run can be expected, but there is far less consensus as to the long run outcome.

One rationale for granting antitrust immunity to liner carriers is that other nations did the same and thus doing otherwise would put U.S. firms at a disadvantage, due to the international nature of the shipping business. In the case of Europe's decision to ban conferences, this argument can now be made in reverse. If repeal of antitrust immunity leads to lower rates in the European trades, then Congress might consider whether carriers would attempt to recoup their revenue losses in other trade lanes, such as the U.S. trans-Pacific. The largest carriers today participate in all the major trade routes.

Beyond evaluating the commercial effects of repealing antitrust immunity, Congress may reconsider the objectives of U.S. liner shipping policy. The following four objectives are stated in current law:<sup>64</sup>

- 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 government intervention and regulatory costs;
- to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
- to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs; and
- to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

The first three of these objectives were established by the Shipping Act of 1984 while the fourth objective was added with the Ocean Shipping Reform Act of 1998.

In the past, U.S. liner policy sought to balance the interest of shippers with an interest in preserving the U.S. liner fleet for national security purposes. The virtual disappearance of the U.S. liner fleet in foreign trade raises the issue whether the interests of shippers should be given greater weight in shaping policy. Since continuing antitrust immunity appears to have had no effect in preserving a U.S. liner fleet, it would seem incapable of aiding in the re-establishment of a U.S. fleet. Other policy instruments, such as direct subsidies, could be more effective, but even these have had little success in the face of competition from "flag of convenience" nations and lower cost foreign suppliers, whether their lower cost is due to comparative advantages or larger government subsidies.

National security issues aside, Congress might consider whether the United States needs a U.S. liner fleet to protect its commercial interests. As identified earlier, there is a strong correlation between the home base of the world's leading

---

<sup>64</sup> 46 U.S.C. App. 1701.

container ship operators and economies that are highly dependent on their export industries. These nations may feel compelled to protect their liner fleets so that they can have some influence over their terms of trade. For instance, Japanese automobile manufacturers do not rely on Korean shipping lines to reach their overseas markets, nor do rival Korean automobile manufacturers rely on Japanese shipping lines. On the other hand, Weyerhaeuser, the second-largest U.S. exporter of containerized cargo, owns a liner carrier — Westwood Shipping, but it is contemplating the sale of this line.<sup>65</sup> As overseas merchandise trade continues to grow in importance to the U.S. economy (from 14.3% of GDP in 1984 to 22.7% in 2007),<sup>66</sup> policymakers may consider whether fleet nationality is a relevant consideration. The ratio of goods exports to goods GDP (the proportion of GDP produced by the goods sectors) rose from 15% in 1970 to 43% in 2000.<sup>67</sup> Yet containerized exports account for only 21% of the tonnage of U.S. waterborne exports.<sup>68</sup> Dry and liquid bulk shipping, carrying grain and energy products, dominates outbound tonnage. Measured in dollar value, air cargo is the leading mode for U.S. overseas exports, carrying lighter and much higher-value products compared to ships. International trade brings about increased specialization, and thus the nation's imports look different than its exports and require different conveyances for efficient transport.

In addition to balancing the interests of carriers and shippers, policymakers might consider the interests of both exporters and importers. As indicated above, one purpose of current policy is to promote U.S. exports but makes no mention of imports. While exports increase producer income and create jobs, imports increase consumer income by lowering prices. Between 1997 and 2004, for instance, the real price of audio equipment decreased by 26%, TV sets by 51%, toys by 34%, and clothing by 9%, all goods imported in containers.<sup>69</sup> Policymakers may consider whether promoting both imports and exports are not equally legitimate goals of U.S. shipping policy. Given the large disparity in volume and total dollar value of import versus export containerized cargo, policymakers might consider which is producing the greatest income effect for the U.S. economy.

---

<sup>65</sup> “Weyerhaeuser Considers Sale of Westwood Shipping,” *Pacific Shipper*, June 9, 2008, n.p.

<sup>66</sup> Bureau of Economic Analysis, National Economic Accounts, Table 1.1.10. Percentage Shares of GDP.

<sup>67</sup> U.S. Bureau of Transportation Statistics, *U.S. International Trade and Freight Transportation Trends*, 2003, p. 14.

<sup>68</sup> U.S. Maritime Administration, *U.S. Water Transportation Statistical Snapshot*, May 2008, p. 1.

<sup>69</sup> *Economic Report of the President*, February 2006, p. 156.